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The U.S. Supreme Court Answers Some (But Not All) Questions Posed by Three Sets of Social Media Cases

By Michael Lambert

It was billed to be a blockbuster term for the First Amendment and social media law. The U.S. Supreme Court's docket in 2023-24 featured a record five cases involving novel questions of free speech and social media. But while the term ended with the resolution of some issues, many remain.

In three of the cases, the Court provided substantive guidance about content moderation, government coercion, and government officials blocking constituents. In sum, the High Court found, for the first time, that content moderation decisions by social media platforms are protected by the First Amendment. It also set new guardrails for government attempts to persuade others to suppress private speech and guidelines to determine when conduct on social media becomes state action. In the other two cases, the Court punted on procedural grounds, finding that the plaintiffs lacked standing required to bring cognizable claims.

The tepid results this term are consistent with the cautious approach historically taken by the Justices when faced with new technology. Although the 2023-24 term will not be remembered as transformational, it has at least provided some much-needed guidance to help lower courts navigate complex constitutional questions.

***Moody v. NetChoice*: Can states regulate content moderation decisions by social media platforms?**

The first set of cases involved NetChoice, a trade group representing a coalition of social media companies (such as Meta, Google, X), challenging the constitutionality of a pair of state laws that required social media platforms to make certain content moderation decisions and provide information about those decisions. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2024 WL 3237685 (2024).

Background

In 2021, Florida enacted SB 7072, which (among other provisions) requires social media platforms to host certain content, prohibited them from moderating speech by or about political candidates or by "journalistic enterprises," and declared social media platforms to be common carriers. The Eleventh Circuit held, 3-0, that most of the law's provisions violated the First Amendment because social media platforms are private actors (*not* common carriers) that make expressive editorial decisions protected under the U.S. Constitution. *NetChoice, LLC v. Attorney Gen., Florida*, 34 F.4th 1196 (11th Cir. 2022).

In 2021, Texas enacted HB 10, which (among other provisions) bans social media platforms with more than 50 million active users from censoring a user, a user's expression, or a user's ability to receive the expression of another person based on the "viewpoint" of the user or another person. The Fifth Circuit held, 2-1, that the law passed constitutional muster because it chills "censorship," not speech. *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022).

Analysis

Instead of squarely deciding the merits of the cases, the Supreme Court, 9-0, vacated both decisions because "neither Court of Appeals properly considered the facial nature of NetChoice's challenge." 2024 WL 3237685 at *5. The Court explained that in a pre-enforcement facial challenge, as opposed to an "as applied" challenge, courts must consider "whether a law's unconstitutional applications are substantial compared to its constitutional ones." *Id*. To answer that inquiry, a court "must determine a law's full set of applications, evaluate which are constitutional and which are not, and compare the one to the other." *Id*.

Although the opinion could have ended there, Justice Elena Kagan opined, for the first time, that content moderation decisions by social media platforms are protected by the First Amendment. *Id*. She explained that social media platforms, like newspapers, make expressive choices when they decide what content to display and how it will be organized. *Id*. ("editorial judgments influencing the content of [news] feeds are . . . protected expressive activity"). Justice Kagan criticized Texas and Florida for interfering with private speech to "advance its own vision of ideological balance." *Id*. at *16.

In a concurring opinion that read more like a dissent, Justice Samuel Alito, with Justices Clarence Thomas and Neil Gorsuch, opined that First Amendment protections do not apply when someone is merely a "compiler" of information and the compilation is not "inherently expressive." *Id*. at *35.

In sum, *NetChoice* breaks new ground by discussing the First Amendment rights of social media platforms. It also serves as a criticism of Texas and Florida for enacting seemingly unconstitutional laws and a rebuke of the Fifth Circuit for its erroneous analysis and application of First Amendment principles. Upon remand, it is likely that large segments of the Florida and Texas laws will be struck down under the Court's guidance. *Id*. at *3.

In the meantime, the repercussions of *NetChoice* will likely to be felt in other cases, such as the pending challenge to the federal TikTok "ban" signed in April 2024. The law requires TikTok's China-based parent company ByteDance to divest TikTok's U.S. operations by January 2025 or effectively be barred in the U.S. In a concurring opinion in *Netchoice*, Justice Amy Coney Barrett weighed in on an issue likely to be raised in the case, writing that "a social-media platform's foreign ownership and control over its content moderation decisions might affect whether laws overriding those decisions trigger First Amendment scrutiny." *Id*. at *18.

Further, *NetChoice* could influence *Free Speech Coalition v. Paxton*, which the Court will review next term. There, the Court will consider the constitutionality of Texas's HB 1181, which requires age verification to access pornography online.

***NRA v. Vullo* and *Murthy v. Missouri*: Does the government infringe free speech rights by pressuring private parties to suppress expression?**

The Court also issued rulings in two cases involving "jawboning," which, in this context, refers to the use of government power to pressure individuals and entities to suppress the speech of third parties. *NRA v. Vullo* involved the National Rifle Association's (NRA) complaint that New York officials violated its First Amendment rights by threatening enforcement actions against those who associated with the gun rights organization. 602 U.S. 175 (2024). *Murthy v. Missouri* involved allegations that federal officials coerced social media platforms to remove their content. 144 S.Ct. 1972, 2024 WL 3165801 (2024).

Background

In *Vullo*, the NRA sued Maria Vullo, the former superintendent of the New York Department of Financial Services (DFS), and other New York officials for violating its First Amendment rights by coercing companies to retaliate against the NRA. The NRA alleges that Vullo met with insurance companies with ties to the NRA and issued a pair of guidance letters calling on regulated insurance and financial services to reconsider their agreements with the NRA. The NRA also claimed that DFS entered into consent decrees with companies that prohibited them from participating in an NRA-backed insurance program.

The Second Circuit reversed the lower court's denial of Vullo's motion to dismiss, finding that Vullo's statements were persuasive, not coercive, and she was carrying out her official duties. *NRA v. Vullo*, 49 F.4th 700, 717 (2nd Cir. 2022).

In *Murthy*, Missouri, Louisiana, and a handful of private parties sued various federal government officials, including U.S. Surgeon General Vivek Murthy, for violating their First Amendment rights by communicating with social media companies and suggesting they block or remove posts about COVID-19 and election fraud, among other topics.

The Fifth Circuit determined that the officials engaged in "a coordinated campaign" of unprecedented magnitude that "jeopardized a fundamental aspect of American life." *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023). The Court affirmed a preliminary injunction that restricted certain government officials from asking platforms to make certain content-moderation decisions. According to the Fifth Circuit, the "unrelenting pressure" from government officials likely "had the intended result of suppressing millions of protected free speech postings by American citizens." *Id*. at 392.

Analysis

In *Vullo*, the U.S. Supreme Court held, 9-0, that the NRA plausibly stated a First Amendment claim because Vullo "threatened enforcement actions against DFS-regulated entities in order to punish or suppress the NRA's gun-promotion advocacy." 602 U.S. at 176. Justice Sonia Sotomayer, writing for the Court, explained that government officials cannot "use the power of the State to punish or suppress disfavored expression." *Id*. at 188.

Relying on *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), the Court wrote that the First Amendment "prohibits government officials from relying on the threat of invoking legal sanctions and other means of coercion," regardless of whether the official had the power to apply formal sanctions. *Id*. at 189. The Court advised lower courts to consider whether a plaintiff plausibly alleged conduct that, viewed in context, "could be reasonably understood to convey a threat of adverse government action in order to punish or suppress [a] plaintiff 's speech." *Id*. at 191. Courts should also consider the "power that a government official wields" and "whether a reasonable person would perceive the official's communication as coercive." *Id*. The Court ultimately vacated the Second Circuit's judgment and remanded for further proceedings.

Although *Vullo* does not drastically change the law, it reaffirms *Bantam Books*, outlines what facts to consider, and directs courts to view those facts holistically rather than in isolation.

In *Murthy*, the Court held, 6-3, that none of the plaintiffs had standing to bring their claims because their alleged injuries were not traceable to the defendants or redressable by the court. 2024 WL 3165801 at *14-15. In reversing the Fifth Circuit's judgment upholding the preliminary injunction, Justice Barrett wrote that a plaintiff "must show a substantial risk that, in the near future, at least one platform will restrict the speech of at least one plaintiff in response to the actions of at least one Government defendant." *Id*. at *8. The plaintiffs failed to sufficiently show

that government action caused any particular moderation decision because "the platforms had independent incentives to moderate content and often exercised their own judgment." *Id*. at *9. The majority also found no redressability because while a court could prevent government defendants from interfering with the platforms' application of their policies, "platforms remain free to enforce, or not to enforce, those policies—even those tainted by initial governmental coercion." *Id*. at *16.

In sum, *Murthy* makes it more difficult for individuals to challenge government efforts to suppress online speech unless they can show that the suppression was directly tied to government action and can be cured by a court. Social media companies, on the other hand, will be more likely able to bring cognizable claims.

***O'Connor-Ratcliff v. Garnier* and *Lindke v. Freed*: When does a government official's conduct on social media become government action?**

The final two social media cases decided this term involve constituents who claimed that public officials violated their First Amendment by blocking them on social media after they made negative comments on the public official's social media page. The Court addressed the threshold question of when a public official's social media activity constitutes state action.

Background

In *Lindke v. Freed*, the Sixth Circuit held that a city manager did not violate the First Amendment when it blocked a city resident because he maintained his Facebook page on his own and was not acting as a government official. 37 F.4th 1199 (6th Cir. 2022).

By contrast, in *O'Connor-Ratcliff v. Garnier*, the Ninth Circuit ruled that a pair of school board members violated the First Amendment by blocking two parents from their personal Facebook and Twitter accounts, in part, because they were also used to share government activities. 41 F.4th 1158 (9th Cir. 2022).

Analysis

In *Lindke*, the Court unanimously held that a government official's social media posts are attributable to the state when the official (1) has authority to speak on behalf of the government and (2) purports to exercise that power when creating the social media content in question. 601 U.S. 187, 191 (2024). Justice Barrett, writing for the Court, emphasized that while a social media profile's appearance and function are relevant, whether a public official has actual power to speak for the government is determinative. *Id*. Justice Barrett also warned that a public official "exposes himself to greater potential liability" if he "fails to keep personal posts in a clearly designated personal account." *Id*. at 204.

In *O'Connor-Ratcliff*, the Court, in a *per curiam* decision, vacated the Ninth Circuit's judgment and remanded the case to be reconsidered in light of the principles outlined in *Lindke*. 601 U.S. 205 (2024).