

May 3, 2006

Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-30523

PELTS & SKINS, LLC

Plaintiff - Appellee,

v.

WILLIAM DWIGHT LANDRENEAU, Secretary for the Department of
Wildlife and Fisheries,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before KING, BENAVIDES, and CLEMENT, Circuit Judges.

BENAVIDES, CIRCUIT JUDGE:

Our previous opinion in this case held that Louisiana's alligator marketing program created an unconstitutional compelled subsidy for private speech. Since then, the United States Supreme Court issued an opinion clarifying when marketing programs like the one at issue are government speech exempt from First Amendment scrutiny. See *Johanns v. Livestock Mktg., Assoc.*, 544 U.S. 550, ___; 125 S. Ct. 2055, 2063 (2005). *Johanns* held that the key

inquiry is the "degree of governmental control over the message." *Id.* Speech constitutes government speech when it is "effectively controlled" by the government. *Id.* at 2062.

Neither this Court, the district court, nor the parties had the benefit of this now-governing standard. At this time, we cannot apply the new standard, given that the record does not contain sufficient evidence of control or lack thereof. Accordingly, we VACATE and REMAND for the district court to allow the parties to develop and present evidence with respect to the new standard and to allow the district court to assess in the first instance the extent of governmental control over the speech at issue.