QUEER EYE FOR THE SUPREME COURT
OCTOBER 2006 TERM

Chief Justice John Roberts and Justice Samuel Alito have started to make their mark on the U.S. Supreme Court this year in a few very polarizing cases on this year's docket. Here are some of the more significant trends:

- Chief Justice Roberts and Justice Alito vote similarly in an extraordinarily high percentage of cases (approximately 90%).
- Chief Justice Roberts and Justice Alito are no less conservative than Justice Scalia and Thomas, but so far they have refrained from adopting Scalia and Thomas's broadly sweeping ideological approach that would wipe out numerous precedents.
- Although Chief Justice Roberts and Justice Alito have refused to reverse (or to admit to reversing) precedent outright, several of their decisions have effectively done so. As a result, Justices Scalia and Thomas criticized the two for not going far enough and confusing the rule of law through "faux judicial restraint," while the Court's progressive wing has criticized the two for failing to respect precedent.
- Justice Kennedy remains the key vote on the Court, and firmly stands in the *relative* center of the Court's four-member progressive and conservative wings. In each of the twenty-four 5-4 rulings this term, Kennedy was in the majority.
- The Court's progressive wing has become increasingly isolated and frustrated by the direction that the Court has taken. The progressive bloc has been vocal in its frustration, having read their dissent from the bench in nearly every controversial case this term. In the school desegregation cases, Justice Breyer stated: "It is not often in the law that so few have so quickly changed so much."
- Justice Kennedy has remained very consistent in his positions on a number of social issues decided this term. Although it may appear that Justice Kennedy's views have become more progressive, his decisions only appear relatively more progressive with the shift of the Court to the right. The case of *Gonzales v. Carhart* is an example of his more limited view of privacy rights.

Although none of the cases on this term's docket directly addresses GLBT rights, the following cases may give us some insight into how the Supreme Court will look at GLBT issues in the future. Some of the issues decided upon this year that may affect the GLBT community include areas of election law, abortion, the establishment clause, employment law, environmental law, equal protection, and the First Amendment. This document was last updated on **July 18, 2007**. Email questions to justiceforall@hrc.org.

Red	Orange	Yellow	Blue	Green
Potentially Very Problematic	Potentially Problematic	Somewhat Relevant	Could Pose Problems	No Effect or Favorable

FEC v. Wisconsin Right to Life (WRTL)

Area of Law: campaign finance, election law
Docket # and Citation: No. 06-969
Status: Court AFFIRMS decision of the D.C. Circuit
Attorneys: Paul D. Clement, Solicitor General (Federal Election Commission);
James Bopp Jr., Bopp, Coleson & Bostrom; The James Madison Center for Free Speech (Wisconsin Right to Life)
Date of Decision/Result: June 25, 2007 – 5-4 decision for WRTL (Roberts)

Point of Interest: Affects federal election laws; may increase attacks against pro-GLBT candidates

Background: Wisconsin Right to Life (WRTL) wanted to use its corporate funds to finance advertisements that encouraged viewers to contact Sens. Feingold and Kohl and to tell them to oppose Senate filibusters of judicial nominees to the federal bench. Section 203 of the Bipartisan Campaign Reform Act (BCRA), also known as the McCain-Feingold Act, requires the disclosures of contributors and contribution caps when a corporation pays for an issue ad that advocates for or against a candidate within 30 days of a primary or 60 days of an election. In a previous decision in this case before the Supreme Court, the Court had overturned a dismissal of WRTL's lawsuit in stating that the district court should determine whether the statute survived a constitutional challenge as applied to WRTL. On remand, WRTL asked for a judgment declaring the BCRA unconstitutional as applied to these "grassroots lobbying advertisements" that it intended to run during the 2004 election and an injunction prohibiting the enforcement of BCRA against any "materially similar ads" that it may run in the future. A special three-judge federal district court ruled 2-1 in favor of WRTL, holding that the specific advertisements at issue were general issue ads that did not come within the statute's restrictions on "express advocacy" and that the federal government lacked a compelling interest in regulating the WRTL advertisements. The dissenting judge stated that the ads were part of the organization's goal of having Sen. Feingold (D-WI) defeated in the election.

Summary of Decision: In a 5-4 decision controlled by the opinion of Chief Justice Roberts, the Court concluded that the ads were not the "functional equivalent" of express advocacy, and that BCRA did not survive strict scrutiny as applied to WRTL's ads. Roberts sought a narrow opinion that protected the political speech of issue ads while also respecting the holding of *McConnell*. Accordingly, he sought a bright line rule between the functional equivalent of express advocacy and issue advocacy. Roberts held that a "court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." The Chief Justice considered whether:

> [T]heir content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political

> party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Thus, the Court held that WRTL's ads could reasonably be seen as issue ads and therefore were issue ads for the purposes of BCRA. The Court agreed that preventing corruption (or the appearance thereof) justified the government's interest in regulating contributions, expenditures, and the functional equivalent of express advocacy, but rejected the idea that this interest could be extended to cover issue ads because issue ads lacked the "quid pro quo corruption interest." Because there was no compelling reason to regulate genuine issue ads, the Court held that BCRA did not regulate WRTL's ads.

Justice Alito joined the opinion but wrote a separate concurrence, which emphasized that he would revisit *McConnell* if the Chief Justice's test resulted in the chilling of political speech. Justice Scalia, in a concurrence joined by Justices Thomas and Kennedy, stated that the Chief Justice's distinction between express advocacy and issue advocacy was "illusory" and would impermissibly chill political speech. Moreover, Scalia would have overruled *McConnell* because it was impossible to draw any clear line between genuine issue ads and the functional equivalent of express advocacy while still respecting the holding of *McConnell*. Justice Souter, in a dissent joined by Justices Stevens, Ginsburg and Breyer, stated that *McConnell* distinguished the functional equivalent of express advocacy from genuine issue ads so that "an ad [that] is reasonably understood as going beyond a discussion of issues (that is, if it can be understood as electoral advocacy)…is not "genuine" or "pure" [issue advocacy]." Any ad that could reasonably be understood as express advocacy would be subject to the regulations of BCRA. Justice Souter found that WRTL's ads went reasonably beyond the issues and, were permissibly regulated as the functional equivalent of express advocacy. Souter also believed that preventing corruption (or the appearance thereof) was a compelling reason to regulate WTRL's ads, and that the regulations were narrow, unambiguous and did not chill legitimate political speech. Accordingly, Souter argued that BCRA permissibly regulated the ads under *McConnell* and that *McConnell* was appropriately decided.

Reactions to the Decision: Many conservative groups believed that the McCain-Feingold Act was one of the most odious and unconstitutional laws inhibiting First Amendment freedoms that existed. Many groups, however, were disappointed with the decision as not going far enough to invalidate BCRA § 203 and overrule *McConnell*, and plainly supported Scalia's opinion. The progressive wing of the Court attacked the decision as yet another example of the Court undermining the principle of stare decisis (giving respect and weight to precedent).

Effect on GLBT Community: **Orange Alert.** BCRA was the law that caused campaign advertisements to include the line: "My name is [blank]. And I approve of this ad." Hearing this line repeatedly may seem ridiculous, but the law still serves the purpose of eliminating sham issue ads that claimed to be about an issue but attacked a candidate. Such ads have been used against pro-GLBT candidates.

Gonzales v. Carhart

Gonzales v. Planned Parenthood

Area of Law: abortion, undue burden, mother's health – Partial-Birth Abortion Ban Act
Docket # and Citation (*Carhart*): No. 05-0380
Status: Court REVERSES decision of the Eighth Circuit
Docket # and Citation (*Planned Parenthood*): No. 05-1382, decided under *Carhart*
Status: Court REVERSES decision of the Ninth Circuit
Attorneys: Paul D. Clement, Solicitor General (Alberto R. Gonzales, Attorney General); Priscilla J. Smith, Center for Reproductive Rights (Leroy Carhart, et al.); Eve C. Gartner, Planned Parenthood Federation of America (Planned Parenthood)
Date of Decision/Result: April 18, 2007 – 5-4 decision for Gonzales (Kennedy)

Points of Interest: Privacy cases often fall in line with GLBT cases; Court accepts Congressional findings without sound scientific support; Court relies on "moral and ethical considerations" of Congress.

Background: In 2000, the Supreme Court invalidated Nebraska's "partial birth abortion" statute as violating the U.S. Constitution in *Stenberg v. Carhart*. Congress passed the federal Partial-Birth Abortion Ban Act of 2003 ("the Act") to prohibit the use of a particular method of abortion procedure that often occurs during the second-trimester, called an "intact D&E." The federal ban also had somewhat different language from the Nebraska statute. In *Gonzales v. Carhart*, the federal district court granted a permanent injunction against the Attorney General from enforcing the Act in all cases but those in which the fetus was viable because the Act lacked a health exception for the mother and because the Act was overbroad in also covering other forms of abortion. The Eighth Circuit affirmed in mandating a health exception for the mother. In *Gonzales v. Planned Parenthood*, the federal district court also placed an injunction upon the Attorney General from enforcing it because the Act: placed an undue burden on a woman's right to choose to have a second-trimester abortion; was void for vagueness; and lacked a health exception for the mother. On appeal, the Ninth Circuit affirmed. Both decisions generally followed the Supreme Court's reasoning in *Stenberg v. Carhart*.

Summary of Decision: The Supreme Court, in a 5-4 decision authored by Justice Kennedy, reversed the decisions of the Eighth and Ninth Circuits. The Court remarked that the State, in line with *Planned Parenthood v. Casey*, has a legitimate and substantial interest in preserving fetal life. The Court applied the standard that it stated that it established in *Planned Parenthood v. Casey*, whereby an undue burden exists if the purpose of the regulation is to place a "substantial obstacle" that prevents a woman from obtaining an abortion, and that regulations that only "create a structural mechanism by which the State…may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's right to choose." The Court reiterated that the Act on its face was not by any means vague because the Act was clear in stating the criteria required to fall under the Act. The Court rejected the argument that the Act was overbroad because of its restrictions upon second-trimester abortions, stating that the requirements would not inhibit the "vast majority of D&E abortions." The Court also stated that the Act did not impose an undue burden by placing a "substantial obstacle" in

the path of a woman's right to obtain an abortion by lacking a health exception for the mother. The Court stated that there was a question of whether the Act subjected women to "significant health risks" and that such a question of fact does not mean that the Act failed to survive a facial attack on its constitutionality considering that there were other options available to avoid prosecution under the Act. Finally, the Court stated that the facial attack should not have been considered because the proper manner to consider exceptions is by an as-applied challenge.

Reactions to the Decision: Pro-choice groups shuddered upon hearing the majority decision authored by Kennedy; pro-life groups praised the Court for its decision. Pro-choice groups cheered as Ginsburg read her blistering dissent from the bench, stating that the Court was clearly reversing itself without admitting to upending precedent.

Effect on GLBT Community: **Red Alert**. Regardless of whether one supports the right of a woman to choose to terminate her pregnancy or supports the right to fetal life, the *Gonzales v. Carhart* decision is significant in that it rolls back recent precedent on the balance of fetal protection and a woman's health. The Court reversed its position on a social issue under debate by the public, accepted Congressional findings contrary to scientific opinion, used language that gives Congress carte blanche to enact abortion restrictions based upon its "moral and ethical" judgments, and dictated that "as-applied" challenges were the proper way of challenging the regulation at issue. he Court repeatedly stated that it held to the "essential" holdings of *Roe* and its progeny, but the case is simply not consistent with precedent established in *Stenberg v. Carhart*.

Furthermore, by relying and looking favorably upon the fact-finding of Congress over the testimony of a significant majority of medical professionals, the Court has clearly stated its preference for allowing Congressional findings to take precedent unless faced with overwhelming scientific and statistical evidence to the contrary. On an issue that is so socially divisive and in which public opinion is completely split, the Court's reliance upon the "moral and ethical considerations" of Congress should undoubtedly concern GLBT civil rights supporters. It suggests that the Court might not reject any anti-GLBT legislation based on "moral and ethical considerations," such as adoption by same-sex couples, that may raise a similar socially divisive question.

Hein v. Freedom from Religion Foundation

Area of Law: taxpayer standing, establishment clause
Docket # and Citation: No. 06-157
Status: Court REVERSES decision of the Seventh Circuit
Attorneys: Paul D. Clement, Solicitor General (Dennis Grace, Acting Director, White House Office of Faith-Based and Community Initiatives, et al (Hein)); Richard L. Bolton, Boardman Suhr Curry & Field (Freedom From Religion Foundation, Inc., et al.)
Date of Decision/Result: June 25, 2007 – 5-4 decision for Hein (Alito)

Point of Interest: Decisions in religion cases can affect GLBT rights.

Background: President George W. Bush established the Faith Based and Community Initiatives Plan (FBCIP) by Executive Order, which organized conferences regarding federal grant programs. The Freedom From Religion Foundation (FFRF) and individual taxpayers sued the FBCIP's Director (Hein) claiming the program violated the First Amendment's Establishment Clause. Under Article III of the U.S. Constitution, a litigant in federal court must have "standing" in order to litigate a claim. Generally, federal taxpayers do not have standing to sue with respect to actions made by the federal government. But a series of cases in line with *Flast v. Cohen* and *Bowen v. Kendrick* holds that a federal taxpayer does have standing to challenge violations of the Establishment Clause pursuant to Congress's taxing and spending power. The district court held that the plaintiffs lacked standing, but the Seventh Circuit reversed.

Summary of Decision: In a plurality decision written by Justice Alito, the Court held that taxpayers lack standing to challenge executive spending that allegedly promoted religion because there was no express congressional mandate for the expenditure. Instead, the challenged activities were funded with general appropriations for day-to-day operations. The Court did not jettison the taxpayer-standing doctrine altogether, declining to overrule *Flast v. Cohen* or *Bowen v. Kendrick* in which taxpayers were allowed to challenge federal expenditures. In those cases, taxpayers were allowed to challenge expenditures resulting from specific congressional mandates: *Flast* involved a statute calling for expenditures on services and equipment to be provided to private schools; and *Bowen* involved a federal statute authorizing the provision of funds to private secular and religious organizations for family-planning activities. The controlling opinion in *Hein*, however, adopts a new "specificity" hurdle that taxpayers must clear before a lawsuit may proceed. Previously, it was sufficient that the challenged expenditures were made pursuant to the Art. I, § 8 taxing and spending power; after *Hein*, the federal statute must also incorporate an adequate level of specificity about how the money is to be spent. Justice Alito explained that only "legally binding restrictions" will suffice—committee reports and other legislative history cannot be the source for the requisite specificity.

Justice Kennedy joined Justice Alito's opinion in full but wrote separately to emphasize that, while he believes *Flast* is correct, it should not be extended in this case because it would implicate separation-of-powers concerns bordering on judicial oversight of executive branch decision-making. Justice Scalia, in a concurring opinion joined by Justice Thomas, argued that *Flast* should be overruled because it is irreconcilable with Article III restrictions on federal-court jurisdiction in the doctrine of standing. In a dissenting opinion in which Justices Breyer, Ginsburg and Stevens joined, Justice Souter argued that *Flast* should apply to the taxpayers at issue because the only distinction between the two cases is the branch of government which caused their injury.

Reactions to the Decision: *Hein* is just one of a series of cases this term that has addressed the standing of litigants to pursue their claims in courts, and in nearly all of these cases, the Supreme Court has chosen to limit access.

Effect on GLBT Community: **Blue Alert.** The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." Generally, this phrase has been interpreted as prohibiting the establishment of a state religion or the preference of one religion over another in the government. The primary concern in this matter for the GLBT community would be whether the faith-based initiatives sponsored by the executive branch are being used in a negative manner that in some way discriminates against the GLBT community. To be granted standing to challenge any of these programs concerning executive spending would probably help mitigate any executive involvement with those religious organizations that may use these resources in a manner that deprives GLBT citizens of either participating equally in these initiatives or being denied access to these programs outright.

Hein could drastically restrict the circumstances by which taxpayers will be able to challenge governmental spending in contravention of the Establishment Clause. The heightened specificity requirements established by *Hein* for enforcing the Establishment Clause could raise some possible concerns if these funds are used by religious groups in a manner that discriminates against the GLBT community.

Ledbetter v. Goodyear Tire & Rubber Co.

Area of Law: Title VII, employment discrimination, disparate treatment
Docket # and Citation: No. 05-1074
Status: Court AFFIRMS decision of the Eleventh Circuit
Attorneys: Kevin K. Russell, Howe & Russell (Lilly M. Ledbetter); James P. Alexander, (Goodyear Tire and Rubber Company, Inc.)
Date of Decision/Result: May 29, 2007 – 5-4 decision for Goodyear Tire (Alito)

Point of Interest: Title VII cases are often representative of the Court's general approach to civil rights issues. In *Ledbetter*, the Court takes a very textualist approach that is indifferent to the realities of discrimination and severely limits access to Title VII.

Background: Plaintiff alleged that defendant discriminated on the basis of her sex through a series of discriminatory employment decisions, each decision compounding the amount by which she was paid less than her male peers. Plaintiff argued that Title VII does not require her to comply with the EEOC's 180-day filing period for making a claim because she was discriminated against every time she received a paycheck. Defendant argued that no discriminatory employment decision had been made for several years, thus plaintiff's claim was time-barred. The trial court found for the plaintiff, granting her 19 years of back-pay. The Eleventh Circuit reversed, stating that her claim could only "reach outside the limitations period created by her EEOC charge no further than the last such decision immediately preceding the start of the limitations period."

Summary of Decision: The Supreme Court affirmed the Eleventh Circuit in a 5-4 decision, finding that the plaintiff's claim was untimely because the "later effects of past discrimination do not restart the clock for filing an EEOC charge." The Court stated that

one wishing to bring a Title VII lawsuit must first file an EEOC charge within 180 days "after the alleged unlawful employment practice occurred." The Court stated that the plaintiff's argument that each paycheck that she received during the charging period and the 1998 raise denial violated Title VII and triggered a new EEOC charging period fails because it would require the Court to eliminate discriminatory intent as the defining element of her disparate-treatment Title VII claim. The Court noted that its jurisprudence instructs that the EEOC charging period is triggered only when a discrete unlawful practice takes place, and not upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. The Court rejected plaintiff's argument that defendant's nondiscriminatory conduct during the charging period gave rise to discriminatory conduct outside of that period. The Court stated that the short EEOC filing deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation. Nothing in Title VII supports treating the intent element any differently from the employment practice element of the claim.

Reaction to Decision: Employers and corporations cheered the decision as it would reduce their potential liability from previous discriminatory acts. Opposition to the Court's decision—led by yet another fierce dissent by Justice Ginsberg, who read her opinion aloud from the bench—was widespread as the decision garnered front-page news coverage. Ginsberg's tone in this dissent and in *Carhart* have shown her increasing frustration with the Court's majority, stating that: "In our view, the court does not comprehend, or is indifferent to, the insidious way in which women can be victims of pay discrimination."

Effect on GLBT Community: Orange Alert. The GLBT community should be concerned about this decision, not only because it makes it more difficult for plaintiff's to successfully litigate claims of discriminatory employment decisions, but also because the Court's reasoning rejects any understanding of how discrimination operates in the real world. The Court's unchecked favoritism of corporate interests indicates that it will give relatively little weight to the interest of civil rights claims, even ones such as Title VII, which have a history of serving a broad remedial purpose. Furthermore, the manner in which the Court interprets Title VII gives no appreciation of this broad purpose in favor of a strictly technical textual interpretation of the statute. Such an interpretation suggests that it is becoming increasingly unlikely that the Court would not expand existing civil rights laws to include the GLBT community.

Massachusetts v. EPA

Area of Law: greenhouse gases, clean air act, EPA
Docket # and Citation: No. 05-1120
Status: Court REVERSES and REMANDS decision of the D.C. Circuit
Attorneys: James R. Milkey (Massachusetts, et al.); Paul D. Clement, Solicitor General (Environmental Protection Agency, et al.)
Date of Decision/Result: April 2, 2007 – 5-4 decision for Massachusetts (Stevens)

Point of Interest: Court broadly interprets the Clean Air Act, expanding governmental power and the EPA's duty to regulate greenhouse gases.

Background: Several private organizations petitioned the Environmental Protection Agency (EPA) to begin regulating the emissions of four "greenhouse" gases, including carbon dioxide, under the Clean Air Act ("the Act"). The EPA denied the petition, stating that (1) the Act did not authorize it to issue mandatory regulations addressing global climate change, and (2) that even if it had the authority, it would have been imprudent to do so because causation between greenhouse gases and rising global temperatures was not unequivocally established. The EPA also stated that this approach would conflict with the President's policy of technological innovation, voluntary private sector involvement in non-regulatory programs, and further research, as well as concerns that it might hamper the President's ability to persuade developing nations to reduce emissions. Petitioners, joined by the State of Massachusetts ("State") as an intervening party, asked for review in the D. C. Circuit. Two of the three judges agreed that the EPA properly exercised his discretion in denying the petition. One judge concluded that the EPA's "judgment" could be based on scientific uncertainty and factors such as concerns that unilateral U.S. regulation would harm their efforts in developing nations. A second judge stated that petitioners failed to demonstrate the particularized injury necessary to establish standing under Article III, but accepted the contrary view and joined the judgment on the merits. Review was therefore denied.

Summary of Decision: In a 5-4 decision authored by Justice Stevens, the Court reversed the decision of the D.C. Circuit, finding that the petitioners did have standing to challenge the EPA's rejection of their rulemaking petition. The Court found that it satisfied Article III requirements and appropriate given that Congress authorized the courts to resolve these questions in writing the Act. The Court stated that Congress ordered the EPA to protect Massachusetts through its rulemaking and gave the State a procedural right to challenge the rejection of its petition as arbitrary and capricious. The Court recognized that the risk of harm to the State was actual and imminent, and that judicial action would prompt the EPA to reduce that risk, stating that the EPA's refusal to regulate contributes to the State's injuries by failing to dispute the causation between greenhouse gas emissions and global warming. Furthermore, the Court stated that Congress made no suggestion that curtailed the EPA's power to regulate. The Court stated that, under the Act, the EPA can avoid its regulatory duties only if it determines that greenhouse gases do not contribute to climate change or if it provides a reasonable explanation why it cannot or will not exercise its authority to determine whether they do. The Court rejected the EPA's policy judgments as not being a reasoned justification and rebuffed the EPA's attempt at avoiding its statutory duties by citing to a certain level of scientific uncertainty. As a result, the Court reversed the D.C. Circuit because the EPA's action was arbitrary and capricious, and remanded the case, demanding that the EPA ground its reasons within the language of the Act. (The EPA did not have alternative arguments to those listed; therefore, the EPA's failure to regulate the four greenhouse gases, including carbon dioxide, was contrary to the Act).

Reactions to the Decision: Environmental groups cheered that the decision may ultimately bring about changes that would stem the tide of global warming. Conservative and libertarian groups pummeled the decision as “activist.” The President released his environmental policy in May 2007 that stated support for cuts in these emissions but continued to emphasize the importance of proceeding with his existing policy favoring innovation and voluntary compliance, which basically means that the President has decided to do nothing despite pressure from Congress and the Supreme Court. The average American still drove their car to work that morning.

Effect on GLBT Community: **Green Alert.** Regardless of one’s beliefs on global warming as a true phenomenon or propaganda, the GLBT community can look at this decision as being rather positive in light of the Court’s position on another social issue. Even with the expanded presence of originalist thinkers (i.e. Chief Justice Roberts and Justice Alito) on the Supreme Court, the Court has continued to support the cause of environmentalism. More importantly, the manner of statutory interpretation used by the Supreme Court in its decision is also encouraging. The Supreme Court’s interpretation of the Clean Air Act as including carbon dioxide as well as other greenhouse gases was undoubtedly broader than it previously had been. Such a broad interpretative approach would be helpful, if not necessary, were the Court ever to expand its interpretations of Title VII, equal protection, due process, or other source of law as the basis for granting GLBT civil rights.

***Meredith v. Jefferson Co. Bd. of Educ.* (combined with *Parents Involved*, below)**

Area of Law: racial discrimination, desegregation, equal protection
Docket # and Citation: No. 05-915
Status: Court REVERSES decision of the Sixth Circuit
Attorneys: Teddy B. Gordon (Crystal D. Meredith, Custodial Parent and Next Friend of Joshua Ryan McDonald); Francis J. Mellen Jr., Wyatt Tarrant & Combs LLP (Jefferson County Board of Education, et al.)
Date of Decision/Result: June 28, 2007 – 5-4 decision for Meredith (Roberts)

Point of Interest: Possible reversal of precedent on civil rights issue; social equality.

Background: The Louisville, Kentucky School District (the “District”) was under court-ordered desegregation until 2000. In 2000, the District adopted a voluntary plan designed to prevent the re-segregation of its schools due to residential racial segregation. Under the plan, students were automatically assigned to nearby schools and could apply to transfer to other schools. Transfer applications were decided based on the student's needs, the school's capacity, and race. The District's goal was to keep every school between 15 percent and 50 percent black. Crystal Meredith's son Joshua applied for a transfer and was rejected because the school was at or almost at 50 percent black and he was white. The district court granted summary judgment to the Jefferson Co. Board of Education because it concluded that the plan that it used to assign students for schools met the constraints of equal protection and because the Board had a compelling interest in using

the racial guidelines and applied them in a narrowly tailored manner. The Sixth Circuit affirmed *per curiam*, finding no problem with the opinion of the district court.

Parents Involved in Comm. Schs. v. Seattle Sch. Dist. #1

Area of Law: racial discrimination, equal protection
Docket # and Citation: No. 05-908
Status: Court REVERSES decision of the Ninth Circuit
Attorneys: Harry J.F. Korrell, Davis Wright Tremaine LLP (Parents Involved in Community Schools); Michael F. Madden, Bennett, Bigelow & Leedom, P. S. (Seattle School District No. 1, et al.)
Date of Decision/Result: June 28, 2007 – 5-4 decision for Parents Involved (Roberts)

Point of Interest: Undermines the principles of *Brown v. Board of Education*, the bedrock case of social equality.

Background: Incoming Seattle high school students were allowed to rank schools based on preference. If a school had more applicants than available slots, the Seattle School District (“the District”) used a series of tie-breakers: first, to students with a sibling attending the school; second, the student’s race if the school's racial composition deviated more than 15% from the overall racial composition of the District. Parents Involved in Community Schools (“PICS”) sued the District claiming that screening students on the basis of race violated the equal protection clause of the Fourteenth amendment. The District stated that it has a compelling state interest in having its schools racially integrated due to its educational advantages and that its plan is necessary to prevent individual high schools from becoming predominately one race or another. PICS stated that the District's goal is racial balancing, which the Supreme Court has rejected previously. PICS also argued that there are other ways for the District to meet its goals without selection based on race. The Ninth Circuit held that the District's approach was lawful and met the appropriate standard of strict scrutiny under equal protection. The Court could, however, dismiss this case for lack of standing because PICS is composed of parents whose children were denied admission but who have already graduated from high school as well as parents with school-age children who have not yet applied. In addition, the District is not using this plan currently.

Summary of Decision: The Court reversed and remanded the decision of the Circuit Courts, by a 5-4 margin in both cases. Chief Justice Roberts delivered a plurality opinion, joined by Justices Alito, Scalia, and Thomas, that rejected the school plans at issue as unconstitutional. Justice Kennedy joined the part of Roberts’s opinion that rejected the school plans at issue as unconstitutional but wrote a separate concurrence that limited the reasoning behind the Court’s decision. As for the school plans at issue, the Court held that both school districts failed to show that the school plans passed review under strict scrutiny. In other words, the school districts failed to demonstrate that their use of racial classifications was “narrowly tailored” to achieve a “compelling” government interest. Strict scrutiny is the most strenuous standard of review used by courts in determining the constitutionality of a law or government practice. The Court stated that, although

remedying the effects of past intentional discrimination is a compelling interest under strict scrutiny (such as compliance with an active desegregation order), that interest is not involved in a voluntary plan or a district where a desegregation court order has been removed. Furthermore, the Court stated that there was only a compelling government interest in student body diversity that considered race only in combination with “all factors that may contribute to student body diversity.” In other words, it was unacceptable to consider race alone as the only factor in student assignment. Furthermore, the Court stated that the school plans were not “narrowly tailored” to their interest. Since the school districts’ racial classifications for school assignment had minimal impact on the numbers of affected students, the Court doubted the necessity of using racial classifications and believed that other means would be just as effective. The Court also stated that:

> narrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives,’ and yet in Seattle, alternative assignment plans that would not have used express racial classifications were rejected with little consideration. Jefferson County also failed to show any evidence that it considered alternatives.

Although the Court stated that the Jefferson County and Seattle school plans were unconstitutional, a majority of the court did not agree on the reasoning behind these decisions that could be used to inform other school districts of the constitutionality of their school plans. The Chief Justice’s plurality opinion with respect to the reasoning stated that the school plans were directed to the interests of racial balance that are connected to racial demographics, not diversity, and stated that racial balancing could never be considered a compelling interest. Roberts continued to attack the school plans but broadened the opinion to attack various interests behind racial classifications, stating that:

> While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggest it differs from racial balance.

The Roberts plurality opinion stated that government action that divides people by race is inherently suspect because the classifications promote “notions of racial inferiority,” “reinforce the belief…that individuals should be judged by the color of their skin,” and “contribut[e] to an escalation of racial hostility and conflict.” The Chief Justice’s opinion comes remarkably close to attacking diversity as being a compelling interest.

In his concurrence, Justice Kennedy refused to adopt the plurality opinion’s implication that race cannot be a factor under certain circumstances. Kennedy agreed that the student assignment plans were not “narrowly tailored” to the school board’s interest but did believe that racial diversity could be a “compelling” interest. Kennedy stated that the Jefferson County plan’s use of broad and imprecise racial classifications and Seattle’s use of the crude racial classifications of “white” and “non-white” were far from being narrowly tailored. At the same time, Kennedy rejected the plurality’s dismissal of the “government’s legitimate interest in ensuring that all people have equal opportunity regardless of their race.” Kennedy continued by providing instances in which the use of racial classifications may be permissible:

> In administering public schools, it is permissible to consider the schools' racial makeup and adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. School authorities concerned that their student bodies' racial compositions interfere with offering an equal educational opportunity to all are free to devise race-conscious measures to address the problem generally and without systematic, individual typing by race. Such measures may include strategic site selection of new schools; drawing attendance zones with general recognition of neighborhood demographics; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.

In dissent, Justice Breyer was unrestrained in viciously attacking the Court's logic and reasoning. Furthermore, Justice Breyer was justified in his vitriol for attacking the Court for undermining decades of precedent. At the core of his dissent was the Court's attempt to equate racial integration with racial segregation as equally invidious social evils. In his reasoning, Justice Breyer relied upon decades of precedent and pointed out huge holes in the logic of the plurality and concurring opinions, and even made references to the utter disregard with which Justices Roberts and Alito have placed on the rule of law. The extent of Justice Breyer's anger can best described in a report on CNN between Wolf Blitzer and CNN Legal Analyst Jeffrey Toobin:

> TOOBIN: …Stephen Breyer, you know, who is kind of the Mr. Congeniality of the Court, was so angry, his voice was practically breaking as he read his dissenting opinion. And this isn't really just about whether school boards can consider race. This is about whether affirmative action can exist at all, whether the use of race is permissible. It was just 2003 when Justice O'Connor wrote her famous opinion in the University of Michigan case saying, yes, race can be considered. But today's decision may be the beginning of the end of that.
>
> BLITZER: Justice Breyer, as we reported earlier, he said "Rarely in the history of the law have so few undone so much so quickly." What is he suggesting that we're going to go back to the bad old days of segregation?
>
> TOOBIN: And he's suggesting that it's because of Roberts and Alito. When Stephen Breyer said that -- which is an unusually personal attack -- you could see the chief's justice's jaw muscles starting to vibrate a little. Justice Alito, who's a very kind of low key presence on the Court, sort of turned across the bench and looked at Breyer as he said that. That's something justices don't say about each other very often. But this is the end of a term where the conservative majority reversed or cut back on a lot of precedents that the court thought were fairly stable. And Breyer was pissed.

Justice Breyer, commenting in his bench statement in the school cases, stated: "This is a decision that the Court and the Nation will come to regret." Unfortunately, it appears that there will be many more regretful decisions made by the Court in the future.

Reactions to the Decision: Conservatives argued that the opinion of the Court reaffirmed the principles of *Brown*. Progressives argued that the Court's decision was a perversion of the principles of *Brown*. As the opinion of the Court was limited by Justice Kennedy's concurrence, both sides attacked Justice Kennedy for obscuring the rule of law.

Effect on GLBT Community: **(A Very Red) Orange Alert.** The Court's general approach to discrimination cases will be very informative upon their probable approach to GLBT civil rights cases. With the departure of Sandra Day O'Connor from the Supreme Court, the five-member majority that had supported consideration of race in admissions in *Grutter v. Bollinger* (2003) (a case at the University of Michigan Law School) evaporated, leaving a four-member dissent in *Parents Involved*. Former Justice O'Connor's split-the-middle approach has been replaced by Justice Alito's commitment to the hard line conservative approach of Scalia and Thomas. Chief Justice Roberts, meanwhile, has followed the approach of his conservative mentor, former Chief Justice William Rehnquist.

Chief Justice Roberts's view of civil rights is best illustrated by this quote from the opinion: "The way to stop discriminating on the basis of race is to stop discriminating on the basis of race." The Chief Justice's position that there is no difference between race discrimination and good-faith efforts to promote diversity show a narrow view of civil rights. Massachusetts Governor Deval Patrick, who was the Assistant Attorney General for Civil Rights in the Department of Justice during the Clinton Administration, once articulated a more nuanced understanding of the issue: "[I]t is a complete ruse to suggest that declaring ourselves colorblind in law is going to cause us to be colorblind in fact.")

It was believed that Justice Kennedy, who in previous cases was dismissive of the merits of affirmative action, would assertively cast his lot with the conservative wing and slip into the background in the school cases. In *Grutter*, Justice Kennedy wrote a separate concurrence to note his strict observance of applying strict scrutiny in voting to strike down an admissions policy at the University of Michigan Law School that allowed the university to consider race as a "plus" factor when choosing who to admit as students. But Kennedy also joined the *Grutter* dissent of Rehnquist, Scalia, and Thomas in full. In *Parents Involved*, Kennedy refused to commit whole-heartedly to the Chief Justice's plurality decision. Some commentators have stated that Kennedy may have felt compelled to stay the course with the departure of O'Connor; some have suggested that the fervent dissents written by Breyer and Stevens "shamed" Kennedy into the middle ground. Some have suggested that Justice Kennedy may be leaning more to the progressive wing on social issues in response to the departure of O'Connor from the bench.

In fact, Kennedy's separate dissent in *Grutter* and his concurring opinion in *Parents Involved* are remarkably similar. In both cases, Justice Kennedy recognizes the compelling governmental interest of diversity in education, but he also attacked the admission plans in both cases for failing to "narrowly tailor" the use of racial classifications to the goal of diversity. It is questionable how a school could pass Justice Kennedy's test requiring a "narrow" fit when the only examples of acceptable racial classifications that he mentions are facially-neutral but race-conscious methods for assigning students, but then again, Kennedy's reservations in *Grutter* are equally as restrictive and remarkably similar. Furthermore, the concurrence of Justice Kennedy only appears to be relatively more progressive because the rest of the Court (and the Court's decision) has become more conservative. Justice Roberts is as reliably conservative as

Rehnquist, but Justice Alito has shown that he is far more conservative than O'Connor on the issue of affirmative action.

Parents Involved clearly displays how the new composition of the Supreme Court has shifted away from civil rights and progressive interests. Importantly, Justice Kennedy is not abandoning his favored role as the Court's relative centrist with the conservative shift of the Court. His positions in nearly every controversial case has remained consistent with his views on these issues in the past, so his support for GLBT civil rights, as expressed by his position in the landmark cases of *Romer v. Evans* and *Lawrence v. Texas*, appears safe for now. But the GLBT community should look at *Parents Involved* as a warning; if the Court feels justified in undermining *Brown*, which is one of the fundamental cases of the American history, *Romer* and *Lawrence* could be next.

Morse v. Frederick

Area of Law: public schools, First Amendment
Docket # and Citation: No. 06-278
Status: Court REVERSES decision of the Ninth Circuit
Attorneys: Kenneth W. Starr, Kirkland & Ellis (Deborah Morse, et al.); Douglas K. Mertz, Mertz Law Office (Joseph Frederick)
Date of Decision/Result: June 25, 2007 – 6-3 decision for Morse (Roberts)

Point of Interest: The First Amendment rights of students can regularly arise in the context of GLBT rights, such as protections for students who wear clothes that are supportive of or against GLBT rights.

Background: High school students were released to view a parade. Student Joseph Frederick stood across the street from the school grounds and unfurled a banner that said "BONG HiTS 4 JESUS." Frederick was suspended by the school principal for ten days. Frederick sued, and the Ninth Circuit held that suspending him was a violation of his First Amendment rights, relying on *Tinker v. Des Moines Independent Community School District*, in which three students were suspended from school for wearing black armbands to protest government policy in Vietnam. The Supreme Court held in *Tinker* that a prohibition against expression of opinion is impermissible under the First and Fourteenth Amendments unless evidence is shown that the rule is necessary to avoid substantial interference with school discipline or the rights of others. The Ninth Circuit pointed out that Frederick's banner did not cause any significant interference with the school's activities as the student was released from school and the incident occurred off of school property. The Ninth Circuit also held that the principal (Morse) had no immunity from a legal action for money damages because any reasonable principal in her position should have known that Frederick's conduct had constitutional protection.

Summary of Decision: In a 6-3 decision with the opinion of the Court written by Chief Justice Roberts and joined by four other justices, the Court reversed the Ninth Circuit, finding that "schools may take steps to safeguard those entrusted to their care from

speech that can reasonably be regarded as encouraging illegal drug use." The majority cited several factors indicating that the students were at a school event: the school sanctioned the event; teachers supervised the event; the event was held during normal school hours; students were present; and the school band and cheerleading squad performed. The majority admitted that the words were "cryptic," but agreed with Morse that students would interpret the words as "advocat[ing] the use of illegal drugs." In particular, the majority found "no meaningful distinction between celebrating illegal drug use…and outright advocacy or promotion." The Court rejected both Frederick's assertion that the words were meaningless because they were simply a ploy to attract TV cameras and the dissent's implied argument that the words referred to political debate over the legality of drugs. Instead, the majority premised its decision on the lack of "any sort of political or religious message" in Frederick's speech that was at the crux of *Tinker*. Noting the state's interest in deterring illegal drug use, which it characterized as "important—indeed, perhaps compelling," the Court concluded that the "'special characteristics of the school environment'…and the governmental interest in stopping student drug abuse…allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."

Justice Thomas urged the Court to abandon the *Tinker* rule, reiterating that student speech is governed by the *in loco parentis* role of the schools, not by the U.S. Constitution. Justice Alito stated that the Court correctly upheld *Tinker* as the general rule but found exceptions for restricting lewd speech, speech imputed to the school itself, and speech advocating illegal drug use. Justice Breyer found the majority's sanctioning of viewpoint-based restrictions unacceptable but concurred with the result because he believed that granting qualified immunity was necessary to prevent excessive school speech litigation. In dissent, Justices Stevens, Ginsburg and Souter urged protecting student speech "if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students." The dissent found viewpoint discrimination, such as that endorsed by the majority, to be unacceptable. Further, even if the restriction was constitutionally valid, Frederick's speech did not amount to advocacy under an objective standard—rejecting any implication that the subjective standard of the listener should determine content and reminding the Court that protecting highly unpopular minority opinions is part of the First Amendment's purpose.

Reactions to the Decision: Several commentators suggested that it was interesting that the conservative wing of the Court eagerly protected the First Amendment rights of corporations (see *FEC v. Wisconsin Right to Life*) but limited the scope of students' right to free speech.

Effect on GLBT Community: **Yellow Alert.** There have been numerous cases that have involved student clothing featuring pro-gay and anti-gay message in recent years, including: *Harper v. Poway Unified Sch. Dist.* (student not allowed to wear T-shirt saying "homosexuality is shameful"); *Chambers v. South Washington Co. Sch. Dist.* (okay to wear shirt stating "straight pride"); and *ACLU v. Webb City R-7 Sch. Dist.* (suit dropped after District changed policy punishing students wearing T-shirts supporting GLBT rights). Similar cases have arisen over years as the Court tried to explain under *Tinker*

what exactly constituted a "substantial interference with school discipline." *Morse* has shifted the discussion away from the *Tinker* standard but has not abandoned it, making it difficult to determine how to define the limits of student speech. Although GLBT supporters should not necessarily support stifling of speech, it has been the uneven-handed application of school rules, often in favor of homophobic viewpoints, that may play a part in supporting an environment of harassment for GLBT youths at schools. Since many states and school systems do not have laws or policies that ban anti-GLBT harassment or bullying in place, *Harper* may be the exception rather than the rule.

(**Curriculum Update**: *Morse v. Frederick* has some interesting parallels to the scenario in Module Eight of the Justice For All Facilitator's Guide ("Students as Lawyers"), where students engage in a mock trial scenario over the rights of a student to wear a t-shirt that states "God hates homosexuals." The following section should be used to complement the teaching materials to give more insight to students on the issue.)

The question of exactly when school officials may restrict a student's speech is a complicated matter, and one subject to much dispute. One of the first school speech cases, *Tinker*, crafted the deceptively simple rule that schools may only restrict a student's right to free speech where the speech will "materially and substantially disrupt the work and discipline of the school." Later cases complicated the issue by adding provisions allowing officials to restrict student speech that was "offensively lewd and indecent" (*Hazelwood Sch. Dist. v. Kuhlmeier*) and student speech that outsiders might interpret as a reflection of the school's own beliefs (*Bethel Sch. Dist. No. 403 v. Fraser*).

The recent Supreme Court decision in *Morse v. Frederick* did very little to clarify the sorts of situations in which school officials may restrict student speech. The majority opinion wrote that the restriction in *Morse* was permissible only because of the "special characteristics of the school environment" and the "governmental interest in stopping drug abuse," and that the decision did not allow schools to ban all offensive speech. Justice Alito joined the majority opinion, but wrote a separate concurrence, joined by Justice Kennedy, to emphasize that restricting a student's non-disruptive speech was acceptable in this case because the speech did not "comment[] on any social or political issue." Justice Stevens, along with Justices Souter and Ginsburg, disagreed and urged the Court to protect student speech "if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students."

Prior to *Morse*, several courts in cases similar to the example have looked at the *Tinker* standard and focused on what sort of disruption the clothing had caused or was likely to cause. *See, e.g., Barber v. Dearborn Pub. Schs.*, 286 F. Supp. 2d 847 (2003). After *Morse*, it is unclear how the Court would analyze a student's free speech right to wear a t-shirt that says "God hates homosexuals." The majority opinion suggests that even a non-disruptive shirt might be prohibited if the school had a particularly strong interest in opposing the message. It is unclear whether preventing harassment and discrimination against GLBT students would be a strong enough interest, but in a pre-*Morse* case where a student wore a t-shirt bearing the message "Be Happy, Not Gay," a federal court found that schools' legitimate educational interest in promoting the tolerance of differences and

protecting gay students from harassment was strong enough to allow schools to restrict certain anti-GLBT student speech. *Zamecnik v. Indian Prairie Sch. Dist.*, 2007 U.S. Dist. LEXIS 28172 (N.D. Ill. 2007). On the other hand, the concurrence by Justices Alito and Kennedy suggests that it might not be permissible to restrict a non-disruptive t-shirt if it can be construed as social or political commentary by the wearer. While the dissenting Justices might allow restriction of a shirt expressly advocating conduct harmful to GLBT students, it is uncertain how they would feel about a shirt not advocating any conduct, but whose anti-GLBT message itself is harmful to students. Ultimately, *Morse* does little to help predict the outcome of a case such as in the Justice For All t-shirt example, but it does highlight the divisions among the Supreme Court on the issue and the importance of wording and context when it comes to student speech.