Freedom of Speech in the United States

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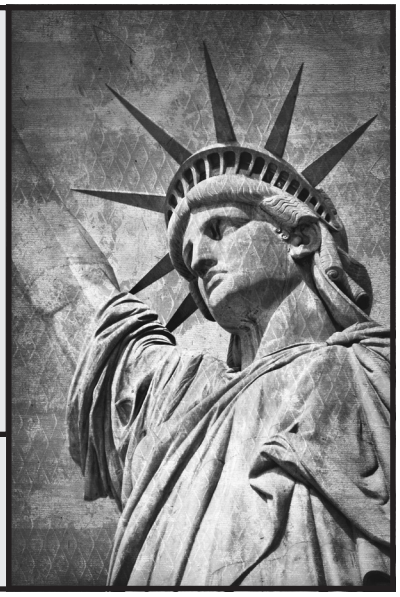

Annual Update — Autumn 2024

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The Supreme Court had another blockbuster term in 2023–2024, which included decisions about freedom of speech, affirmative action, voting rights, and corporate regulations that are likely to shape law, policy, and everyday life for decades. One of the two most significant opinions of the term was released on the last day of the term, when the Court issued an opinion on two cases, *Moody v. NetChoice, LLC* and *NetChoice, LLC v. Paxton,* reinforcing the application of First Amendment rights in the digital age, particularly regarding social media platforms.

Other key First Amendment cases this term examined whether states could compel social media companies to host or remove certain content, contrary to their own policies; what criteria are needed to establish government censorship of online speech; and what actions constitute state action in relation to public officials' social media activities. The Court also addressed issues involving attempts to silence speech. One case explored whether the Superintendent of the New York Department of Financial Services used her authority to coerce financial institutions into severing ties with the National Rifle Association for politically motivated reasons, effectively punishing dissenting views. The Court also considered challenges to a North Carolina law that permitted employers to sue employees who made undercover recordings, a response to actions by People for the Ethical Treatment of Animals (PETA). Additionally, the Court reviewed whether government officials targeted a city council member who was leading a petition to remove the city manager, resulting in the council member's brief incarceration. The Court also evaluated a case concerning the liability of protest organizers for injuries that were incurred at protests, but that the organizers did not directly cause. Finally, a free speech case involving the phrase "Trump Too Small" reaffirmed a significant aspect of trademark law.

The other blockbuster decision of the term, *Trump v. United States,* also issued on the Court's last day, focused on presidential immunity. It was related to the events of January 6, 2021 and has potential First Amendment implications because of its expansion of presidential immunity.

Emily Berg Paup would like to thank Autumn Green for her contribution as research assistant on the 2024 Update.

A few notable trends emerged this term. One trend was the Court's particularly pronounced focus on social media, government influence, and content regulation. A second was the Court's tendency to remand cases to lower courts for further review under newly clarified frameworks. A third was a common thread of analysis to encourage review of laws (both in the Court's own decisions and in its instructions to lower courts) "in context" or "as applied." Further, no cases discussed in this Update were sharply divided along ideological lines. Justices dissented in a small minority in only two cases (*Gonzalez v. Trevino* and *Murthy v. Missouri*). They also crossed ideological lines to write concurrences together (*Vidal v. Elster*), and shared the burden in writing the unanimous majority opinions across ideological lines as well.

The complete text of this update and a library of landmark free speech decisions can be found on the website for the book:

http://www.tedford-herbeck-free-speech.com

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Looking to the Future

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Chapter 3: Political Heresy

U.S. Supreme Court

Case: *Trump v. United States* (2024)
Subject: Presidents have immunity for "official acts" committed within their constitutional presidential authority and the intent behind those acts cannot be questioned; they have no immunity for "unofficial" acts.
Summary: In *Trump v. United States*, the Court significantly expanded the concept of presidential immunity, holding that former presidents have absolute immunity from criminal prosecution for actions taken within their "conclusive and preclusive constitutional authority," and presumptive immunity for all other official acts. The central issue of the case revolved around whether a former U.S. president, specifically Donald Trump, could claim absolute immunity from federal criminal prosecution for actions taken while in office. This case was the first instance in U.S. history in which a former president faced criminal charges for actions conducted during his time in office. Trump also claimed presidential immunity in civil lawsuits filed against him by Capitol police officers and members of Congress in regard to the events at the U.S. Capitol on January 6, 2021 (discussed in Chapter 3, page 58).

The Court's decision was simultaneously sweeping and limited. The central issue of the case was the distinction between the president's official and unofficial actions. On the one hand, the majority recognized "the breadth of the President's 'discretionary responsibilities' under the Constitution and laws of the United States," granting presidential immunity for acts that extend "to the 'outer perimeter' of the President's official responsibilities," so long as the actions are "not manifestly or palpably beyond [his] authority." Further, the majority said that "in dividing official from unofficial conduct, courts may not inquire into the President's motives" because it would be "highly intrusive" and "risk exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose."

On the other hand, the Court also determined that the president does not have immunity for unofficial conduct and remanded the case back to the District Court to decide whether the actions under indictment were part of President Trump's official duties (which would grant him immunity based on the Court's ruling on this case) or unofficial, in which case he could face criminal or civil liability. When determining whether a president is acting (or speaking) in an official or unofficial capacity, the Court cited *Snyder v. Phelps* (2011) (discussed in Chapter 5, pages 124–125) to suggest that "content, form, and context" must inform the analysis.

Trump v. United States could have ramifications for freedom of expression in a few ways. First, during an extensive discussion of former President Trump's speech and conduct on January 6, 2021 (discussed in Chapter 3, pages 58–59), the majority contended that "a long-recognized aspect of Presidential power is using the office's 'bully pulpit' to persuade Americans, including by speaking forcefully or critically, in ways that the President believes would advance the public interest," and that "most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities." This statement could imply that future communication acts like former President Trump's January 6 speech, which some legal scholars believe bordered on incitement under the *Brandenburg* test, might be viewed as permissible.

Second, this ruling raises questions about the extent of executive power. Justice Sonia Sotomayor wrote a scathing dissent of the decision, in which Justices Elena Kagan and Ketanji Brown Jackson joined. She began it with: "Today's decision to grant former Presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law." Justice Sotomayor also drew on the First Amendment to address the ruling that a president's motives cannot be scrutinized, which, she wrote, is "the majority's extraordinary rule" that "has no basis in law." She added,

> For instance, the majority struggles with classifying whether a President's speech is in his capacity as President (official act) or as a candidate (unofficial act). Imagine a President states in an official speech that he intends to stop a political rival from passing legislation that he opposes, no matter what it takes to do so (official act). He then hires a private hitman to murder that political rival (unofficial act). . . . Under the majority's rule, the murder indictment could include no allegation of the President's public admission of premeditated intent to support the *mens rea* of murder.

Citing *Wisconsin v. Mitchell* (1993), she said, "Although the First Amendment prohibits criminalizing most speech, it 'does not prohibit the evidentiary use of speech,' including its use 'to prove motive or intent.'"

The statements in the majority opinion about presidential immunity, specifically the president's relationship with the Department of Justice, combined with courts' inability to scrutinize presidential motives, raise First Amendment concerns. These concerns are particularly relevant to the dynamic between the presidency and the free press, as such expansive immunity could impact press freedom and journalistic accountability if the president's actions, even if driven by personal bias, cannot be legally questioned. Under this ruling, prosecution of journalists (for instance, for refusing to disclose sources or publishing classified documents) could, in theory, fall within the president's unchallengeable authority, even if such actions were driven entirely by personal animosity toward specific reporters or media outlets, potentially undermining press freedoms. Journalists would still be protected by the First Amendment precedents discussed in Chapters 9 and 10, but a president would not necessarily be prohibited from pursuing criminal prosecutions against the press for actions such as publishing classified documents (as discussed in Chapter 9, pages 233–241), refusing to reveal confidential sources (Chapter 10, pages 256–259), or utilizing civil litigation such as defamation lawsuits (an issue covered in Chapter 3, page 60).

Perhaps partly in reaction to the decision in *Trump v. United States,* President Joe Biden issued a statement on July 29, 2024, about his intention to "reform the Supreme Court and ensure no President is above the law." He laid out three proposed reforms. The first proposal is a call for a constitutional amendment called the "No One Is Above The Law Amendment" that would say that the Constitution, "does not confer any immunity from federal criminal indictment, trial, conviction, or sentencing by virtue of previously serving as President." Under the second proposal, which calls for imposing term limits for Supreme Court justices, each president would appoint a new justice every two years to serve for a term of 18 years. The third proposal is for a "binding code of conduct" that would "require Justices to disclose gifts, refrain from public political activity, and recuse themselves from cases in which they or their spouses have financial or other conflicts of interest."

U.S. Supreme Court

Case: *Gonzales v. Trevino,* 602 U.S. ___ (2024)
Subject: The criteria that individuals must meet to bring forward First Amendment claims against state or local officials for retaliatory arrests based on their speech are reconsidered and slightly widened.
Summary: Upon being elected to the Castle Hills, Texas, city council in 2019, 72-year-old Sylvia Gonzalez learned of widespread discontent with the city manager and created a "nonbinding" petition for the manager's removal. Mayor Edward Trevino questioned Gonzalez about the petition, which was located in her binder. Two days later, due to a criminal complaint that Trevino set against her, Gonzalez was arrested for allegedly stealing the petition and spent a night in jail. After Gonzalez was arrested, Trevino also took the document home with him, but was not arrested. Gonzalez sued Trevino, claiming that he violated her First and Fourteenth Amendment rights. Although she eventually conceded there might be probable cause for her arrest for taking the petition home, Gonzalez further alleged that the arrest was an act of retaliation for her use of her right to petition. City officials used a seldom-used anti-tampering state law, usually applied to fake IDs, to justify the arrest. Gonzalez sued, claiming the police had never enforced this law before and only did so in her case because of her criticism of the city manager—speech protected by the First Amendment. The district court agreed with Gonzalez.

Government officials appealed. The Fifth Circuit Court of Appeals reversed the decision on the basis of a precedent set forth in *Nieves v. Bartlett* (2019), in which the Supreme Court held that a claim of retaliatory arrest is valid when the plaintiff demonstrates "that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." The appeals court interpreted *Nieves* to mean that in order to prove retaliatory arrest, Gonzalez would need to show others doing exactly the same thing without being arrested. She argued that it should be enough to show that officials used an obscure law to silence her, even without such examples. The Fifth Circuit, however, insisted on specific examples of nonenforcement in identical situations. Gonzales argued that the motivation for her arrest was retaliatory in nature because the affidavit that law enforcement made against her discussed her viewpoints and not any criminal action. Furthermore, she argued, no similarly situated person in a ten-year misdemeanor record had been arrested for the same crime, including Mayor Trevino, even though he took the same actions that she did.

The Supreme Court granted certiorari and, in an 8 to 1 per curiam decision, disagreed with the lower court, vacating and remanding the judgment for another review. The majority found that the Fifth Circuit's view was "too cramped," that is, that requiring an exact replica of Gonzalez's case to demonstrate comparative evidence was too strict an interpretation of the *Nieves* exemption to the probable-cause standard. The Court sent the case back to the Fifth Circuit for review in light of this slightly less strict interpretation. Gonzales' case highlights the potential for abuse of power when officials use obscure laws to target critics, leading to a potential chilling effect on constitutionally protected speech. (For example, Gonzales has since left public service.)

Justice Samuel Alito wrote a concurrence that seemed to assume that the per curiam decision did not provide enough guidance for the lower court, and proceeded to provide such guidance. Namely, he cautioned the Fifth Circuit not to provide too much leeway when they revisit the *Nieves* exemption. He wrote, "If a plaintiff could evade the no-probable-cause

requirement simply by submitting evidence that no one who engaged in an exact duplicate of his behavior had been arrested, . . . the Nieves's exception would drain the no-probable-cause requirement of all force."

Justice Ketanji Brown Jackson also issued a concurrence, in which Justice Sonia Sotomayor joined, that suggested that other types of objective evidence besides arrest records can be used to satisfy the *Nieves* exception, such as falsified arrest documents or retaliatory statements in warrants or affidavits.

U.S. Supreme Court

Case: *Mckesson v. Doe,* 592 U.S ____ (2024)
Subject: A protest organizer might be held liable for injuries caused during a protest.
Summary: DeRay Mckesson organized a protest in Baton Rouge, Lousiana, against a police shooting. As part of the protest, protesters occupied a highway in front of the police headquarters. During arrests, someone threw a rock, injuring Officer "John Doe." Doe suffered severe injuries, including brain trauma and tooth loss. Though Mckesson did not throw the rock himself, the officer sued on the grounds that Mckesson negligently planned the protest and should have known that violence would ensue.

The U.S. District Court for the Middle District of Louisiana barred the officer's claim of negligence on the grounds that the protest was speech protected by the First Amendment and dismissed the case. A divided Fifth Circuit Court of Appeals reversed the decision and allowed the case to proceed under a theory of "negligent protest," essentially stating that Mckesson could be held liable even if he didn't intend for violence to occur.

Mckesson appealed to the Supreme Court in 2020. The Court vacated the Fifth Circuit Court's ruling and remanded the case back to the lower court for reconsideration as to whether a protestor could be held liable under Louisiana state law. In March 2022, the Louisiana Supreme Court allowed the lawsuit against Mckesson to proceed under state law. A year later, in June 2023, the Fifth Circuit reaffirmed its stance that the lawsuit didn't violate the First Amendment, but with a slightly modified reasoning. It argued that Mckesson could be held liable for creating unsafe conditions and inciting violence by organizing the protest, even if he didn't intend any violence himself.

The Supreme Court denied Mckesson's petition for review in April 2024, but Justice Sotomayor suggested that the Court's 2023 decision in *Counterman v. Colorado* (discussed in the 2023 update to *Freedom of Speech in the United States*) should guide future proceedings. She said that the decision in *Counterman v. Colorado* clarified that the First Amendment prohibits using an objective standard, such as negligence, for punishing speech because of established precedent requiring demonstration of intent (like the *Brandenburg* test and the *Watts* "true threat" test discussed in this chapter). The "recklessness" standard established in *Counterman* requires that, to secure a conviction for a "true threat," the state must prove that the defendant "consciously disregards a substantial and justifiable risk that the conduct will cause harm to another."

Sotomayor stressed that the denial of review in McKesson's case should not be interpreted as a judgment on the merits of his claim and urged the Fifth Circuit to fully consider the implications of the *Counterman* ruling when it reviewed the case in the future.

Chapter 4: Defamation

U.S. Supreme Court

Case: *Blankenship v. NBC Universal* 601 U.S ____ (2023)
Subject: The Supreme Court declines to review the "actual malice" standard in an appeal from a defamation case brought by Don Blankenship, a former coal executive, against NBC Universal and other media outlets, alleging they misreported his criminal history related to a mine explosion.
Summary: Justice Thomas retained interest in revisiting the "actual malice" standard as a burden of proof for public officials that was set in *New York Times v. Sullivan* (1964). In the 2024 term, he expressed that interest in a concurrence accompanying the denial of review of a defamation case brought by coal baron and conservative politician Don Blankenship against NBC Universal (*Blankenship v. NBC Universal,* 2023). After an unsuccessful run for a West Virginia seat in the U.S. Senate, Blankenship sued multiple media organizations for defamation, false light, invasion of privacy, and civil conspiracy, claiming they had mislabeled him a "felon" when referring to his year-long prison sentence for federal criminal conspiracy when it was technically a misdemeanor. The U.S. District Court for the Southern District of West Virginia dismissed the case. The Fourth Circuit Court of Appeals upheld that ruling. The Supreme Court denied review in 2024 because it found that Blankenship's claims were too narrow to justify a re-examination of the "actual malice" standard.

Civil Court

Defamation lawsuits involving high profile public figures and public controversies are important avenues for shaping how defamation law is applied in modern contexts.

Case: *Freeman v. Giuliani , Civil Action No. 21-3354 (BAH) (D.D.C. 2023)*
Subject: Georgia election workers Ruby Freeman and her daughter Wandrea "Shaye" Moss win a defamation judgment against former New York Mayor Rudy Giuliani after he falsely accuses them of election fraud during the 2020 presidential election, leading to widespread harassment.
Summary: During the 2020 election cycle, former New York City mayor and presidential candidate Rudy Giuliani, then a lawyer working for former President Donald Trump, made claims, alongside Trump, about election fraud. Some of these claims centered around Georgia volunteer election workers Ruby Freeman and Shaye Moss (mother and daughter). Giuliani claimed that Freeman and Moss manipulated ballots while working at the State Farm Arena in Fulton County. Then-President Trump also mentioned Freeman in a January 2, 2021, phone call with Brad Raffensperger, the Georgia secretary of state. During the call, Trump mentioned Freeman 18 times and proceeded to ask Raffensperger to help him "find" 11,800 votes. Giuliani kept mentioning the women in public, calling for their home to be searched and comparing them to drug dealers.

Freeman and Moss brought defamation suits against Giuliani, Trump, and several others, including the media outlet One America News Network. They claimed that once they were made targets, they started to be harassed. They settled every lawsuit out of court except for the one against Giuliani. Giuliani's defense rested on the idea that his statements were protected by the First Amendment. In August 2023, Giuliani conceded to two claims that he made defamatory statements. Judge Beryl A. Howell of the Federal District Court of Washington,

D.C., noted that Giuliani's defense had "more holes than Swiss cheese" and held him liable for defamation, intentional infliction of emotional distress, and civil conspiracy.

During the discovery process, Giuliani refused to release "reams" of crucial evidence and portrayed himself as a victim of judicial prejudice and abuse of process. Judge Howell ordered Giuliani to pay $90,000 of legal fees that Freeman and Moss had incurred during the prolonged defamation suit. In December 2023, a jury trial began to determine the damages to be awarded. In May 2024, a jury awarded Freeman and Moss $148 million in damages, including $75 million in punitive damages and $20 million in emotional distress. Giuliani eventually agreed to "never again accuse either [Ruby] Freeman or [Shaye] Moss of engaging in any wrongdoing in connection with the 2020 election."[1] Giuliani has since filed for bankruptcy and, as of August 2024, is back in court against Freeman and Moss over control of his assets in relation to paying the damages owed to them.

Developments in Earlier Cases

Two earlier defamation suits had developments in 2024.

Case: *E. Jean Carroll v. Donald Trump* (update)
A detailed account of the first two defamation lawsuits that journalist E. Jean Carroll filed against former President Donald Trump is included in the 2023 Update. The first suit (named *Carroll I*) was filed after the former president denied her claims in 2019 that he had sexually assaulted her in 1996. Carroll claimed that he had harmed her reputation, harmed her professionally, and caused her emotional pain. The case was held up in a series of technicalities related to whether Trump was acting in his official capacity as president, and thus whether he could be sued. On September 6, 2023, a federal judge determined that President Trump had, in fact, defamed Carroll. In January 2024, a jury awarded Carroll a total of $83.3 million in damages—$18.3 million in compensatory damages and $65 million in punitive damages. On appeal, a federal judge denied his motion for a new trial.

The second lawsuit (called *Carroll II*), also detailed in the 2023 Update, similarly involved statements that President Trump had made about Carroll's claims, calling her allegations "a complete con job" and "a hoax and a lie, just like all the other hoaxes that have been played on me for the past seven years." A jury found him guilty of defamation and awarded Carroll $5 million in damages in May 2023. This case is still going through the court system. In June 2023, President Trump filed a countersuit, claiming that Carroll had defamed him. In August, a judge dismissed the appeal. In 2024, President Trump's legal team appealed the dismissal, which is still being litigated.

Case: *Alex V. Jones v. Sandy Hook Families*
On December 14, 2012, 26 people, 20 of them children between the ages six and seven, were murdered at Sandy Hook elementary school in Newtown, Connecticut. Alex Jones, a provocative far-right radio host and conspiracy theorist, called the shooting a "hoax" on his program *Infowars* and claimed that it was staged by actors to support gun control laws. Multiple families of the victims filed lawsuits for defamation in Connecticut and Texas, claiming that they were being harassed and threatened by listeners, who believed his lies.

[1]Lucien Bruggeman, "Giuliani agrees to cease election fraud accusations against 2 former election workers, May 21, 2024, ABC News, https://abcnews.go.com/Politics/giuliani-agrees-cease-election-fraud-accusations-2-former/story?id=110451611.

In what may be some of the biggest financial awards in history, the Sandy Hook victims' families won a total of almost $1.5 billion in damages from their successful defamation suits in 2022. As of the summer of 2024, Jones was still trying to find ways to pay the families of victims. Jones was granted a request to convert his bankruptcy filings to a liquidation of his personal assets. On September 24, 2024, a bankruptcy judge in Houston, Texas ruled that Jones' Infowars Media platform, Free Speech Systems, and its assets could be sold at auction. The auction is set for November 2024 and the proceeds will go to the Sandy Hook families.

The defamation suits against Jones set a precedent for holding people and media outlets accountable for spreading harmful conspiracy theories and disinformation. The substantial damages awarded emphasize the level of the harm that Jones' false statements inflicted.

U.S. Supreme Court

Case: *Moody v. NetChoice, LLC and NetChoice, LLC v. Paxton, 603 U.S.* ___ (2024).
Subject: Social media platforms have the right to moderate content, pending further review in the lower courts.
Summary of Decision: Many conservative politicians have alleged in recent years that social media platforms are disproportionately censoring or deplatforming conservative voices. After the January 6, 2021, attack on the Capitol building, former President Donald Trump was deplatformed from most major social media platforms for inciting violence and violating their policies.

Florida Governor Ron DeSantis signed Florida Senate Bill 7072 on May 24, 2021, claiming that he was doing so to "ensure that 'We the People'—real Floridians across the Sunshine State—are guaranteed protection against the Silicon Valley elites." The new law required platforms to offer clear content moderation policies and allow users to appeal moderation decisions, and prohibited deplatforming political candidates.

Texas House Bill 20, enacted on September 9, 2021, similarly aimed to regulate large social media companies by forbidding any social media company with more than 50 million users to censor a user's expression based on viewpoint, and to "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression."

NetChoice, LLC, is a trade association whose members include major tech companies such as Meta (Facebook), Google, YouTube, Amazon, PayPal, Snap, and Lyft. The association's mission is "to make the Internet safe for free enterprise and free expression." In two separate lawsuits, NetChoice challenged the constitutionality of the Texas and Florida laws on First Amendment grounds, arguing that social media companies have a constitutionally protected right to editorial judgment over the content they allow. The U.S. District Courts for the Northern District of Florida and the Western District of Texas both issued preliminary injunctions against the respective laws in their states, halting the enforcement of the laws.

In *NetChoice LLC v. Attorney General of Florida* (2022), the Eleventh Circuit Court of Appeals upheld the injunction against the Florida law, affirming the First Amendment claims of the social media companies. The court emphasized that social media platforms engage in "editorial judgment" when moderating content. It also found that requiring platforms to explain "millions of [decisions] per day" would be "unduly burdensome" and likely to have a chilling effect. As a result, the Florida law remained under injunction until the case reached the Supreme Court.

In Texas, in *NetChoice, LLC v. Paxton,* the Fifth Circuit Court of Appeals issued a conflicting decision, reversing the District Court's injunction and upholding the Texas law. The court argued that social media platforms do not operate like traditional media outlets and therefore do not merit First Amendment protection. It also held that these platforms function as public forums for speech and should not engage in censorship that limits free expression based on a user's viewpoint.

The Supreme Court agreed to hear the two cases together to resolve the split between the Fifth and Eleventh Circuits. Overall, the Court determined that both the Florida and Texas courts had made errors in their rulings. The cases had been brought as facial challenges, meaning that NetChoice argued that the laws were unconstitutional in all cases. However, the lower courts had mostly focused on how the laws affect social media content moderation, overlooking their possible impact on other services, such as messaging or financial transactions. The Supreme Court emphasized that in a facial challenge, the full scope of the law must be evaluated. Consequently, the cases were sent back to the lower courts to conduct a more comprehensive analysis, considering the law's broader implications beyond social media.

Although the cases were remanded for further review, the opinions delivered espoused principles about the internet as a public forum, freedom of expression, regulation, and social media platforms as companies and media entities. Justice Kagan, in the majority opinion, reaffirmed the extension of First Amendment protections to the internet that were originally established in *Reno v. ACLU* (1997) (discussed in Chapter 6, pages 159–161). She highlighted the "staggering amount of content" (about 100 billion messages sent on Facebook alone every day) on social media platforms and likened them to traditional media, both of which "curate speech products." Justice Kagan also emphasized that platforms' decisions to select, organize, and even remove content are exercises of editorial judgment, protected by the First Amendment. She wrote, "In constructing certain feeds, those platforms make choices about what third-party speech to display and how to display it . . . . They include and exclude, organize and prioritize—and in making millions of those decisions each day, produce their own distinctive compilations of expression."

Justice Kagan expressed doubts about the Texas law's constitutionality in particular, making it clear that the Court did not think it likely to succeed after a more thorough review "because of the core teaching elaborated in the above-summarized decisions: The government may not, in supposed pursuit of better expressive balance, alter a private speaker's own editorial choices about the mix of speech it wants to convey." She underscored that just as traditional media is protected in its expression under the First Amendment, "the principle does not change because the curated compilation has gone from the physical to the virtual world."

The majority stressed that although technology may change, the core principles of the First Amendment do not. Justice Kagan recognized the distinct differences between old and new communication methods, acknowledging the unique challenges and potential harms posed by modern social media platforms:

> No one thinks Facebook's News Feed much resembles an insert put in a billing envelope. And similarly, today's social media pose dangers not seen earlier: No one ever feared the effects of newspaper opinion pages on adolescents' mental health. But analogies to old media, even if imperfect, can be useful. And better still as guides to decision are settled principles about freedom of expression, including the ones just

> described. Those principles have served the Nation well over many years, even as one communications method has given way to another.

The Court concluded that "old laws" and precedents still have relevance and applicability to the current issues at hand, and suggested that the lower courts reexamine the state laws with a more comprehensive analysis.

The Court further emphasized that the First Amendment protects not only the right to speak but also the right not to speak. Requiring social media companies to host all content without discretion would violate their right to control their expressive choices. The laws under review aimed to counter what conservative lawmakers saw as viewpoint discrimination by platforms. Justice Kagan addressed this by dissecting the term "viewpoint," underscoring the complexities of enforcing such a standard in content moderation:

> And what does that "based on viewpoint" requirement entail? Doubtless some of the platforms' content moderation practices are based on characteristics of speech other than viewpoint (e.g., on subject matter). But if Texas's law is enforced, the platforms could not—as they in fact do now—disfavor posts because they: support Nazi ideology; advocate for terrorism; espouse racism, Islamophobia, or anti-Semitism; glorify rape or other gender-based violence; encourage teenage suicide and self-injury; discourage the use of vaccines; advise phony treatments for diseases; advance false claims of election fraud . . . . Texas's law profoundly alters the platforms' choices about the views they will, and will not, convey.

The majority said that a desire to improve the balance of the "marketplace of ideas" is insufficient to meet First Amendment scrutiny, as the Fifth Circuit suggested. The Court reiterated that private entities cannot be compelled to host speech they do not wish to present, citing *Miami Herald Publishing Co. v. Tornillo* (1974), which protected newspapers' editorial discretion. The majority also referenced other precedents involving content moderation, including cases on private companies' newsletters, cable companies' "must-carry" rules, and parade participation, reinforcing the idea that private companies should retain control over their content decisions and be able to make editorial decisions about what type of speech is expressed.[2]

The decision to remand the cases back to the Fifth and Eleventh Circuit Courts of Appeal was unanimous, but several justices wrote concurring opinions. A few of the justices took issue with the way the majority opinion was written, particularly the commentary on the Fifth Circuit ruling and potential foreshadowing of the Court's stance in terms of the Texas law. Justice Jackson wrote in her concurrence, "Faced with difficult constitutional issues arising in new contexts on undeveloped records, this Court should strive to avoid deciding more than is necessary." Justices Thomas and Alito shared similar views in their own concurring opinions.

In her concurrence, Justice Amy Coney Barrett zeroed in on the importance of an "as-applied challenge," which, she argued, "would enable courts to home in on whether and how specific functions—such as feeds or direct messaging—are inherently expressive and answer platform- and function-specific questions that might bear on the First Amendment analysis." She cautioned against applying principles in "one fell swoop to the entire

[2]*Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.,* 475 U. S. 1 (1986), *Turner Broadcasting System, Inc. v. FCC,* 512 U. S. 622 (1994), *Turner Broadcasting System, Inc. v. FCC,* 520 U. S. 180-190 (1997), *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U. S. 557 (1995).

social-media universe," because platforms, ownership, forms, functions, and types of speech vary so dramatically and can change so much over time. She cited examples of platforms that use AI or algorithms for content moderation, compared platforms with distinct purposes such as Uber and Etsy, and discussed platforms with foreign ownership to argue that contextual analysis on an "as-applied" basis was, in her view, the appropriate path forward.

Justice Thomas encouraged courts to apply the common carrier doctrine to social media platforms, as he did in another 2024 social media case before the Supreme Court, *Lindke v. Freed*. The same argument was made in defense of the Texas law by the Texas solicitor general. The common carrier doctrine is a legal framework that poses certain obligations on entities that transmit communication to the public, such as not discriminating against customers and having a duty of care for their goods and services. Justice Thomas asserted that social media companies should be akin to common carriers and thus held to similar standards. He encouraged the Fifth and Eleventh Circuits to apply the doctrine in their analysis in their future review, previewing what he will be looking for when the cases inevitably return to the Supreme Court.

Justice Alito also penned a concurrence, in which Justices Thomas and Gorsuch joined. It was the lengthiest concurrence, at 33 pages. In it, he reaffirmed the narrowness of the Court's opinion and essentially chastised Justice Kagan for including what he considered to be "nonbinding dicta" in her opinion. He suggested that the Court exercise restraint in addressing these complex issues and avoid making broad pronouncements about the constitutionality of content moderation practices.

Despite criticizing the majority for doing the same, Justice Alito then went on to conduct his own First Amendment analysis, of sorts. He started by reiterating that social media is the "modern public square," citing *Packingham v. North Carolina*, (2017). Like Justice Thomas, he thinks social media platforms should be considered in light of common carrier doctrine. He then took issue with the majority's comparison of social media platforms to traditional media outlets. "Newspaper editors are real human beings, and when the Court decided *Tornillo* (the case that the majority finds most instructive), editors assigned articles to particular reporters, and copyeditors went over typescript with a blue pencil." He went on, "the platforms, by contrast, play no role in selecting the billions of texts and videos that users try to convey to each other." He asserted that the platforms themselves might not know how the editorial choices are made: "Algorithms remove a small fraction of nonconforming posts post hoc and prioritize content based on factors that the platforms have not revealed and may not even know." Context matters, he argued: "While the meaning of the Constitution remains constant, the application of enduring principles to new technology requires an understanding of that technology and its effects."

The majority remanded these cases to the lower courts, but the decision in *Moody v. NetChoice, LLC /NetChoice, LLC v. Paxton* is likely to be regarded as a landmark decision. The Court appears to frame social media companies more as publishers than mere distributors of content. This perspective is evident in the majority opinion, which emphasized the editorial control and judgment exercised by social media platforms, aligning them with traditional publishers who curate and manage the content they present to the public. Justice Kagan wrote:

> Deciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive

> activity of its own. And that activity results in a distinctive expressive product. When the government interferes with such editorial choices—say, by ordering the excluded to be included— it alters the content of the compilation. (It creates a different opinion page or parade, bearing a different message.) And in so doing—in overriding a private party's expressive choices—the government confronts the First Amendment.

This framing clearly aligns social media platforms with traditional media companies that make editorial choices, and could have two significant outcomes.

First, if social media platforms were to be treated as publishers, they would receive First Amendment protection similar to that of the press when moderating content. For the government to regulate speech for these entities, it must pass a strict scrutiny test: it must demonstrate that it has a compelling interest, that the regulation is narrowly tailored to serve that interest, and that the regulation offers the least restrictive means for achieving that interest.

Still, classifying social media platforms as publishers rather than distributors could strip them of the liability protections provided by Section 230. Until now, these companies have largely avoided accountability for content on their platforms, frustrating both Congress and the public. Numerous laws have been proposed to limit Section 230, but only the FOSTA-SESTA Act of 2017 has passed. This act amended Section 230, allowing victims of sex trafficking to sue tech companies that violate sex trafficking laws. There is the potential for future legislation to be passed that further strips away protections for social media companies—the Court having set the precedent that the platforms perhaps should not be considered distributors and thus are not deserving of Section 230 protections.

In May 2024, bipartisan lawmakers introduced a draft bill to fully repeal Section 230. The bill proposes an 18-month window for Congress and stakeholders to collaborate on a new legal framework balancing free speech, innovation, and platform accountability. If passed, Section 230 would be nullified after December 31, 2025. The decision in *Moody v. NetChoice, LLC /NetChoice, LLC v. Paxton* could provide some justification or legal framework for why Section 230 is no longer necessary or appropriate.

The second reason *Moody v. NetChoices, LLC/NetChoice, LLC v. Paxton* is likely to be a landmark decision is that it reaffirmed the commitment to safeguarding expression on the internet, a medium that is still relatively new technology, yet has become ubiquitous in our daily lives. Overall, the decision protects the speech of private entities within this medium. The decision asserted that "social-media platforms, as well as other websites, have gone from unheard-of to inescapable," and the courts "have a necessary role in protecting those entities' rights of speech, as courts have historically protected traditional media's rights."

Further, the Court affirmed the foundational principle that one cannot be compelled to speak. Justice Kagan wrote, "The government may not, in supposed pursuit of better expressive balance, alter a private speaker's own editorial choices about the mix of speech it wants to convey."

The persistent legislative efforts, the ever-present public debates, and the prominence of the *Moody v. NetChoice, LLC/NetChoice, LLC v. Paxton* ruling highlight the growing tension surrounding Section 230's relevance and the complex balance between free speech and platform accountability. The ongoing discussions and legal challenges underscore the need to reevaluate how we navigate the digital landscape, ensuring both the protection of free expression and the responsible management of online content.

Chapter 9: Prior Restraint

U.S. Supreme Court

Case: *National Rifle Association of America v. Vullo,* 602 U.S. ___ (2024)
Subject: Government officials cannot use the government's regulatory power to coerce private parties to punish or suppress views that the government disfavors.
Summary of Decision: The National Rifle Association (NRA) has typically provided insurance programs to its members to cover costs related to personal injury and legal defense associated with the use of firearms. In 2017, following a referral and tip from a gun control advocacy group to the New York County District Attorney's office, the New York State Department of Financial Services (DFS) launched an investigation into two of those insurance agencies under the direction of the then-superintendent of the DFS, Maria T. Vullo, for suspected legal violations.

During the investigation, tragedy struck when on February 14, 2018, a gunman killed 17 students and staff at Marjory Stoneman Douglas High School in Parkland, Florida. This incident sparked a student-led gun-control movement that prompted the Florida legislature to pass several gun-control laws. The activism also intensified nationwide criticism of organizations such as the NRA. New York Governor Andrew Cuomo even referred to the NRA as a "terrorist organization" on Twitter. Amidst this charged atmosphere, in a meeting with executives of one insurance firm, Vullo advised them to reassess their relationships with the NRA and similar groups. She noted various "technical regulatory infractions plaguing the affinity-insurance marketplace," but informed the insurance companies that "DFS was less concerned with pursuing these infractions as long as [they] ceased providing insurance to gun groups, particularly the NRA." On April 19, 2018, Vullo sent two letters under the DFS name, titled "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations," to insurance organizations and financial services institutions. These letters emphasized the "social backlash" against the NRA and mentioned companies that had fulfilled their "corporate social responsibility" by "severing ties with the NRA."

The NRA responded by suing Vullo, alleging that her actions constituted coercion that infringed on its free speech rights. The U.S. District Court for the Northern District of New York dismissed most of the NRA's claims, except for two: that Vullo's conduct had a chilling effect on otherwise constitutionally protected speech, and that she had unlawfully retaliated against the NRA for exercising its First Amendment rights. Believing she had acted within her role as director of DFS and had not violated the NRA's constitutional rights, Vullo filed a motion to dismiss the case on the grounds of "qualified immunity," which shields government officials from civil liability for their actions unless those actions clearly violate a constitutional right. To overcome this immunity, a person must prove the official's actions were unconstitutional and that any reasonable official in their position would have known they were wrong.

The U.S. District Court for the Northern District of New York denied that motion, but the Second Circuit Court of Appeals reversed that decision, ruling that the NRA had not plausibly demonstrated that Vullo's actions were coercive, and that even if her actions did violate the NRA's First Amendment rights, she was entitled to qualified immunity.

The U.S. Supreme Court granted certiorari to hear only the First Amendment claims of the case. Justice Sonia Sotomayor wrote the opinion for a unanimous Court, which reversed the decision of the Second Circuit Court of Appeals. The Court rejected Vullo's claims that she

was merely engaged in government speech and found that the NRA plausibly alleged that the DFS violated the First Amendment through coercion. "At the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society," she wrote. She continued:

> A government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of persuading others to follow her lead. In doing so, she can rely on the merits and force of her ideas, the strength of her convictions, and her ability to inspire others. What she cannot do, however, is use the power of the State to punish or suppress disfavored expression.

The Court drew upon the precedent established in *Bantam Books v. Sullivan* (1963) (discussed on page 228 of the textbook), which concerned a Rhode Island law that would pursue publishers for circulating materials deemed "obscene" or harmful to young people. In *Bantam*, the Court "explored the distinction between permissible attempts to persuade and impermissible attempts to coerce." Simply put, "*Bantam Books* stands for the principle that a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." Justice Sotomayor cites *Bantam* (and other cases) as the foundation for using a multifactor test—or as she refers to it, a "totality-of-the-circumstances analysis"—to determine whether there has been wrongdoing.

The Court determined that the appropriate test, based on previous precedent and contemporary legal analysis, is as follows: To claim that one's First Amendment rights have been violated through coercion, a plaintiff must "plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress" the speech. The requirement that the conduct be viewed "in context" means considering the speech within its surrounding circumstances, background, or cultural significance. The standard that it must be "reasonably" understood to "convey a threat" relates to the "reasonableness" standard discussed in Chapter 3 concerning "true threats." In other words, courts should consider factors such as the identity of the government official, the power dynamics at play, and the potential consequences of disregarding the threat if the party continued to engage in the speech.

In short, the Supreme Court found that the NRA had sufficiently established that Vullo crossed the line from persuading companies to coercing them into cutting ties with the NRA. The Court sent the case back to the Second Circuit Court of Appeals for reconsideration, but left open the possibility that Vullo could still claim "qualified immunity."

The decision was 9-0, with Justices Gorsuch and Jackson filing concurrences. Justice Gorsuch's concurrence emphasized the importance of protecting free speech from government overreach. Justice Jackson's was more in depth and highlighted the crucial distinction between government coercion and a violation of the First Amendment. She underscored the need for a nuanced analysis in cases involving government coercion of private speech, such as the NRA's. She argued that courts should examine both the coercive nature of the government's actions and the specific harms inflicted on the speaker's First Amendment rights when making their determinations.

Ultimately, *NRA v. Vullo* is an important case in upholding the constitutional right to freedom of expression, even for controversial organizations such as the NRA. It also reaffirmed that government officials cannot use their regulatory power to suppress speech or discriminate against organizations based on their viewpoints.

U.S. Supreme Court

Case: *Murthy v. Missouri*, 603 U.S. ___ (2024)
Subject: The Supreme Court temporarily lifted a restriction imposed by a lower court on government officials communicating with social media companies while the case proceeds, which raised issues of free speech, government influence, and online content regulation.
Summary of Decision: This case began with the concerns about misinformation surrounding the COVID-19 pandemic and political elections in the United States. Federal officials, including Surgeon General Vivek Murthy, members of the Department of Health and Human Services (HHS), and the Centers for Disease Control and Prevention (CDC), began working with social media companies to address the spread of health-related misinformation. They urged the platforms to remove or flag posts that they deemed harmful or inaccurate, arguing that such actions were necessary to protect public health and safety. The CDC would alert the platforms about trends and send them example posts. In addition, the FBI and the Cybersecurity and Infrastructure Security Agency communicated with the social media companies about election-related misinformation during the 2020 and 2022 elections.

Several individuals and two states, Missouri and Louisiana, however, argued that the government pressured the social media companies to censor their speech by removing their posts. In 2023, after an extensive discovery process, the Western District of Louisiana agreed in *Missouri v. Biden* that removing posts because of government-provided information could be seen as government-induced censorship. The federal government, represented by Murthy, appealed the decision, arguing that their communication was necessary to combat harmful misinformation. They claimed that they were not directly censoring speech but merely advising private companies. The Fifth Circuit Court of Appeals agreed with the lower court, claiming that "coerc[ing]" or "significantly encourag[ing]" the platforms' moderation decisions (a practice often called "jawboning") became synonymous with government action. The court issued an injunction against federal officials, preventing them from communicating with the social media companies.

In a 6-3 decision, the Supreme Court temporarily lifted the injunction while the case proceeded. Justice Amy Coney Barrett wrote the majority opinion, joined by Justices Roberts, Sotomayor, Kagan, Kavanaugh, and Jackson. The first issue the majority addressed was whether there was standing for the case to proceed in the first place. In order for a "case or controversy" to have standing under Article III of the Constitution, the Court requires that a party prove that it has suffered a concrete and particularized injury that is actual or imminent, show some sort of fairly traceable causal connection between the injury and the conduct complained of, and show that the injury is likely to be fixed by a favorable court decision (referred to as redressability). The majority said there was a lack of any "concrete link" between the censorship cited by the complainants and the government officials' actions. Even if there were such a link, the majority added, blocking communication between the two would be unlikely to solve that particular issue. Justice Barrett wrote that the plaintiffs' claims about government influence over the content moderation, particularly the causal claims, were overly broad:

> As already discussed, the platforms moderated similar content long before any of the Government defendants engaged in the challenged conduct . . . . And the platforms continued to exercise their independent judgment even after communications with the defendants began . . . . Moreover, the platforms did not speak only with the defendants about content moderation; they also regularly consulted with outside experts.

The majority found that the platforms might have been influenced by the information that the government provided, but they made their own content-moderation choices and had their own incentives for doing so.

Justice Alito disagreed in a fiery dissent, in which Justices Thomas and Gorsuch joined, calling this case perhaps "one of the most important free speech cases to reach this Court in years." He added:

> Freedom of speech serves many valuable purposes, but its most important role is protection of speech that is essential to democratic self-government, and speech that advances humanity's store of knowledge, thought, and expression in fields such as science, medicine, history, the social sciences, philosophy, and the arts. The speech at issue falls squarely into those categories . . . . Our country's response to the COVID–19 pandemic was and remains a matter of enormous medical, social, political, geopolitical, and economic importance, and our dedication to a free marketplace of ideas demands that dissenting views on such matters be allowed . . . . I assume that a fair portion of what social media users had to say about COVID–19 and the pandemic was of little lasting value. Some was undoubtedly untrue or misleading, and some may have been downright dangerous. But we now know that valuable speech was also suppressed. That is what inevitably happens when entry to the marketplace of ideas is restricted.

Justice Alito encouraged this case to be considered in light of this term's *NRA v. Vullo* decision, citing its conclusion that "government officials may not coerce private entities to suppress speech." Although he admitted that "what the officials did in this case was more subtle than the ham-handed censorship found to be unconstitutional in *Vullo,*" he said, "it was no less coercive." He continued:

> And because of the perpetrators' high positions, it was even more dangerous. It was blatantly unconstitutional, and the country may come to regret the Court's failure to say so. Officials who read today's decision together with *Vullo* will get the message. If a coercive campaign is carried out with enough sophistication, it may get by. That is not a message this Court should send.

The Court avoided addressing the critical issue of when government interactions with social media platforms violate the First Amendment. This omission leaves ambiguity and makes it more difficult for future challenges against government "jawboning," as censored users must now demonstrate clear links and a strong likelihood of future harm. However, the Court did acknowledge that courts have the authority to intervene if there is sufficient evidence of government pressure on social media companies.

Fourth Circuit Court of Appeals

Cases: *People for the Ethical Treatment of Animals, Inc. v. North Carolina Farm Bureau Federation* 60 F.4th 815 (4th Cir. 2023)
Subject: A North Carolina law that allows employers to sue employees who make undercover video or audio recordings is unconstitutional.
Summary: People for the Ethical Treatment of Animals (PETA) frequently engages undercover investigations to expose the unethical or abusive treatment of animals in private

facilities. By secretly recording such practices, PETA aims to raise public awareness and advocate for animal rights through protest and information dissemination. Posing undercover to expose wrongdoing is a common tactic for activists and journalists alike.

In North Carolina, the grocery store food chain Food Lion sued ABC News in the late 1990s after its reporters posed as employees and filmed what they alleged to be unsafe food handling practices. In *Food Lion v. Capital Cities/ABC, Inc.,* the Fourth Circuit Court of Appeals found that individuals who lie to private companies to gain access to private facilities can be held liable for illegal activities and are not protected by the First Amendment.

To codify the Court of Appeals decision, North Carolina passed the Property Protection Act of 2015 by overriding the governor's veto. The new law allowed employers to sue any employee who, "without authorization records images or sound occurring within" the nonpublic areas of the employer's private property "and uses the recording to breach the person's duty of loyalty to the employer." Critics of the law, including then–North Carolina Governor Pat McCrory, in his veto statement, argued that it would have a potential "ag-gag" effect, referring to the idea that it could muzzle animal rights activists and groups and create an environment that discourages employees "from reporting illegal activities."

Laws that criminalized entering industrialized farms without permission and recording the operations became a trend in the 1990s, first passing in Kansas, Montana, and North Dakota. An undercover investigation by the Humane Society of the United States then exposed dairy cow abuse and public health violations at the Hallmark-Westland Meatpacking Company in California in 2008. After a massive beef recall and the downfall of the company, 25 states attempted to pass what became known as "ag-gag" bills, which specifically prohibited undercover recording of images or sounds at farming operations and subsequent public distribution.

Only a few of these laws passed. Most are currently held up in court. In 2021, in *Animal Legal Defense Fund v. Kelly,* the Tenth Circuit Court of Appeals in Kansas found the 1990 Kansas law to be in violation of the First Amendment because it "punishe[d] entry [to an animal facility] with the intent to tell the truth on a matter of public concern," and that the law was akin to viewpoint discrimination because it was based on the "intent or motive" of the speaker. Also in 2021, the Ninth Circuit found unconstitutional the provision of an Idaho law that prohibited journalists from recording inside animal facilities, because food safety is a matter of public concern. Similar issues were before the Court in regard to the North Carolina property protection law.

People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Federation, which was appealed to the Supreme Court in 2024, originated when PETA employees conducted undercover investigations by secretly recording footage of alleged animal abuse at farms. When the farms and their owners sued PETA under the Property Protection Act, a federal court in North Carolina struck down a significant portion of the law. The U.S. District Court for the Middle District of North Carolina determined that the ban on recordings specifically targeted speech critical of employers, making it a content-based restriction that failed to meet constitutional scrutiny and was thus unconstitutional.

The Fourth Circuit Court of Appeals partially upheld the lower court's ruling, rejecting PETA's argument that the law was inherently unconstitutional. However, in a split decision, the court prevented North Carolina from applying the law to PETA's undercover investigations. It held that an undercover employee's "recording in non-public areas" of the employer's property "as part of newsgathering constitutes protected speech." The court also

dismissed the state's claim that the law did not violate the First Amendment because it targeted all conduct, not just speech. The court reasoned that even broad laws can restrict speech just as effectively as laws that directly target it. Consequently, the court concluded that the ban on recordings, at least when used by organizations such as PETA for newsgathering purposes, is unconstitutional.

In a separate appeal, *Stein v. People for the Ethical Treatment of Animals, Inc.,* North Carolina Attorney General Josh Stein also appealed to the Supreme Court to review and overturn the Fourth Circuit Court ruling. Stein contended that appellate courts were divided on whether and when unauthorized recordings on private property constitute protected speech (citing the Ninth and Tenth Circuit Court decisions as examples) and that the Fourth Circuit Court's decision was substantively flawed. The Supreme Court denied certiorari in that case on the same day they denied it for *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Federation*. Because the Supreme Court declined to hear both appeals related to the Fourth Circuit Court's decision in *People for the Ethical Treatment of Animals, Inc. v. North Carolina Farm Bureau Federation,* the North Carolina Property Protection Act remains unconstitutional and unenforceable when applied to newsgathering activities. It may, however, be enforceable on a case-by-case basis in other contexts because of decisions in other Circuit Courts. It is likely that the Supreme Court will have to contend with ag-gag laws at some point in the future.

Chapter 12: Institutional Constraints: Schools, the Military, and Prisons

U.S. Supreme Court

Cases: *Lindke v. Freed,* 601 U.S. ____ (2024) and *O'Conner-Ratcliff v. Garnier* 601 U.S ____ (2024)
Subject: Government officials' social media activity constitutes state action when the officials use their accounts to perform official duties and when they present their accounts as channels for official communication.
Summary: James Freed and Kevin Lindke are both residents of Port Huron, Michigan. Freed started using Facebook around 2008 as a private user. As he became a more avid user and approached the platform's 5,000 friend limit, he changed his page to a public page and changed his status to "public figure" on the page. As a result, anyone could see or comment on his posts. In 2014, he was appointed city manager of Port Huron, Michigan. After his appointment, he continued to use his page to post primarily personal information, but also information related to his job. Visitors to his page frequently posted on his page, engaging with both his personal content and sometimes with questions or comments about city-related issues.

Kevin Lindke describes himself as a social media activist, who "goes after" public officials who are "unethical or dishonest."[3] Lindke first commented on Freed's Facebook page with three smiling emoji's that Freed thought were "creepy." After Freed posted a photo of himself picking up takeout food with the mayor, Lindke left a comment implying that they were ignoring the needs of their constituents while enjoying extravagances such as an expensive

[3] John Fritze, "Mich. Dispute Now Free Speech Test: At Issue Is How Officials Communicate with Public," *Lansing State Journal,* Oct. 31, 2023, https://www.proquest.com/newspapers/mich-dispute-now-free-speech-test/docview/2884036114/se-2.

meal. At first, Freed only deleted Lindke's comments, but ultimately blocked him entirely, which meant that Lindke could see what Freed posted but could not comment or engage with him.

Lindke sued Freed for violating his First Amendment rights. Lindke argued that Freed's Facebook page acted as a public forum and, accordingly, he had the right to comment on it. Freed, Lindke claimed, had engaged in viewpoint discrimination by deleting unfavorable comments and blocking him. The Eastern District of Michigan found that because Freed's account was his personal account, because he did not conduct any official city business on the account, and because of the personal nature of his posts, Freed did not violate Lindke's rights. The Sixth Circuit Court of Appeals affirmed, writing, "the caselaw is murky as to when a state official acts personally and when he acts officially," and that in regard to social media, one needs to know whether "the official is 'performing an actual or apparent duty of his office,' or if he could not have behaved as he did 'without the authority of his office'" to sort the personal from the official. According to the U.S. Supreme Court, the Sixth Circuit's analysis in *Lindke v. Freed* differed from analyses performed in similar cases before the Second and Ninth Circuit Courts of Appeals. (Lower courts' disagreements in a decision or in their reasoning is one of the most common reasons that cases are granted certiorari.)

The second case, *O'Conner-Ratcliffe v. Garnier,* involved boards of trustees of a school district in Southern California. Michelle O'Conner-Ratcliff and T. J. Zane started public Facebook pages in 2014 to promote their campaigns for the Poway Unified School District Board of Trustees. After the election, both continued to use their accounts to communicate with constituents about things such as budgets, public safety updates, and openings for board positions. These accounts were separate from their private, personal accounts.

Christopher and Kimberly Garnier, who had children enrolled in the district, had been critics of it for years, often posting critiques on their social media accounts to express concerns about such things as race relations in the district and the alleged financial impropriety of the superintendent of the District.

Sometimes the Garniers would post serially. For example, they posted 42 separate posts of almost identical content on O'Connor-Ratcliff's Facebook page, as well as identical replies within a 10-minute span to each of 226 tweets on her Twitter feed. Initially, O'Conner-Ratcliff and Zane deleted the Garniers' posts, but eventually blocked them all together.

The Southern District of California found that the Garniers' First Amendment rights had been violated, because the trustees' pages should be considered a public forum. Although the judge found that the initial blocking could be considered content neutral because of the repetitive nature of the postings, continued blocking of the Garniers was unreasonable because they did not repeat the behavior. The Ninth Circuit Court of Appeals affirmed that decision, finding a "close nexus" between the trustees' use of the social media accounts and the performance of their official duties. The Ninth Circuit analyzed the case based largely on the "appearance and content" of the Facebook pages.

The Court seemed keen to consider both Lindke's and the Garniers' cases together. Justice Amy Coney Barrett wrote the decision for a 9-0 opinion in *Lindke v. Freed*. The Supreme Court decided to consider the issue and then vacated and remanded both cases back to the lower courts to reconsider in light of this new approach that describes conduct by government officials. Whereas in some cases, action by state officials is "easy to spot," the Court said, sometimes the "line between private conduct and state action is difficult to draw." The Court

determined that the test should be about "substance, not labels." Justice Barrett wrote, "Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights."

Freed, she said, did not give up his rights to free expression after assuming the role of city manager. On the contrary, "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern," Justice Barrett wrote, citing *Garcetti v. Ceballos* (2006); that because "these officials too have the right to speak about public affairs in their personal capacities . . . if Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights—instead, he exercised his own."

Justice Barrett admitted, though, that social media makes for a more complex landscape in which to assess such activity. Because of the sheer number of government employees and types of jobs, and the number of those employees who might have social media accounts, the line between an account being used for government purposes and being used for personal purposes is likely to be more difficult to determine.

Accordingly, Justice Barrett laid out the following "state-action" test for Section 1983 for social media activity: "A public official's social-media activity constitutes state action . . . only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media." In other words, first, the public official must actually have the authority to speak for the government. Second, it must be shown that they have used their speech to further their government authority and not as a private citizen. To demonstrate this test, Justice Barrett writes that "categorizing posts that appear on an ambiguous page like Freed's is a fact-specific undertaking in which the post's content and function are the most important considerations." In sum, "The appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first." Both cases were vacated and remanded back to the lower courts for reconsideration.

In a 2019 case, *Knight First Amendment Institute v. Trump* (2019), the Second Circuit Court of Appeals had found that former President Donald Trump had violated individuals' First Amendment rights when he blocked them from interacting with his personal Twitter account when he was president of the United States because it should be considered a public forum. Both the Second and Ninth Circuit Courts of Appeals focused more on whether the appearance and content of the accounts looked official, as opposed to whether they could be classified as "state action," as in the *Lindke v. Freed* analysis. In *Knight First Amendment Institute v. Trump,* the High Court considered the case moot because Trump's account had been suspended and he was no longer president.

Justice Clarence Thomas wrote a concurrence when the Supreme Court dismissed the lawsuit against Donald Trump in 2019. Regarding whether public officials' social media accounts should be considered public forums, in particular regarding the difficulty of applying "old doctrines to new digital platforms," Justice Thomas pointed out that the Court considers a designated public forum to be one that has been "opened for expressive activity by part or all of the public." He wrote that "on the surface, some aspects of Mr. Trump's Twitter account resembled a public forum," but Trump's use of it was "in tension with, among other things, our frequent description of public forums as 'government-controlled spaces.'" Justice Thomas predicted:

> Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.[4]

Chapter 13: Copyright

U.S. Supreme Court

Case: *Vidal v. Elster,* 602 U.S. ___ (2024)
Subject: The prohibition on registering a trademark containing the name of a living person does not violate the First Amendment, even if the proposed trademark is meant as a political statement.
Summary: During the 2016 Republican primary campaign, an ongoing exchange occurred between Florida Senator Marco Rubio and then-candidate and businessman Donald Trump. Trump commonly assigned nicknames to his opponents—for example, "Lyin' Ted" as a reference to Senator Ted Cruz and "Low Energy Jeb" to refer to Governor Jeb Bush. To counter Trump's repeated mocking references to him as "Little Marco," Senator Rubio quipped during a campaign event on February 28, 2016, "And you know what they say about men with small hands?" He paused with a knowing grin before finishing, "You can't trust them," seemingly implying a link between hand size and other attributes, and hinting at the size of male genitalia. In response, holding up his hands toward the start of the March 3, 2016, Republican primary presidential debate hosted by Fox News in Detroit, Michigan, Trump responded, "Look at those hands. Are they small hands? And he referred to my hands—if they're small, something else must be small. I guarantee you there's no problem. I guarantee you."

California-based employment attorney Steve Elster sought to trademark the phrase "Trump Too Small" for use on T-shirts and other merchandise. The U.S. Patent and Trademark Office (USPTO) rejected his application on two grounds. First, they rejected it under Section 2 (c) of the Lanham Act, which prohibits federal registration of any trademark that "[c]onsists of or comprises a name . . . identifying a particular living individual except by his written consent," also known as the names clause. Second, they rejected it under Section 2 (a), which bars the registration of trademarks that "falsely suggest a connection with persons, living or dead . . . or bring them into contempt, or disrepute." In this case, naming Trump in the trademark might cause people to think that Trump himself was selling the Tshirts. Elster appealed the decision, claiming that because his statement was "political speech," the rejection was a violation of his First Amendment Rights.

The Trademark Trial and Appeal Board (TTAB) upheld the USPTO's refusal to register the mark. The Court of Appeals for the Federal Circuit reversed, however, holding that the Lanham Act's prohibition on registering trademarks containing the name of a living person without their consent violates the First Amendment. The court reasoned that the provision was a content-based restriction on speech and that the government did not demonstrate a sufficiently compelling state interest in justifying the restriction. The appeals court determined that the government failed to establish that the prohibition on using a living person's name

[4]*Biden v. Knight First Amendment Institute at Columbia University*, 593 U. S. ____ (2021).

without their consent in a trademark served a substantial government interest, such as preventing consumer confusion—one of the primary purposes of trademark protection. Additionally, the court found that the prohibition was not narrowly tailored and could potentially suppress constitutionally protected speech.

Upon appeal, the Supreme Court unanimously reversed the appeals court decision, leading to the rejection of the trademark application and upholding the "names" clause of the Lanham Act. Recognizing that the Court was considering "the constitutionality of a content-based—but viewpoint-neutral—trademark registration" for the first time, Justice Thomas was careful to remind the public that precedent distinguishes between content-based and content-neutral restrictions and that there is a system for doing so. That system involves strict scrutiny analysis similar to that laid out in *U.S. v. O'Brien* (1971) (discussed in Chapter 11 on page 287). In other words, in order to justify an otherwise unconstitutional content-based restriction, the government must prove that it is serving a narrowly tailored and compelling government interest.

Justice Thomas then laid out what he believed to be a clear case, asserting that "there are many reasons why a person may be unable to secure another's consent to register a trademark bearing his name." He continued: "Even when the trademark's message is neutral or complimentary, a person may withhold consent to avoid any association with the goods, or to prevent his name from being exploited for another's gain." He pointed to the rich tradition and history of trademark law, remarking that "trademark rights have always coexisted with the First Amendment . . . despite the fact that trademark protection necessarily requires the fact that trademark protection necessarily requires content-based restrictions." Justice Kavanaugh and Chief Justice Roberts, who joined with the majority in part and concurred in part, were similarly committed and even less reliant on historical tradition, writing that "a viewpoint-neutral, content-based trademark restriction might well be constitutional even absent such historical pedigree."

Justice Thomas distinguished the case from two other recent Supreme Court trademark cases, *Matal v. Tam* (2017) and *Iancu v. Brunetti* (2019). In both of those cases, the justices found parts of the Lanham Act unconstitutional due to unconstitutional viewpoint-based restrictions. In *Vidal v. Elster,* however, the Court found that "the names clause does not facially discriminate against any viewpoint." The decision is described as narrow, however, leaving room for future constitutional challenges to other types of content-based trademark restrictions.

Although the decision was 9 to 0, the justices were not necessarily in agreement in their reasoning, particularly on the sole reliance on historical precedent to justify the constitutionality of upholding this precarious content-based restriction. Justice Barrett joined the majority in part and also filed a concurring opinion, which Justices Kagan, Sotomayor, and Jackson joined in various parts. Justice Barrett took slight issue with the majority's historical analysis, arguing not only that parts of the analysis were wrong, but also that history and tradition alone might not always provide the clearest guidance for future cases. She advocated for a clear, reasonable standard by which to evaluate content-based trademark restrictions based in the purpose of trademark law itself. For Justice Barrett, "Content-based criteria for trademark registration do not abridge the right to free speech so long as they reasonably relate to the preservation of the mark owner's goodwill and the prevention of consumer confusion."

Justice Sotomayor also filed a concurring opinion, in which Justices Kagan and Jackson joined. She similarly argued against depending solely on history and tradition for

the justification of upholding the restriction, stating instead that the Court should "rely on this Court's tried-and-tested First Amendment precedent." She continued, citing *Iancu v. Brunetti* (2019), "This Court has held in a variety of contexts that withholding benefits for content-based, viewpoint-neutral reasons does not violate the Free Speech Clause when the applied criteria are reasonable and the scheme is necessarily content based . . . . "Content discrimination is an inescapable feature of the trademark system . . . .the denial of trademark registration is therefore "consistent with the First Amendment if it turns on 'reasonable, viewpoint-neutral content regulations.'"

Justice Sotomayor then proposed a two-step framework for evaluating the constitutionality of content-based trademark regulations. The first step is to determine whether or not the restriction is viewpoint-based. If it is, Justice Sotomayor wrote, it is "presumptively unconstitutional," and therefore "heightened scrutiny" should apply. If it is viewpoint neutral, though, the registration restriction should be assessed according to a reasonableness standard, that is, whether the restriction is "reasonable" in terms of its purpose of "identifying and distinguishing goods for the public."

Looking to the Future

It is likely that a few of the cases heard this term will return to the Supreme Court after being reheard in the lower courts. In addition, a writ has been filed before the court involving "citizen journalism," but the Court has yet to say whether it will hear it.

The justices will hear *Free Speech Coalition v. Paxton* in the 2024–2025 term. This case challenges Texas House Bill 1181, which mandates that websites that have at least one-third of their content classified as "harmful to minors" must implement age verification measures for all users before granting access. Since 2023, 19 states have attempted to pass age-verification laws to access online pornography. Almost all such laws have been blocked in federal courts because of the precedents set in *Reno v. ACLU* and *Ashcroft v. ACLU* (discussed in Chapter 6). Critics argue that these laws prevent access to constitutionally protected speech.

Several free speech organizations, including FIRE and the ACLU, have spoken out against the Texas law and filed a joint amicus brief with the Supreme Court. The ACLU claims: "The age verification requirement restricts adults' access, effectively requiring them to identify themselves to pass through the age-gate. It also robs people of anonymity, and threatens to bar individuals—for example, those who lack government identification or whose age is mis-identified by the relevant technology—from accessing the websites altogether."

Although the Texas law was initially blocked in district court, the Fifth Circuit Court of Appeals upheld it. Instead of applying strict scrutiny, which would follow precedent and align with how other federal courts have addressed similar state laws, the Fifth Circuit applied a "rational basis" review. The Supreme Court is set to determine the appropriate standard of review in the upcoming term, in another potentially impactful First Amendment case.

Another case began in 2015, when citizen journalist Priscilla Villarreal filmed a hostage situation near her home, including the aftermath with the victims. She shared the footage on Facebook, where it went viral. Villarreal, while working in the cleanup of crash scenes, found her true passion in documenting the city's underbelly through unedited videos. With the rise of Facebook Live, her popularity surged. She now commands a massive following for her live streams of crime scenes and her candid monologues on various topics, from food to corruption. Villarreal's reporting on sensitive information, such as the names of a deceased Border Patrol agent and of a family involved in a car crash, drew attention in Laredo, leading to police

harassment and Villarreal's eventual arrest for violating a rarely enforced state law involving seeking or acquiring information from a public official that "has not been disclosed to the public" with the intent to gain an advantage, despite her having verified the information with police officers.

In 2019, Villarreal filed a lawsuit against the Laredo Police Department; the city of Laredo; Webb County; the local district attorney; and others, alleging that they violated her First Amendment rights by arresting her for doing journalism. The U.S. District Court for the Southern District of Texas dismissed the case, ruling that the officials were protected by qualified immunity because they were performing official duties.

The Fifth Circuit Court of Appeals overturned the lower court's decision. Judge James C. Ho emphasized that a citizen journalist has the right to ask questions of public officials without fear of imprisonment, highlighting that Villarreal's arrest was a clear violation of the Constitution. In January 2023, the Fifth Circuit heard the case again en banc with a 16-judge panel. A divided court found in a 9-7 decision that the officials should be granted qualified immunity and against Villarreal.

The Foundation for Individual Rights and Expression (FIRE) filed a petition for writ of certiorari to the Supreme Court in April of 2024 on behalf of Villarreal. According to FIRE, over 40 individuals, civil liberties groups, and media outlets have filed friend of the court briefs on Villarreal's behalf.