CARLTON FIELDS

Top First Amendment Cases of the 2023-2024 Supreme Court Term

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The U.S. Supreme Court stepped back from the brink in a term that could have reshaped First Amendment law for the internet age. The outcome might have been far different. The court had accepted some of the most significant free speech cases in years. Decisions in two cases about new state laws in Florida and Texas could have transformed how governments can regulate social media companies — the most influential media of our time. Decisions in two other cases could have set a new standard for how the government can influence speech indirectly through pressure, rather than legislation. But rather than announce broad new principles overturning well-settled First Amendment law, as the court has done in other areas, the court issued a series of unanimous or near-unanimous rulings that applied existing doctrine modestly to politically controversial cases. In other cases, the court ducked the tough issues and left them for another day. The court returned the potentially momentous *NetChoice* cases to the lower courts for a do-over to apply well-settled First Amendment doctrine. The court held that the lower courts had not considered all applications of the new social media laws — not surprising, since neither Florida nor Texas raised any of these theoretical applications at all in the lower courts. Likewise, *Murthy* presented a politically charged case about the White House's efforts to tamp down misinformation on the internet about COVID-19 and election fraud. But rather than wade into this political thicket, the court sidestepped the controversial issues by holding that the plaintiffs lacked standing to bring their claims. In *National Rifle Association of America*, the court unanimously applied an existing precedent to allegations of government coercion against the NRA. In *Gonzalez*, the court had an opportunity to enlarge peoples' ability to bring First Amendment retaliation claims for wrongful arrests. But the court sidestepped the hard issue there too, sending the case back to the lower court to apply the court's existing precedent. Why did the court blink? The decisions may reflect the court's judgment not to change existing law. For decades, the court has demonstrated a deep commitment to broad First Amendment values. It has upheld free speech even in the most difficult cases, including, for example, one case about protests at the funerals of soldiers killed in combat. Justice Kagan's opinion in *NetChoice* holds true to those core principles, even as applied to the technology. Alternatively, the

court may simply be moving more slowly or with uncertainty about its direction. A divided court may simply not yet know whether, or how, it should restructure foundational First Amendment principles that have endured over generations. This term's cases also did not provide good vehicles to change the law. The three biggest cases came to the court on an expedited schedule after preliminary injunction hearings. The lower courts had even decided the cases on the merits. Historically, the law shifts slowly, and the court wants different cases to percolate in the lower courts for years before it steps in. Time will tell.

1. *Moody v. NetChoice LLC* and *NetChoice LLC v. Paxton*

In a unanimous judgment for the court, Justice Kagan wrote an opinion, joined in full by five justices, returning two sweeping social media laws passed by Florida and Texas back to the lower courts. But in doing so, the court's majority opinion explained that courts should view the new laws through old First Amendment lenses. Justice Kagan wrote that the First Amendment protects editorial discretion whether performed by newspaper editors, parade organizers, or social media platforms arranging content on feeds. "[W]hile much about social media is new," Justice Kagan wrote, "the essence of that project is something this Court has seen before." The blockbuster First Amendment cases came from Florida and Texas, which each enacted similar laws in 2021 regulating how large social media companies like Facebook control content posted on their sites. Among other things, both laws prohibited social media platforms from engaging in "viewpoint discrimination" and required them to provide billions of individualized explanations about the platforms' editorial decisions. The Florida law prohibited the deplatforming of political candidates and "journalistic enterprises." NetChoice, a trade association representing the social media industry, challenged both laws as violating its First Amendment right to exercise editorial judgment to moderate and curate social media posts. It brought a facial challenge to all applications of both statutes and sought a preliminary injunction to stop the law from going into effect. NetChoice won in the Eleventh Circuit but lost in the Fifth Circuit, which upheld the Texas law under the First Amendment. Earlier this term, the Supreme Court stopped the Fifth Circuit's decision from going into effect. In an opinion highly critical of the Fifth Circuit, Justice Kagan wrote that the court erred in fundamental ways. Indeed, as applied to social media feeds and content moderation, the Texas law "is unlikely to withstand First Amendment scrutiny," the court wrote. Justice Barrett concurred but explained that an as-applied challenge, as opposed to a facial challenge, would allow courts to better assess the wide-ranging statutes with many applications. Justice Jackson also stressed that the holding was narrow and wrote that "further factual development may be necessary" before deciding either case. Justices Alito and Thomas both concurred to agree only that the cases should be remanded to the lower court. Justice Alito described most of Justice Kagan's opinion as "nonbinding dicta" that carried no precedential weight. Justice Thomas' concurrence launched an assault on facial challenges overall, arguing that federal court lacks jurisdiction to hear facial challenges. No party had made this argument below. So much remains to

be decided in the coming years of litigation.

2. *National Rifle Association of America v. Vullo*

At the end of oral argument, Justice Alito asked counsel Neal Katyal whether he stood by the assertion in his brief that this case did not present a close call. He said he did. Well, the case wasn't close. The court unanimously ruled against Katyal's client, Maria Vullo, the then-superintendent of the New York Department of Financial Services. Vullo had urged insurers and banks to cut ties with the NRA after the mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida. She warned insurers and financial institutions about "reputational risks" from doing business with the NRA. If insurers dropped ties with the NRA, she allegedly said the state would go easy against insurers that had violated state insurance law by helping the NRA offer illegal "murder" insurance.

In a unanimous decision by Justice Sotomayor, the court held that the NRA plausibly stated a claim that Vullo violated the First Amendment by coercing regulated businesses to end their relationship with the NRA based on the group's advocacy of gun rights. It applied existing precedent under *Bantam Books* and reiterated the principle that the government could not suppress speech indirectly if it could not directly suppress the same speech. "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," Justice Sotomayor wrote. "What she cannot do, however, is use the power of the State to punish or suppress disfavored expression." Justice Gorsuch wrote a concurrence reminding lower courts to treat their four-factor coercion test as a guidepost only, and instead evaluate cases holistically. Justice Jackson also concurred, emphasizing that coercion must be connected to the suppression of speech, rather than conduct, to violate the First Amendment. She also suggested the case might have been better analyzed as a retaliation, rather than coercion, claim.

3. *Murthy v. Missouri*

Justice Alito wrote that if the lower court's view of the record was correct, "this is one of the most important free speech cases to reach this Court in years." Indeed, it might have been had Justice Alito written the court's opinion rather than a dissent. In this case, a group of bloggers and two states alleged that the Biden administration in 2021 pressured social media companies to limit their posts, which the government considered disinformation, about COVID-19, vaccines, mask mandates, and alleged fraud in the 2020 election. The district court entered a sweeping injunction prohibiting a swath of government officials from the White House press secretary to the surgeon general from coercing or "strongly encouraging" social media platforms to remove posts. But rather than decide the merits, in a 6–3 decision written by Justice Barrett, the court held the plaintiffs lacked standing to bring their claims. The court's opinion sharply criticized the district court's and Fifth Circuit's evaluation of standing "at a high level of generality" without finding how a discrete act of content moderation by a specific defendant caused a specific injury. For example, Justice Barrett noted that Facebook had been targeting one plaintiff's posts for misinformation about COVID-19 vaccines long before Facebook heard from the government. And because the

federal government had years ago stopped its efforts to curb COVID-19 and election fraud misinformation, the plaintiffs failed to prove that they faced a substantial risk of future harm to obtain an injunction of future government coercion. Justices Alito, Thomas, and Gorsuch would have found the chains in causation close enough to establish standing. After all, the dissent pointed out that the court had found standing for states in an earlier case about adding a citizenship question to the U.S. census. There, states claimed that a question about citizenship would discourage immigrants from answering the census, which would reduce the count for certain states, which would mean lost congressional representation and then lost federal funding.

4. *Lindke v. Freed* and *O'Connor-Ratcliff v. Garnier*

All sorts of government officials — from former President Trump to the city manager of a small Michigan town — use their social media pages to publish different types of messages. Some use their pages to spread government news, discuss issues integral to their public positions, or share family pictures. Many do all three on the same page. In a unanimous decision by Justice Barrett, the court announced a new legal test to determine when government officials use their social media pages in their governmental capacity, subjecting their editing to First Amendment scrutiny, or their personal capacity, giving them the power to delete and edit people's comments by exercising their own First Amendment editorial rights. The court held that a public official who blocks a user or prevents them from commenting on their social media page engages in state action only if (1) the official both possesses actual authority to speak on the government's behalf on the subject and (2) purports to use that authority when speaking about the subject on their social media page. The court's test does not require government officials to separate their personal and professional social media pages. But applying the test to current technology creates an incentive for officials to do just that. That's because most sites only allow someone to block a user from an entire social media page, not just one comment or part of a page. Under the ruling, if *any* comment on the social media page constitutes state action, the First Amendment potentially prevents a government official from blocking a person. The court remanded the two cases to the lower courts to apply the new test to the facts at hand. We will see in these cases — and others — how courts apply the new test to the wide array of public official's social media pages, as well as new technology.

5. *Vidal v. Elster*

The court unanimously held that part of the Lanham Act that prevented someone from using another person's name without their consent in a trademark did not violate the First Amendment. Although the trademark law discriminated based on content by barring the use of another's name without consent, the law did not discriminate based on viewpoint. A person might withhold his or her consent to a trademark for many reasons unrelated to the mark's viewpoint. The case concerned a lawyer's attempt to trademark a brand of T-shirts with the phrase "Trump Too Small" — a clear dig at Trump. The slogan referred to Sen. Marco Rubio's comment during the 2016 presidential primary about Trump's "small hands." The court unanimously upheld the law but splintered on the

reasons. Four justices wrote four opinions, joined by different coalitions of justices in some parts but not others. Justices Thomas, Alito, and Gorsuch wrote that history and tradition alone supported the decision since trademark law had historically coexisted with the First Amendment. Justice Barrett disagreed, writing that history did not provide the answer to the constitutional question. She would have asked whether the provision reasonably related to the trademark's statutory purposes. Justice Kavanaugh took a middle ground, writing that history answered the question in this case but might not in others. Justice Sotomayor wrote that the law did not violate the First Amendment because a trademark conferred a government benefit but did not limit what a person could say. In fact, the plaintiff could sell his "Trump Too Small" T-shirts without the trademark or select a different name for his brand but still put the "Trump Too Small" message on T-shirts.

6. *Gonzalez v. Trevino*

The court has long struggled to fully explain what plaintiffs must show to sue for being arrested in retaliation for exercising their First Amendment rights to free speech. This case allowed the court to clarify the contours of a rule generally requiring a plaintiff to prove the absence of probable cause for his or her arrest, with an important exception at issue in this case. But rather than craft the outlines of the full exception to the "probable cause" rule, the court instead issued an unsigned 8–1 decision sending the case back to the Fifth Circuit for a do-over under existing precedent. In the case, Sylvia Gonzalez, a former city council member in a small Texas town, alleged she was arrested in retaliation for seeking to oust the city manager. Police arrested her for tampering with government records after she picked up a petition calling for the city manager's removal at the end of a contentious council meeting about firing the city manager. Prosecutors dropped charges once they learned of the arrest, which allegedly occurred through an irregular procedure. Gonzalez filed a federal civil rights claim, arguing her arrest was retaliatory. Under the court's 2019 decision in *Nieves v. Bartlett*, Gonzalez had to either show a lack of probable cause for the arrest or that others not engaged in protected speech weren't similarly arrested. In its per curium opinion, the court wrote that the Fifth Circuit had construed the probable cause exception too narrowly. It agreed that requiring Gonzalez to provide examples of people who also mishandled a government petition but were not arrested "goes too far" in limiting the probable cause exception. "Although the *Nieves* exception is slim, the demand for virtually identical and identifiable comparators goes too far."

Justice Alito concurred, fleshing out the facts of the case and arguing the *Nieves* exception was not limited to split-second arrests (an issue the court decided not to decide). Justice Kavanaugh concurred but wrote he would have dismissed the case as improvidently granted. Justice Jackson also concurred, emphasizing that Gonzalez had presented ample objective evidence to fit within the probable cause exception. Justice Thomas dissented, arguing that federal law does not allow any First Amendment retaliation claims for arrests at all — an issue no party had even argued. *David Karp is an appellate lawyer at Carlton Fields and leads the annual First Amendment seminar sponsored by the Florida Bar at its summer convention.*

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