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SELECTED RECENT SUPREME COURT DECISIONS FROM 2024

This year, the Court has taken on several controversial topics. Below is an overview of selected cases relating to social media/free speech, administrative law, and arbitration.

The Supreme Court's Social Media Docket

by Blaine H. Evanson and Minsoo Kim

Lindke v. Freed, 601 U.S. 187 (2024)

In *Lindke v. Freed*, 601 U.S. 187 (2024), the Supreme Court, in a unanimous opinion by Justice Barrett, held that 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 most cases, "state action is easy to spot." But *Lindke* presented a new question unique to the social media age: whether a public official engaged in state action or private conduct when he deleted a user's comments and blocked the user from commenting again on his Facebook page.

When James Freed was appointed city manager of Port Huron, Michigan, he began using his preexisting personal Facebook page to post information related to his job. The mixed-use nature of Freed's Facebook page, which blended personal communications and official business, presented a novel factual complexity. Just looking at Freed's status as a state employee was not enough. As the Court put it, "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."

The Court announced a two-prong test to identify official speech in the social-media context.

First, Freed had to have had *actual* authority to communicate information—the state must have entrusted Freed with the responsibility of posting information about "a matter within Freed's bailiwick" on his Facebook page. If a "statute, ordinance, regulation, custom, or usage" authorized Freed to speak for the state, the Court explained, "he may have the authority to do so on social media even if the law does not make that explicit."

Second, Freed had to have purported to use that state authority. On a mixed-use page, whether certain posts were made in Freed's personal or official capacity would depend on a fact-specific inquiry into the "content and function" of each post. For example, a post that expressly invokes state authority to make an announcement not available elsewhere is different from a post that merely repeats preexisting information. Given the added complication for officials whose duties may include "routine interaction with the public," the Court emphasized that the burden is on a plaintiff "to show that the official is purporting to exercise state authority in specific posts."

The Court concluded with an admonition that the "nature of the technology matters to the state-action analysis." Freed's deletion of Lindke's comments requires an inquiry into only the posts on which Lindke commented. But blocking Lindke from commenting *at all* on the page requires a consideration of "any post on which Lindke wished to comment." By contrast, blocked users on some social media platforms "might be unable even to *see* the blocker's posts." Thus, the Court warned, a public official "exposes himself to greater potential liability" by using a mixed-use account.

***Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024)**

In *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024), the Supreme Court considered First Amendment challenges to Texas and Florida laws designed to regulate the content on social media platforms.

To address what they perceived as viewpoint discrimination against conservative voices, Texas and Florida passed laws regulating the ability of social media platforms to engage in content moderation—*e.g.*, filtering, prioritizing, and labeling user content. NetChoice brought facial challenges against both laws. The Eleventh Circuit affirmed an injunction against the Florida law. The Fifth Circuit reversed an injunction against the Texas law, finding content moderation to be conduct, not speech.

The Supreme Court, in a unanimous opinion written by Justice Kagan, vacated both decisions for failing to address the facial nature of the constitutional challenges. The parties had litigated the cases "as if the laws applied only to the curated feeds offered by the largest and most paradigmatic social-media platforms." But the laws could "apply to, and differently affect, other kinds of websites and apps." And "that could well matter" because the plaintiffs brought facial challenges, which ask "whether a law's unconstitutional applications are substantial compared to its constitutional ones." The courts of appeals had not "performed that necessary inquiry," so the Supreme Court had to vacate their decisions and remand for a fulsome analysis of the facial nature of the challenges.

Six of the justices then "set out the relevant constitutional principles" to guide the lower courts on remand.

Although this controversy arose in a new factual context—third-party speech transmitted online on social media platforms—the Court applied the preexisting doctrinal framework for addressing the propriety of state laws requiring public-facing platforms (like newspapers and parades) to carry and transmit unwanted speech. Under that framework, the Court had "repeatedly held" that "ordering a party to provide a forum for someone else's views implicates the First Amendment," "if, and only if, the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt," or if "that expressive activity includes presenting a curated compilation of speech originally created by others."

Analogizing to *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)—which held that Florida couldn't force a newspaper to publish a political candidate's response to criticism published in that newspaper—and its progeny, the Court held that exercising "editorial discretion" by "compiling and curating others' speech" is "expressive activity" protected by the First Amendment. "And that is as true when the content comes from third parties as when it does not." Thus, government interference with social media platforms' exercise of editorial discretion over users' content on their platforms implicates the First Amendment.

The Court distinguished *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), as inapplicable to the social-media context. *Pruneyard* upheld a California law requiring a shopping mall to allow the distribution of handbills on its property. But unlike social media companies, the mall in *PruneYard* was not "engaged in any expressive activity."

Having laid out the applicable First Amendment framework for social media platforms' content moderation practices, five Justices noted that Texas's law was unlawful as applied to social media platforms' management of their feeds because 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."

***Murthy v. Missouri*, 144 S. Ct. 1972 (2024)**

In *Murthy v. Missouri*, 144 S. Ct. 1972 (2024), the Supreme Court, in a 6-3 opinion by Justice Barrett, ruled that the plaintiffs lacked standing to seek a preliminary injunction against federal government officials.

During the COVID-19 pandemic, social media platforms began deleting posts regarding the pandemic they deemed to be false and misleading. That included posts that questioned mask wearing and the vaccine. The platforms applied this policy to reporting on the 2020 presidential election as well, taking down "a report about Hunter Biden's laptop" and "posts that questioned the integrity of the election results." During this time period, federal officials "regularly spoke with the platforms about COVID-19 and election-related misinformation" and pressured the platforms "to do more" to "suppress certain content."

Two states and five individual social-media users filed suit, with the individual plaintiffs alleging that "various platforms removed or demoted their COVID–19 or election-related content" and the states claiming that the platforms "suppressed the speech of state entities and officials, as well as their citizens' speech." The plaintiffs argued that, although the platforms restricted their content, "the federal government was behind it" by pressuring the platforms to censor their speech, "in violation of the First Amendment." The district court issued a preliminary injunction enjoining various officials and agencies from "urging, encouraging, pressuring, or inducing" content suppression. The Fifth Circuit affirmed in part and reversed in part, holding that (1) the plaintiffs had Article III standing, including that their injuries were traceable to government coercion, and (2) the defendants "likely both coerced *and* significantly encouraged the platforms to moderate content."

The Supreme Court reversed, holding that none of the plaintiffs had standing to seek an injunction against any defendant. The plaintiffs relied on the defendants' past actions as evidence of a likelihood of future censorship. But the plaintiffs failed to establish that their alleged injuries were traceable to the defendants' past actions. The plaintiffs had sought to enjoin only government officials and agencies, not the platforms. But they couldn't establish a

causal link between the defendants' alleged pressure campaign and the platforms' actions, especially considering the platforms' independent incentives and exercise of judgment to moderate content. And given that the defendants ceased the challenged conduct in 2022, it was speculative that the plaintiffs faced a substantial risk of future injury traceable to the defendants. Moreover, the plaintiffs couldn't prove that their injuries would be redressed by an injunction, as the platforms continued to enforce their content-moderation policies despite the cessation of government pressure.

The Court Curbs the Administrative State

by Mary-Christine Sungaila

***Securities and Exchange Commission v. Jarkesy*, 144 S. Ct. 2117 (2024)**

In a 6-to-3 decision authored by Chief Justice Roberts that will move many disputes from administrative agencies to federal courts and juries, the Court determined that the SEC's practice of imposing civil fines for securities fraud in its administrative proceedings violated the Seventh Amendment. As the Court explained, a suit at common law to which the Seventh Amendment attaches includes not only common law forms of action in existence when the Seventh Amendment was ratified, but also any statutory claim if it is legal in nature. In this case, a majority of the Court concluded that, although statutorily based, the civil penalties were a "prototypical common law remedy" because they provided monetary relief that was designed to punish and deter, not to compensate.

Nor did the case involve a "public right" which could be assigned to an agency without a jury consistent with the Seventh Amendment because the substance of the action here was like the fraudulent conveyance action in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), which the Court had concluded was not protected by the public rights exception.

While the majority declined to further define the criteria for application of the public right exception, Justice Gorsuch in a concurrence joined by Justice Thomas suggested that the exception should apply only to the collection of revenue, customs enforcement, immigration, and the grant of public benefits. Otherwise, Justice Gorsuch observed, the Seventh Amendment, Article III, and the Due Process Clause require a jury trial and conventional civil litigation before the government can deprive a citizen of money.

Justice Sotomayor dissented, observing that the public rights doctrine has historically applied where the government is a party to an action. She also noted that the decision in this case would have far reaching effects across federal administrative agencies, two dozen of which impose civil penalties in administrative proceedings, including the FDA, EPA, and FCC.

***Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024)**

In one of the most significant federal administrative law decisions in decades, the U.S. Supreme Court overruled the Chevron doctrine, which required federal courts to defer to a federal agency's reasonable interpretation of ambiguous statutory provisions the agency administers. The *Chevron* framework, the Court ruled, violated Section 706 of the Administrative Procedures Act, which requires courts to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. Section 706, the Court held, requires courts to exercise their own independent judgment in determining the meaning of a federal statute, rather than defer to reasonable agency interpretations of an ambiguous statute, which would require them to abdicate the judiciary's foundational function to say what the law is.

The petitioners in *Loper* had also challenged *Chevron* on constitutional grounds, but the majority opinion did not address that argument. Justice Thomas, in a concurrence, asserted that the *Chevron* doctrine was also inconsistent with the Constitution's division of power among the three branches of government.

Justice Kagan, in dissent, asserted that by overruling the *Chevron* doctrine the Court had created a "jolt to the legal system."

The Court Finds Common Ground in Its Arbitration Cases

by Jenny Hua

On an increasingly polarized Court, the nine justices have found common ground in their interpretation of the Federal Arbitration Act (FAA). This term, in three unanimous opinions, the Court resolved a longstanding circuit split on whether district courts can dismiss rather than stay an action upon granting a motion to compel arbitration, clarified the framework for applying the transportation worker exemption, and answered the question of "who decides" whether the parties' prior arbitration agreement was superseded by a subsequent agreement.

***Smith v. Spizzirri*, 601 U.S. 472 (2024)**

The farthest reaching of the three cases is *Smith v. Spizzirri*, 601 U.S. 472 (2024). There, after decades of deferment, the Court finally resolved the circuit split as to whether a district court may dismiss rather than stay an action after granting a motion to compel arbitration that requests a stay. Before this decision, six circuits had held that Section 3 of the FAA mandated a stay in such circumstances while four circuits had held the district court retained the discretion to dismiss rather than stay the action.

Notably, the Ninth Circuit was one of four circuits that allowed its district courts the option of staying or dismissing the case. *See, e.g.*, *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014). The difference between a stay and dismissal was not simply academic. Only a dismissal provided an immediate right to appeal. A stay forced the moving party to proceed to arbitration in order to challenge the court's order compelling arbitration after completion of arbitration. The Court's decision in *Smith* focused on the FAA's language, structure, and purpose, finding all three led to the same result. First, Section 3 specifies that, when a dispute is subject to arbitration, the court "shall on application of one of the parties stay the trial of the action until [the] arbitration" has concluded. 9 U.S.C. § 3. The word "shall" creates an "obligation impervious to judicial discretion." Second, Congress provided for immediate interlocutory appeal of the denial of an arbitration request, but not an order compelling arbitration. Compare §16(a)(1)(C) with § 16(b). This distinction is consistent with Congress' intent for parties to proceed quickly to arbitration, which is impaired when the court is given discretion to manufacture the right to an immediate appeal. Finally, the Court concluded that staying rather than dismissing a suit comports with the supervisory role that the FAA envisions for the courts, which requires continued jurisdiction to resolve disputes over the appointment of arbitrators, enforcing subpoenas, and facilitating recovery following an arbitral award. Notwithstanding this decision, the right to a stay is not automatic; practitioners should

make the request for a stay in their motion to compel arbitration.

***Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024)**

Section 1 of the FAA exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Court has limited this exemption to "transportation workers." *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105. When the Court recently considered the scope of Section 1 in *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 456 (2022), it declined to adopt an industrywide approach. It thus rejected a Southwest Airline employee's claim she was exempt from arbitration because she worked for an airline. The Court held the relevant question was what the employee does at the airline, not what the airline does generally. *Id*. In *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024), the Court considered the other side of the coin: is an employee who works outside the transportation industry, in this case, for a producer and marketer of baked goods, automatically excluded from this exemption. The Court answered "no" and resolved a Circuit split involving the same employer.

Consistent with its analysis in *Southwest Airlines Co.*, the question remains what the employee does for its employer, not the employer's industry. An employee falls within the exemption so long as he or she is "actively engaged in transportation of goods across borders via the channels of foreign or interstate commerce," and plays a "direct and necessary role in the free flow of goods" across borders. *Id*. at 256 (cleaned up). The Court, however, expressed no opinion as to whether employees who deliver baked goods only in their own state constituted transportation workers within the meaning of this exemption. This leaves many more questions for the lower courts to resolve. What is the test for whether a role is "direct and necessary" in the flow of goods? How much of an employee's work must be engaged in the transportation of goods across borders? What is the relevant time frame for analysis, especially where the employee's role in the company changes? With this decision, more employees will likely try to fit within Section 1's exemption as part of their effort to avoid arbitration.

***Coinbase, Inc. v. Suski*, 144 S. Ct. 1186 (2024)**

It is well-settled that arbitration agreements are creatures of contract. But the battle is often first fought over the question of who—the court or arbitrator—resolves the disagreement. To set the stage, the Court explained the different orders in a dispute. The merits of a dispute is a first-order disagreement. Whether the parties agreed to arbitration on the merits is a second-order disagreement. Who should decide the second-order disagreement—for example, where the enforceability of a delegation provision is at issue—is a third-order disagreement. In *Coinbase, Inc. v. Suski*, 144 S. Ct. 1186 (2024), the court resolved what it called a fourth-order disagreement: What happens if parties have multiple agreements that evidence a conflict over the answer to the third-order question of who decides arbitrability?

There, parties had entered into two contracts. The first contained an arbitration provision with a delegation clause that gave the arbitrator the right to decide all disputes under the contract, including whether a given disagreement is arbitrable. The second included a forum selection clause, providing that all disputes related to that contract must be decided in California courts. The Court held that because arbitration is a matter of contract and consent, only the courts can decide what the parties have agreed to and which contract controls. In so doing, the Court rejected Coinbase's warning that this approach will invite chaos by facilitating challenges to delegation clauses. The Court noted that this question is presented only where the parties have entered into more than one agreement, with at least one of the agreements either implicitly or explicitly sending disputes to the courts. Given this decision, practitioners would be wise to review all executed versions of agreements to uncover potential conflicts in the dispute resolution provisions *before* a dispute arises.

Practice Note for California Practitioners

As FAA jurisprudence continues to evolve, California practitioners should monitor those changes and make sure their arbitration agreements explicitly call out the application of the procedural rules they seek to have applied. Even faced with the same arbitration agreement, a California state court and a federal district court may differ on whether to apply the FAA's procedural rules or the CAA's procedural rules unless the parties "*expressly* designate that any proceeding [may] move forward under the FAA's procedural provisions rather than under state procedural law." *Valencia v. Smyth*, 185 Cal. App. 4th 153, 174 (2010), citing *Cronus Invs., Inc. v. Concierge Servs.*, 35 Cal. 4th 376, 394 (2005) (emphasis in original).

An express designation becomes increasingly important as the chasm between the FAA and CAA continues to widen. For example, the California legislature recently amended California Code of Civil Procedure section 1294 to remove the automatic stay that applied upon the appeal of a denial of a motion to compel arbitration. In contrast, just last term, the Supreme Court ruled in *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023) that, under the FAA, an appeal of a denial of a motion to compel arbitration automatically stays district court proceedings. Then there are the 2019 amendments to the CAA (sections 1281.97 *et seq*.), which make it extremely easy for an employer or business to waive its right to arbitration with a single delayed payment of arbitration fees. While some of these changes may not survive their eventual trip to the United States Supreme Court, practitioners can mitigate some uncertainty with a well-written arbitration agreement.

Blaine H. Evanson *is a partner in Gibson, Dunn & Crutcher's litigation department, practicing primarily in the appellate and constitutional law practice group, and* ***Minsoo Kim*** *is a litigation associate. They can be reached at bevanson@gibsondunn.com and mkim@gibsondunn.com, respectively.*
Mary-Christine Sungaila *is a partner with the Complex Appellate Litigation Group. She has briefed or argued more than 170 appeals, and also created and hosts the podcast The Portia Project®. She filed an amicus brief for the ABA in one of the cases discussed in this article, Sec. & Exch. Comm'n v. Jarkesy. She can be reached at mc.sungaila@calg.com.*
Jenny Hua *is counsel at Snell & Wilmer. Her practice is concentrated in commercial litigation and appellate litigation, and she has handled a wide range of business litigation matters, including those involving arbitration provisions, consumer protection statutes, and anti-SLAPP matters. She can be reached at jhua@swlaw.com.*

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