Faith conservatives cheered by high court rulings: High-profile First Amendment cases

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Conservative religious organizations praised the Supreme Court term that ended last month, saying they are pleased with the way the court resolved several high-profile First Amendment disputes.

The court left high school students with considerable leeway to voice religious opinions, cleared the way for interest group–funded campaign ads, and shielded part of the White House's faith-based initiative from challenge in the courts. The justices also upheld the constitutionality of a federal ban on so-called partial-birth abortions.

"Overall, we had a very good term with the partial-birth abortion case and the Wisconsin right-to-life case all being decided in our favor," said Jay Sekulow, counsel for the American Center for Law and Justice, referring to the campaign finance opinion.

In an amicus brief filed in the campaign finance case, Sekulow's office urged the justices to end the prohibition on issue-advocacy ads in the days before an election. Chief Justice John G. Roberts Jr. cited that brief in rejecting arguments by the law's defenders that the intent of the organization should be considered.

"Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election," Roberts wrote in his opinion. "Where the First Amendment is implicated, the tie goes to the speaker, not the censor."

In the student speech case, *Morse v. Frederick,* the court held that public school officials do not violate a student's free-speech rights when they prohibit displays that promote illegal drug use. In the ruling, however, the court majority suggested that schools could not similarly suppress speech that voiced genuine political or religious points of view.

The decision appeared to satisfy religious groups, which had expressed concern that a ruling could give schools power to limit student religious expression that officials find offensive.

The case left wiggle room for future litigation about religious expression in public schools, said Ira C. Lupu, a law professor at George Washington University and codirector of legal research for the Roundtable on Religion and Social Welfare Policy.

“The kid in this case had a goofball message,” Lupu said, referring to student Joseph Frederick’s 14-foot banner that said “Bong Hits 4 Jesus.”

“But when a kid shows up with a serious political or religious message, that’s no longer the kid being the goofball. And you can see how the argument will go,” he said. “The school will say that this undermines its ability to enforce its tolerance policy and the other side will say that this is religious or political speech.”

Robert A. Destro, a law professor at Catholic University, agreed. “The court has been very open to schools controlling the message—except usually when it has to do with religion,” he said.

“In that context, a lot of the case turns on what we call a characterization,” Destro said. “People who are concerned about religious liberty need to be looking at the extent to which the environment is arguably hostile to their point of view. And that happens in a lot of places.”

Lupu pointed to a recent appeals court case in which a California teenager said his First Amendment rights were violated when high school officials forbade him from wearing a T-shirt that read “Homosexuality Is Shameful.” “The family is still maneuvering to litigate this,” he said. “People really want to get this case up before the high court.”

Meanwhile, in *Hein v. Freedom from Religion Foundation,* the court barred taxpayer challenges to executive branch funding of arguably religious activities, such as faith-based social services.

It was called “a disappointing decision” by Barry Lynn, executive director of Americans United for Separation of Church and State. But he added that “it is important to note that this ruling applies to only a few situations. Most church-state lawsuits, including those that challenge congressional appropriations for faith-based

programs, will not be affected."

Taxpayers are still free—for the moment—to use federal courts to challenge congressional funding decisions. But Congress could get around that distinction, said Douglas Laycock of the University of Michigan Law School, by simply funneling money to the executive branch and letting it specify how the money will be used.

"In effect, the court is saying that Congress may appropriate big lump sums to the executive and not say anything specifically besides a wink and nod, and there will be no taxpayer standing," he said.

All four cases were decided by 5-to-4 votes, with both of President Bush's new appointees—Roberts and Justice Samuel A. Alito Jr.—siding with the majority.

Alito's predecessor, perennial swing voter Sandra Day O'Connor, might have come down differently on these and other high-profile cases, said Destro. "O'Connor tended to be more of a balancer," Destro said. "It would depend on the facts. She would always talk about the need for judges to weigh 'social facts.' And I'm not sure I know what one of those is, but I do think she would have been looking for them in these cases." –*Religion News Service*