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Judge Samuel Alito's Opinions in Freedom of Speech Cases

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Summary

Judge Samuel Alito, who has been nominated by President Bush to take retiring Justice Sandra Day O'Connor's seat as associate justice of the U.S. Supreme Court, has been a judge on the U.S. Court of Appeals for the Third Circuit since 1990. This report examines his major judicial opinions, both for the majority and in dissent, in freedom of speech cases. It also briefly discusses some cases in which he joined the opinion for the court but did not write it. This report examines Judge Alito's free speech opinions by subject area.

Contents

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Introduction

Judge Samuel Alito, who has been nominated by President Bush to take retiring Justice Sandra Day O'Connor's seat as associate justice of the U.S. Supreme Court, has been a judge on the U.S. Court of Appeals for the Third Circuit since 1990. This report examines his major judicial opinions, both for the majority and in dissent, in freedom of speech cases.[1] It also briefly discusses some cases in which he joined the opinion for the court but did not write it.

Freedom of speech cases involve interpretations of the part of the First Amendment that provides, "Congress shall make no law ... abridging the freedom of speech, or of the press." The Supreme Court has interpreted this restriction to apply not only to Congress, but to every level of government — federal, state, and local — and to all three branches of government — executive, legislative, and judicial. The Supreme Court has also found that "no law" should not be taken literally, and it is clear that the government may prohibit speech that consists of, among other things, threatening to kill someone, conspiring to commit a crime, offering a bribe, engaging in perjury, treason, or false advertising, or, to cite Oliver Wendell Holmes' famous example, falsely shouting fire in a theater. Freedom of speech cases thus involve deciding just what exceptions apply to the mandate that there shall be "no law ... abridging the freedom of speech."[2] This report examines Judge Alito's free speech opinions by subject area.

Prisoners' Free Speech Rights. In *Banks v. Beard*, the Third Circuit, with Judge Alito dissenting, struck down a prison policy that prohibited inmates, who had been segregated from the general prison population for being disruptive, from having "access to photographs, and all newspapers and magazines which are neither legal nor religious in nature."[3] The Supreme Court has agreed to review the case.

The majority opinion relied on the Supreme Court's decision in *Turner v. Safley*

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[1] Courts of appeals decisions are made by three-judge panels, except when they are decided "en banc" by the entire court, which, in the Third Circuit, consists of 12 judges. Two of the decisions discussed in this report were en banc: *Banks v. Beard* and *C.H. ex rel. Z.H. v. Oliva*.

[2] For additional information, see CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment*, by Henry Cohen.

[3] 399 F.3d 134, 148 (3d Cir. 2005), *cert. granted*, No. 04-1739 (Nov. 14, 2005).

"that a prison regulation that impinges on inmates' constitutional rights 'is valid if it is reasonably related to legitimate penological interests.'"[4] The Third Circuit wrote:

> The Supreme Court articulated an analytical framework within which the reasonableness of such a regulation is assessed by weighing four factors. First, there must be a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." Second, the court must determine "whether there are alternative means of exercising the right that remain open to prison inmates." Third, the court must assess "the impact accommodation of the asserted constitutional right will have on guards and other inmates" and prison resources generally. Finally, the court must consider whether there are "ready alternatives" to the regulation that "fully accommodate the prisoners' rights at *de minimus* [sic] cost to valid penological interests. The existence of such alternatives is evidence that the regulation is an "exaggerated response to prison concerns."[5]

The Third Circuit applied these four factors and found, as to the first factor, that prison officials had offered no evidence that the speech restriction had a rational connection to the legitimate governmental interests in rehabilitation of prisoners or security; as to the second factor, that inmates had no alternative means to exercise their "First Amendment right of access to a reasonable amount of newspapers, magazines, and photographs"[6]; and, as to the third and fourth factors, that alternative policies that were less restrictive of First Amendment rights would have only a minimal impact on prison resources. These alternative policies were to establish specific reading periods in which guards deliver a single newspaper or magazine to an inmate's cell and retrieve it at the end of the period, or to escort prisoners "to the secure mini-law library to read a periodical of their choosing."[7]

Judge Alito dissented, disagreeing with the majority's application of all four *Turner v. Safley* factors. As to the first factor, he argued that it was rational for prison officials to think that their First Amendment restriction would deter inmates who were not in segregated confinement from engaging in misconduct that could send them there, and would deter inmates who were in segregated confinement from engaging in misconduct that could keep them there longer. Judge Alito also argued that prison officials need not offer evidence that their rule achieves its rehabilitative purpose because all that *Turner v. Safley* requires is a "*logical connection* between the regulation and the asserted goal."[8] As to the second factor, Judge Alito argued that inmates could receive information about current events from books in the prison library and could receive letters from family members and friends, even if not photographs. As to the third and fourth factors, Judge Alito found that the alternative policies that the majority suggested would impose significant burdens on prisons.

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[4] *Id*. at 139, quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987).

[5] *Id*. (citations omitted).

[6] *Id*. at 145.

[7] *Id*. at 147.

[8] *Id*. at 149, quoting *Turner v. Safley*, 482 U.S. at 89 (emphasis added by Judge Alito).

The Supreme Court is likely to decide *Banks v. Beard* before the end of June 2006, but not before the Senate votes on whether to confirm Judge Alito's nomination.

In *Waterman v. Farmer*, Judge Alito wrote a unanimous opinion upholding a New Jersey statute that denied access to sexually oriented material to inmates who were imprisoned as pedophiles, child molesters, or rapists.[9] Applying *Turner v. Safley*'s first prong, Judge Alito found "that New Jersey has a legitimate penological interest in rehabilitating its most dangerous and compulsive sex offenders," and "could rationally have seen a connection between pornography and rehabilitative values."[10] Applying the second prong, Judge Alito found that the statute was not so broad as "to forbid prisoners from reading the Bible, legal publications, or other non-pornographic books," and therefore left the plaintiffs with alternative means to exercise their constitutional rights.[11] Applying the third and fourth prongs, Judge Alito concluded that the less-restrictive alternative of the prison's reviewing incoming publications on a case-by-case basis would have costs that would be "far from de minimis" and "would have an unduly burdensome effect 'on guards ... and on the allocation of prison resources.'"[12]

Teachers' Free Speech Rights. In *Edwards v. California University of Pennsylvania*, Judge Alito wrote a unanimous opinion for the Third Circuit holding "that the First Amendment does not place restrictions on a public university's ability to control its curriculum."[13] The case was brought against the university by a tenured professor who alleged that the university had violated his First Amendment rights by suspending him for teaching from a nonapproved syllabus in order to advance his religious beliefs. Judge Alito quoted from a Supreme Court case holding that "when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking."[14]

In *Sanguigni v. Pittsburgh Board of Public Education*, Judge Alito wrote a unanimous opinion for the Third Circuit upholding a public high school's power to remove a teacher from her coaching positions for publishing certain statements in a faculty newsletter.[15] The teacher's statements had focused on employee morale, asserting "that some faculty members were 'being put under undue stress,' had experienced 'bad luck,' and had left the building with 'low esteem.'"[16] Judge Alito wrote: "While holding that public employees enjoy substantial free speech rights, the

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[9] 183 F.3d 208 (3d Cir. 1999)

[10] *Id*. at 215, 217.

[11] *Id*. at 218-219.

[12] *Id*. at 220.

[13] 156 F.3d 488, 491 (3d Cir. 1998).

[14] *Id*., *quoting* Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 833 (1995).

[15] 968 F.2d 393 (3d Cir. 1992).

[16] *Id*. at 399.

Supreme Court has nevertheless recognized that 'the State has interests as an employer in regulating the speech of its employees," and that, [w]ith respect to personnel actions, ... First Amendment rights are implicated only when a public employee's speech relates to matters of public concern."[17] In *Sanguigni*, the teacher's statements did not relate to a matter of public concern, and her free speech claim, Judge Alito found, had been properly dismissed by the lower court.

Students' Free Speech Rights. In *Saxe v. State College Area School District*, the Third Circuit, in an opinion by Judge Alito, found a public school district's "Anti-Harassment Policy" unconstitutionally overbroad because it prohibited "a substantial amount of speech that would not constitute actionable harassment under either federal or state law."[18] Even "[a]ssuming for present purposes that the federal anti-discrimination laws are constitutional in all of their applications to pure speech, we note that the [school district's] Policy's reach is considerably broader. For one thing, the Policy prohibits harassment based on personal characteristics that are not protected under federal law. ... [Federal statutes] cover only harassment based on sex, race, color, national origin, age and disability. The Policy, in contrast, is much broader, reaching, at the extreme, a catch-all category of 'other personal characteristics' (which, the Policy states, includes things like 'clothing,' 'appearance,' 'hobbies and values,' and 'social skills'). ... By prohibiting disparaging speech directed at a person's 'values,' the Policy strikes at the heart of moral and political discourse — the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about 'values' may offend is not cause for its prohibition, but rather the reason for its protection ... ."[19]

Nevertheless, school students do not have full First Amendment rights, so Judge Alito "examine[d] whether the Policy may be justified as a permissible regulation of speech within the schools." He noted Supreme Court cases that hold that "a school may categorically prohibit lewd, vulgar or profane language," and "may regulate school-sponsored speech ... on the basis of any legitimate pedagogical concern. Speech falling outside of these categories ... may be regulated only if it would substantially disrupt school operations or interfere with the rights of others."[20] Judge Alito found that the Policy "appears to cover substantially more speech than could be prohibited under" this test.[21] Among the speech it unconstitutionally covered was speech that has the "purpose" of disruption, even when there was no reasonable basis to believe that it would cause substantial disruption; and speech that offends but does not interfere with the rights of others. Furthermore, "harassment" as defined by the Policy did not necessarily rise to the level of substantial disruption.

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[17] *Id*. at 396-397, *quoting* Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

[18] 240 F.3d 200, 204 (3d Cir. 2001).

[19] *Id*. at 210.

[20] *Id*. at 214.

[21] *Id*. at 217.

Saxe included a concurring opinion by Judge Rendell but no dissent. Judge Rendell expressed "strong disagreement with the notion ... that the judicial analysis of permissible restrictions on speech in a given setting should be affected — let alone dictated — by legislative enactments intended to proscribe activity that could be classified as 'harassment.'"[22]

In *C.H. ex rel. Z.H. v. Oliva*, the plaintiff was a kindergarten student in a class in which the students were asked to make posters depicting what they were thankful for on Thanksgiving Day.[23] The plaintiff produced a poster indicating that he was thankful for Jesus, and his poster was displayed in the hallway of the school, along with those of his classmates. Subsequently, however, Board of Education employees removed the poster because of its religious theme, and later the child's teacher returned the poster to the hallway, but in a less prominent location at the end of the hallway. A free speech claim was filed on behalf of the student.

The Third Circuit, en banc, did not reach the merits of the free speech claim, in part because it found that it was "not alleged that the removal occurred as a result of any school policy against the exhibition of religious material," or "that the restoration to 'a less prominent place' was the result of a school policy or an authoritative directive from [the principal or superintendent]."[24] Judge Alito dissented, writing:

> I would hold that discriminatory treatment of the poster because of its "religious theme" would violate the First Amendment. Specifically, I would hold that public school students have the right to express religious views in class discussion or in assigned work, provided that their expression falls within the scope of the discussion or the assignment and provided that the school's restriction on expression does not satisfy strict scrutiny.[25]

The final phrase in this quotation implies that the school's restriction on free expression would be constitutional if it satisfied strict scrutiny. What Judge Alito meant by this was that, if the poster "would have 'materially disrupt[ed] classwork or involve[d] substantial disorder or invasion of the rights of other" students, then its discriminatory treatment would be permitted as an exception to the First Amendment. Otherwise, to treat the poster differently "because it expressed thanks for Jesus, rather than for some secular thing ... was quintessential viewpoint discrimination, and it was proscribed by the First Amendment. ..."[26] Judge Alito added that for the school to display the poster would not have violated the Establishment Clause because "[t]he Establishment Clause is not violated when the government treats religious speech and other speech equally and a reasonable observer would not view the government practice as endorsing religion."[27] Judge Alito would have sent the case back to the lower court to determine whether the poster had been treated in a

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[22] *Id*. at 218.

[23] 226 F.3d 198 (3d Cir. 2000) (en banc), *cert. denied*, 533 U.S. 915 (2001).

[24] *Id*. at 202.

[25] *Id*. at 210.

[26] *Id*.

[27] *Id*. at 212.

discriminatory fashion because of its religious content and, if so, whether the discrimination satisfied strict scrutiny.

Discrimination Against Religious Speech. In *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Township School District*, Judge Alito wrote a unanimous opinion affirming a preliminary injunction issued against a public school district to require it to allow a religious group "to hand out materials and staff a table at Back-to-School nights."[28] Judge Alito noted that, although the school district "had no constitutional obligation to distribute or post *any* community group materials or to allow *any* such groups to staff tables at Back-to-School nights[,] ... when it decided to open up these fora to a specified category of groups (i.e., non-profit, non-partisan community groups) for speech on specific topics (i.e., speech related to the students and the schools)," it could not "discriminate against speech on the basis of its viewpoint."[29]

The school district had discriminated against the religious group because it feared that to allow it to speak on school property would violate the Establishment Clause of the First Amendment, which prohibits the government from endorsing religion. But Judge Alito found that the speech was not school-sponsored, because the school district's purpose in allowing the distribution and posting of community group materials was "not to convey its own message" but was "to 'assist all organizations' in the community."[30] Because the plaintiff's speech was private and not school-sponsored, the fact that it was religious did not cause it to violate the Establishment Clause. The plaintiff, therefore, was likely to succeed on the merits of its case and was entitled to a preliminary injunction pending trial.

Zoning of "Adult" Establishments. In *Phillips v. Borough of Keyport*, a district court had dismissed a lawsuit before trial, but the Third Circuit ruled that it should go forward and sent it back for trial.[31] Judge Alito concurred, but dissented with respect to allowing one of the claims to go forward. The lawsuit was over the denial of an application to open an adult book and video store at a particular location. The denial was based on an ordinance that prohibited such establishments from being located within 500 feet of a residence, church, school, playground, or the like.

Sexually explicit material is protected by the First Amendment unless it constitutes obscenity or child pornography, neither of which was at issue in *Phillips*. Speech that is protected by the First Amendment may not be regulated on the basis of its content unless the regulation satisfies strict scrutiny. This means, as the court in *Phillips* wrote, that content-based regulations "will be sustained only if they are shown to serve a compelling state interest in a manner which involves the least possible burden on expression."[32]

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[28] 386 F.3d 514, 522 (3d Cir. 2004).

[29] *Id*. at 526.

[30] *Id*. at 525.

[31] 107 F.3d 164 (3d Cir. 1997), *cert. denied*, 522 U.S. 932 (1997).

[32] *Id*. at 172.

Now, it might appear that a regulation that limits the location of a bookstore because it sells sexually explicit material discriminates against the bookstore on the basis of the content of its material, and that such a regulation therefore should be subject to strict scrutiny. The Supreme Court, however, has held that regulations that "are *justified* without reference to the content of the regulated speech" are to be regarded as content-neutral.[33] The regulation at issue in *Phillips* was justified allegedly not on the basis of animus toward sexually explicit material, but "to prevent the deterioration of the community" and "to ensure [its] economic prosperity" and "well being of the quality of life."[34]

Regulations of speech that are regarded as content-neutral, however, are not necessarily constitutional. Although they are not subject to strict scrutiny, they are subject to "intermediate" scrutiny, which, as the court in *Phillips* explained, means that they will be upheld only if "they are narrowly tailored to serve a significant or substantial governmental interest; and ... they leave open ample alternative channels of communication."[35] (Thus, a city could not prohibit adult bookstores at *all* locations, or allow them only at excessively inconvenient ones.) Intermediate scrutiny may be contrasted with strict scrutiny in that a regulation may be narrowly tailored without necessarily imposing the least possible burden on expression, and may serve a significant or substantial governmental interest without necessarily serving a compelling one.

In *Phillips*, the district court had concluded "that the Ordinance is an effort to suppress the secondary effects of sexually explicit expression and not sexually explicit expression itself," and that it "was narrowly tailored to achieve that objective."[36] The court of appeals, however, concluded "that the district court was simply not in a position to make these findings," and therefore sent the case back to the district court to hear evidence on these matters.[37] The court of appeals added that "our First Amendment jurisprudence requires that the Borough identify the justifying secondary effects with some particularity," and that "[t]o insist on less is to reduce the First Amendment to a charade in this area."[38]

On another point, the court of appeals did not take a strong free-speech position. It held that, although there must "be a factual basis for a legislative judgment [as to the existence of secondary effects] presented in court when that judgment is challenged," there is no "requirement that such a factual basis have been submitted to the legislative body prior to the enactment of the legislative measure."[39] Judge

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[33] Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48 (1986) (emphasis in original).

[34] 107 F.3d at 170.

[35] *Id*. at 172.

[36] *Id*. at 173.

[37] *Id*.

[38] *Id*. at 175.

[39] *Id*. at 178.

Rosenn, dissenting, observed that "not a single court of appeals has interpreted *Renton* as requiring absolutely no pre-enactment evidence."[40]

Judge Alito concurred with the court of appeals majority as to all of the above. He dissented, however, from part IV of the decision, in which the majority held that, on remand, the district court should also consider the plaintiffs' claim that their right to substantive due process was violated when their application was subjected to "denial, delay and revocation" because of defendants' "dislike of the proposed adult entertainment expression."[41] Judge Alito dissented because he believed that, even if the plaintiffs' application had been rejected for improper reasons, he was not convinced "that every ill-motivated governmental action that restricts the use of real estate constitutes a violation of substantive due process."[42] He believed, therefore, that the district court had properly dismissed the substantive due process claim. His dissent thus did not turn on a point of First Amendment law.

In *Terminello v. City of Passaic*, Judge Alito joined an unreported decision in a case that challenged a requirement that, in order to qualify for an entertainment license, a theater must employ an off-duty police officer as part of its security team.[43] Although the opinion does not state that this theater was an "adult" establishment, we include it in this section because, like the zoning restriction in *Phillips*, the requirement here was aimed at combating the secondary effects of speech rather than at regulating speech on the basis of its content. The district court had granted the theater a preliminary injunction that allowed it to operate pending trial. The City appealed, and the Third Circuit vacated the preliminary injunction because the lower court had used the wrong standard in granting the injunction. It should have used the intermediate scrutiny standard that is applicable to restrictions that are justified without regard to the content of speech, which is that such restrictions must be "narrowly tailored to serve a substantial or significant government interest; and ... leave[ ] open ample alternative channels for communication."

The Third Circuit found that the district court could not have properly determined whether the restriction was narrowly tailored "because there is no evidence in the record establishing the cost of hiring off-duty police officers as compared to bonded security guards ... ." The Third Circuit, therefore, sent the case back to the district court for the district court to receive evidence on this question and then determine whether the requirement was narrowly tailored and whether it should reissue the preliminary injunction.

Erotic Dancing. In *Conchatta, Inc. v. Evanko*, the plaintiffs were a "gentleman's club" in Philadelphia and two erotic dancers who worked there. They challenged as violating the First Amendment a Pennsylvania statute that prohibits

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[40] *Id*. at 189. *Renton* is a Supreme Court case that upheld zoning of adult theaters; it is cited in n. 33, *supra*.

[41] *Id*. at 181.

[42] *Id*. at 186.

[43] 118 Fed. Appx. 577 (3d Cir. 2004) (per curiam).

"lewd, immoral, or improper entertainment" in a facility holding a liquor license. [44] They requested a preliminary injunction, pending a trial, against the enforcement of the statute. The district court denied their request, and the Third Circuit, in an unreported decision joined by Judge Alito, affirmed. The court noted that, to be granted a preliminary injunction, "a plaintiff must show both (1) that the plaintiff is reasonably likely to succeed on the merits and (2) that the plaintiff is likely to experience irreparable harm without the injunction."

Applying this standard, the court of appeals found that the plaintiffs "have made a strong case that the statute is overbroad," which means that it restricts speech that is protected by the First Amendment. But the court did not find it necessary to decide the question, because it held that "the plaintiffs are nevertheless not entitled to a preliminary injunction because, as the District Court held, the plaintiffs failed to show that the denial of their motion for a preliminary injunction would result in irreparable harm." This was because "the plaintiffs have never been cited for violating the statute or regulations, and there is no imminent threat of such action."

A dissenting judge found that "[t]he plaintiff dancers have already suffered irreparable harm and will continue to suffer irreparable harm if their motion for a preliminary injunction is not granted." This was because the dancers' "uncertainty as to what the regulation prohibits and their fear of being found in violation" caused them "to restrain their performances." The dissent quoted the Supreme Court as having said that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[45]

The district court later decided the case on the merits and found the statute unconstitutional to the extent that it contained the words "immoral" and "improper" because "[t]here can be no doubt that the terms 'immoral or improper' are vague," and therefore the statute "does not provide reasonably clear notice of what is and what is not prohibited."[46] The court upheld the statute insofar as it applied to "lewd" conduct, as it found that "lewd" was "sufficiently clear so as not to constitute unconstitutional vagueness."

Defamation. *Tucker v. Fischbein* was a defamation case for which Judge Alito wrote the Third Circuit's 2-to-1 opinion.[47] The suit was brought by William Tucker and his wife, C. Delores Tucker, a crusader against "gangsta rap" lyrics, against the estate of rapper Tupac Shakur and several companies connected with the production of an album of Shakur's. The plaintiffs alleged that Shakur on the album had attacked Mrs. Tucker "using 'sexually explicit messages, offensively coarse language and lewd and indecent words' and that she had received death threats because of her activities."[48] The plaintiffs sued for defamation, alleging that the

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[44] 83 Fed. Appx. 437, 2003 WL 22931320 (3d Cir. 2003) (per curiam).

[45] Elrod v. Burns, 427 U.S. 347, 373 (1976).

[46] Conchatta, Inc. v. Evanko, 2005 WL 426542 (E.D. Pa. 2005).

[47] 237 F.3d 275 (3d Cir. 2001), *cert. denied*, 534 U.S. 815 (2001).

[48] *Id*. at 280.

husband had suffered a loss of consortium as a result of the lyrics. Loss of consortium means loss by one spouse of the comfort and society of the other, and may, but does not necessarily, include the loss of sexual relations.

Richard Fischbein, the lawyer representing Shakur's estate, was quoted in the press as expressing skepticism about the claim that the lyrics could have destroyed Mrs. Tucker's sex life. The plaintiffs then amended their complaint to include Fischbein as a defendant for having defamed them by characterizing their loss of consortium claim as a claim for loss of sexual relations. Fischbein subsequently again expressed his skepticism of the claim that the lyrics could have destroyed Mrs. Tucker's sex life, and the Tuckers amended their complaint again, to add another defamation claim against Fischbein, as well as one against *Time*, and *Newsweek* for publishing his comment.

Fischbein, *Time*, and *Newsweek* moved for summary judgment, and the federal district court granted their motions, which means that it dismissed the case without allowing it to go to trial. It did so because the Tuckers were "public figures" under defamation law, and could not prove by clear and convincing evidence that the defendants acted with "actual malice," as public figures must do to win a defamation case. To act with "actual malice" means to make a defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not."[49]

On appeal, in order to show that Fischbein had acted with actual malice, "the Tuckers argue[d] that Fischbein, as a lawyer, should have known that a claim for loss of consortium may not have anything to do with damage to sexual relations," so he "was at least reckless when he told the press that Mrs. Tucker was trying to recover for injury to her sex life."[50] Judge Alito rejected this argument with respect to the first time that Fischbein made a statement to the press, because, at that time, "there is no evidence that Fischbein was informed that Mr. Tucker's consortium claims did not refer to damage to sexual relations."[51] After the Tuckers added him to their complaint, however, it appears that Fischbein should have known that they had not claimed a loss of sexual relations, and, therefore, Judge Alito found, a reasonable jury could find by clear and convincing evidence that Fischbein's second statement that the Tuckers had made such a claim constituted actual malice. Judge Alito, however, affirmed the dismissal of the claims against *Time* and *Newsweek* because he found no clear and convincing evidence that they had acted with actual malice.

Judge Nygaard dissented from Judge Alito's holding as to Fischbein, as Judge Nygaard read the Tuckers' amended complaint as "insufficient to indicate a change in their attitude toward alleging a loss of sexual relations" and therefore he found no clear and convincing evidence that Fischbein had spoken with actual malice.[52]

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[49] New York Times v. Sullivan, 376 U.S. 254, 279-280 (1964).

[50] Tucker v. Fischbein, 237 F.3d at 284.

[51] *Id.*

[52] *Id*. at 292. On remand, Fischbein again won summary judgment, but on different grounds.
(continued...)

In another defamation case, *Remick v. Manfredy*, Judge Alito joined an opinion by Judge Sloviter finding that, in context, the defendant's statement that the plaintiff was "attempting to extort money" was not defamatory because it constituted mere "rhetorical hyperbole."[53] It was, in context, an opinion, and, under Pennsylvania law, "an opinion cannot be defamatory unless it 'may reasonably be understood to imply the existence of *undisclosed defamatory facts* justifying the opinion.'"[54]

Commercial Speech. In *Pitt News v. Pappert*, Judge Alito wrote a unanimous decision striking down a restriction on commercial speech.[55] Section 4-498 of the Pennsylvania Statutes Annotated banned advertisers from paying for alcoholic beverage advertising in communications media affiliated with a university, college, or other educational institution, and a student newspaper sued. Judge Alito first noted that it makes no difference that the statute, rather than banning the newspaper's speech, merely prevented it from receiving payment for speech. "Imposing a financial burden on a speaker based on the content of the speaker's expression is a content-based restriction and must be analyzed as such."[56]

Judge Alito next applied the *Central Hudson* test to the speech restriction. Advertising is a form of commercial speech, and commercial speech, though protected by the First Amendment, is subject to greater governmental regulation than other speech. The Supreme Court has prescribed the four-prong *Central Hudson* test to determine whether a governmental regulation of commercial speech is constitutional. This test asks initially (1) whether the commercial speech at issue is protected by the First Amendment (that is, whether it concerns a lawful activity and is not misleading) and (2) whether the asserted governmental interest in restricting it is substantial. "If both inquiries yield positive answers," then to be constitutional the restriction must (3) "directly advance[ ] the governmental interest asserted," and (4) be "not more extensive than is necessary to serve that interest."[57]

Judge Alito noted that the first prong of the test is satisfied, as "the law applied to ads that concern lawful activity (the lawful sale of alcoholic beverages) and that are not misleading."[58] He also found the second prong satisfied, as "[t]here can also be no dispute that the asserted government interest — preventing underage drinking and alcohol abuse — are, at minimum, 'substantial.'"[59] He found, however, that the statute founders on the third and fourth prongs. As for the third prong, "the

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[52] (...continued)
The Tuckers again appealed, and the appeal is pending.

[53] 238 F.3d 248, 262 (3d Cir. 2001).

[54] *Id.* at 261 (emphasis added by the Third Circuit).

[55] 379 F.3d 96 (3d Cir. 2004).

[56] *Id.* at 106.

[57] Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980).

[58] 379 F.3d at 106.

[59] *Id.* at 106.

Commonwealth has not shown that Section 4-498 combats underage or abusive drinking 'to a material degree.' ... Section 4-498 applies only to advertising in a very narrow sector of the media ... and the Commonwealth has not pointed to any evidence that eliminating ads in this narrow sector will do any good."[60]

As for *Central Hudson*'s fourth prong, the Supreme Court has held that it is not to be interpreted to require the legislature to use the "least restrictive means" available to accomplish its purpose. Instead, the Court held, legislation regulating commercial speech satisfies the fourth prong if there is a "reasonable 'fit' between the legislature's ends and the means chosen to accomplish those ends."[61] "Here," Judge Alito wrote, "Section 4-498 is both severely over- and under-inclusive."[62] It was overinclusive because it included students who were over the legal drinking age, and they were a substantial majority of the students. It was underinclusive presumably because it applied only to a narrow sector of the media.

Judge Alito added that Pennsylvania "can seek to combat underage and abusive drinking by other means that are far more direct and that do not affect the First Amendment," namely by "enforcement of the alcoholic beverage control laws on college campuses."[63] He concluded "that Section 4-498 fails the *Central Hudson* test," and then added that it "violates the First Amendment for an additional, independent reason: it unjustifiably imposes a financial burden on a particular segment of the media, i.e., media associated with universities and colleges."[64] For such a financial burden to be justifiable under the First Amendment, it must be "'necessary' to achieve what the [Supreme] Court has described as 'an overriding government interest' and an 'interest of compelling importance.'"[65] But "the Commonwealth has not shown that Section 4-498 is 'necessary' to discourage underage drinking or abusive drinking."[66]

Public Employees' Speech Rights. In *Swartzwelder v. McNeilly*, Judge Alito wrote a unanimous decision upholding a preliminary injunction that prevented the Pittsburgh Police Bureau from enforcing its order requiring its employees "to obtain clearance before testifying in court under certain circumstances."[67] In this case, the Bureau attempted to enforce its order against a police officer who was an expert in the proper use of force by police officers and who was subpoenaed to testify as a defense expert in the prosecution of a police officer for first-degree murder in connection with a shooting in the line of duty. The subpoenaed police officer sued,

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[60] *Id*. at 107.

[61] Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480 (1989).

[62] 379 F.3d at 108.

[63] *Id*.

[64] *Id*. at 109.

[65] *Id*. at 111, *quoting* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 582, 585 (1983).

[66] *Id*.

[67] 297 F.3d 228, 231 (3d Cir. 2002).

contending that the order deprived him of his First Amendment right of free speech, and he sought a preliminary injunction against enforcement of the order pending trial. The federal district court granted the preliminary injunction after a Magistrate Judge found that the plaintiff was likely to prevail in the lawsuit, that irreparable harm would result if the preliminary injunction were not granted, that granting the preliminary injunction would not cause greater harm to the defendant than denying it would cause to the plaintiff, and that the preliminary injunction would be in the public interest.

Judge Alito noted the general principle that, "[w]hile public employees do not give up all 'the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest,' 'the State has interests as an employer in regulating the speech of its employees ... .'"[68] He found that a speech restriction would be permissible in this case if the government could "show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government."[69] As for the free speech interests in *Swartzwelder v. McNeilly*, "the regulation of opinion testimony alone imposes a significant burden on First Amendment interests" of both Bureau employees and potential audiences. As for the government's interests, Judge Alito found that several interests that the government cited, such as "keeping track of the location of employees who are testifying," could be served without reviewing and clearing the substance of their testimony.[70] Others, such as "prevent[ing] public confusion regarding the City's official policies and practices," could be served by an order that applied only to testimony related to an employee's official duties.[71] Judge Alito therefore concluded that the district court had not abused its discretion in finding that the plaintiff was likely to prevail in the lawsuit. As for the other elements that must be shown to be granted a preliminary injunction, Judge Alito noted that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"; that the balance of hardships weighs in the plaintiff's favor because a preliminary injunction "leaves the City free to attempt to draft new regulations"; and that "the public interest is best served by eliminating the unconstitutional restrictions imposed by" the order.[72]

Freedom of Association. In *In re Asbestos School Litigation*, Judge Alito wrote a 2-to-1 opinion holding that an asbestos manufacturer could not, "consistent with the First Amendment, be held liable on the plaintiff's conspiracy and concert of action claims."[73] The plaintiffs had alleged that Pfizer had "marketed an asbestos-containing product for an eight-year period without warnings though it had specific

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[68] *Id*. at 235.

[69] *Id*. at 236, *quoting* United States v. National Treasury Employees Union, 513 U.S. 454, 468 (1995).

[70] *Id*. at 238.

[71] *Id*. at 239-240.

[72] *Id*. at 241-242 (citing *Elrod v. Burns*, *supra* note 45, regarding irreparable injury).

[73] 46 F.3d 1284, 1286 (3d Cir. 1994).

knowledge of the product's hazard. This conduct was in keeping with the method of marketing asbestos products by its co-conspirators, as Pfizer well knew, without any or adequate warnings."[74] Pfizer's alleged co-conspirators were members of a trade organization called the Safe Building Alliance (SBA).

Pfizer argued that to hold it liable on the conspiracy claim would penalize its "exercise of its First Amendment rights to engage in free speech and to associate with [the SBA]."[75] Judge Alito agreed, finding that to hold Pfizer liable would be "squarely inconsistent with the Supreme Court's decision in *N.A.A.C.P. v. Claiborne Hardware Co.*"[76] That case grew out of a boycott by the N.A.A.C.P. of white merchants in Claiborne County, Mississippi, from 1966 to 1972. A group of the merchants sued the N.A.A.C.P. and the Mississippi Supreme Court upheld a judgment in the merchants' favor "based on civil conspiracy and the common law tort of malicious interference with the plaintiffs' businesses."[77] The boycott had included some acts of violence, but the U.S. Supreme Court reversed, concluding "that the nonviolent elements of the boycott — giving speeches, banding together for collective advocacy, nonviolent picketing, personal solicitation of nonparticipants, and the use of a local black newspaper — were protected by the First Amendment."[78] The Supreme Court wrote in *Claiborne Hardware*:

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals *and that the individual held a specific intent to further those illegal aims.*[79]

"In the present case," Judge Alito wrote, "it is abundantly clear that the strict standard set out in *Claiborne Hardware* cannot be met," and he therefore ruled for Pfizer.[80] He added that, although "the factual background of *Claiborne Hardware* was very different from this case and that the constitutionally protected conduct in *Claiborne Hardware* was of much greater societal importance[,] ... nothing in the Supreme Court's opinion ... lends support to the suggestion that the standard it enunciated was not meant to have general applicability."[81]

Dissenting Judge Stapleton argued that "[j]oining together with others does not render legal conduct that would be illegal if engaged in on one's own," and *Claiborne Hardware* "expressly recognizes that one may be held liable if one

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[74] *Id.* at 1287.

[75] *Id.* at 1288.

[76] *Id.* at 1289, *citing* N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886 (1982).

[77] *Id.*

[78] *Id.*

[79] *Id., quoting* 458 U.S. at 920 (emphasis added by Third Circuit).

[80] 46 F.3d at 1290.

[81] *Id.* at 1291.

supports a group that one knows to have 'illegal aims.'"[82] In this case, he added, "Pfizer has failed to convince me that its position is in any way different from a defendant in any antitrust conspiracy case. ..."[83]

Conclusion

We conclude this report with a note of caution. For various reasons, one should draw only limited conclusions from the fact that, in each of the cases discussed above, Judge Alito voted for the party to the litigation who claimed a free speech right, or for the other party (which was a governmental entity except in the defamation cases and the freedom of association case).

One reason is that some judicial decisions follow clear Supreme Court precedents, which a lower-court judge may feel obliged to follow whether he agrees with them or not, but which he might be inclined to overturn were he on the Supreme Court.

Another reason is that the fact that a judge favored or disfavored the free speech side in a particular case may reveal little of his view of the First Amendment, because the basis of his opinion may not have been his view of the First Amendment. In *Phillips v. Borough of Keyport*, for example, Judge Alito joined an opinion to send the case back to the lower court to hear additional evidence. This ruling favored the government because the lower court had previously ruled against the government, but it did not ensure that the government would ultimately win the case. Similarly, in *Terminello v. City of Passaic*, the Third Circuit vacated the district court's decision because the district court had applied the wrong legal standard in granting an injunction, not necessarily because the Third Circuit disagreed with the district court's result on the merits.

Yet another reason to use caution in attributing particular First Amendment views to a judge on the basis of particular rulings is that even a ruling for the government may expand the right of free speech, and a ruling against the government may narrow it (not that there are necessarily any instances of either of these occurrences among the cases discussed in this report). A famous example of the former occurrence is *Schenck v. United States*, in which Justice Oliver Wendell Holmes wrote an opinion that affirmed a criminal conviction, yet expanded the First Amendment so that the government could punish political advocacy only when such advocacy creates a "clear and present danger."[84]

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[82] *Id.* at 1296.

[83] *Id.*

[84] 249 U.S. 47, 52 (1919).