RECENT DEVELOPMENTS IN BUSINESS LITIGATION

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I. JUDICIAL RECEPTION OF ARTIFICIAL INTELLIGENCE IN LITIGATION

Generative artificial intelligence (AI) has begun to permeate legal practice, forcing litigators to wade through a quickly expanding set of authorities regulating its use, both as evidence and otherwise. Although, to date, no statute or rule specifically addressing the use of generative AI in litigation has been adopted, courts and judges have begun to address the appropriate scope of use and best practices through the issuance of standing orders and decisions.

A. *Individual Rules and Standing Orders*

Many courts and judges have begun to address generative AI by way of standing orders. For example, Magistrate Judge Gabriel A. Fuentes of the Northern District of Illinois and District Judge Michael M. Baylson of the Eastern District of Pennsylvania have both issued standing orders regarding the use of AI in cases appearing within their courtrooms.[1] Magistrate Judge Fuentes "requests that any party using any generative AI tool in the preparation or drafting of documents for filing with the Court must disclose in the filing that generative AI was used to conduct legal research and/or to draft the document."[2] Judge Baylson's standing order goes a step further, requiring disclosure as well as a certification that each citation to the law or record has been verified as accurate in an effort to combat fictitious AI generated case law, also known as "hallucinations."[3] Similarly, District Judge Evelyn Padin of the District of New Jersey requires litigants to identify any portion of the filing drafted by generative AI and certify the generative AI work product was diligently reviewed by a human being for accuracy and applicability.[4] District Judge Matthew J. Kacsmaryk of the Northern District of Texas requires all attorneys and pro se litigants to file a mandatory certification together with the notice of appearance attesting either that no portion of any filing will be drafted with generative AI, or that any language drafted by generative AI will be checked for accuracy via

1. *See* Hon. Gabriel A. Fuentes, U.S.M.J., Standing Order for Civil Cases Before Magistrate Judge Fuentes (Nov. 15, 2024), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20revision%2011-15-24%20GAF.pdf [hereinafter Fuentes Order]; Hon. Michael M. Baylson, U.S.D.J., Standing Order Re: Artificial Intelligence ("AI") in Cases Assigned to Judge Baylson (June 6, 2023), https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf [hereinafter Baylson Order].

2. Fuentes Order, *supra* note 7.

3. Baylson Order, *supra* note 7.

4. Hon. Evelyn Padin, U.S.D.J., Judge Evelyn Padin's General Pretrial and Trial Procedures (Nov. 13, 2023), https://www.njd.uscourts.gov/sites/njd/files/EPProcedures.pdf.

traditional legal databases and by an actual human being.[5] Notably, these individual rules do not discourage litigators from using AI, but rather they emphasize attorneys' obligations to properly gatekeep any representations made to the court that may rely, in whole or in part, on AI.

Conversely the United States District Court for the Western District of North Carolina, Charlotte Division, has issued a standing order precluding specified use of artificial intelligence.[6] This standing order requires litigators to file a certification with all briefs and memorandums verifying that no artificial intelligence was used while conducting legal research to prepare the document "with the exception of such artificial intelligence embedded in standard online research sources like Westlaw, Lexis, Fastcase, Bloomberg."[7] Similarly, Magistrate Judge Michael J. Newman of the Southern District of Ohio has issued a blanket ban on AI within his courtroom, with the potential of penalties for failure to comply.[8] Specifically, any litigant who incorporates AI runs the risk of "sanctions including, *inter alia*, striking the pleading from the record, the imposition of economic sanctions or contempt, and dismissal of the lawsuit."[9] Judge Newman's standing order further imposes a duty to immediately disclose the use of AI, in the event any litigant learns that it was used in any document filed in their case, although it distinguishes AI embedded within legal search engines like Westlaw and LexisNexis.[10]

More recently, the Chief Justice of the Delaware Supreme Court issued an order adopting an interim policy authorizing Delaware judges and court personnel to use AI.[11] The interim policy "is intended to ensure the safe and appropriate use of GenAI by Authorized Users" and "applies to the use of GenAI by Authorized Users in the course and scope of their official

5. Hon. Matthew J. Kacsmaryk, U.S.D.J., Judge Specific Requirements, https://www.txnd.uscourts.gov/judge/judge-matthew-kacsmaryk (last visited May 29, 2025).

6. *In Re:* Use of Artificial Intelligence, No. 3:24-mc-104, W.D.N.C., Charlotte Div. (June 18, 2024), https://www.ncwd.uscourts.gov/sites/default/files/Standing%20Order%20In%20Re-%20Use%20of%20Artificial%20Intelligence2.pdf.

7. *See id.*

8. *See* Hon. Michael J. Newmann, U.S.D.J., Standing Order Governing Civil Cases (Dec. 18, 2023), https://www.ohsd.uscourts.gov/sites/ohsd/files//MJN%20Standing%20Civil%20Order%20eff.%2012.18.23.pdf ("No attorney for a party, or a *pro se* party, may use Artificial Intelligence ("AI") in the preparation of any filing submitted to the Court.").

9. *See id.*

10. *See id.*

11. Hon. Collins J. Seitz, Jr., Chief Justice, Supreme Court of Delaware, Order Annexing Delaware Commission on Law and Technology, Interim Policy on the Use of Generative AI by Judicial Officers and Court Personnel (Oct. 21, 2024), https://courts.delaware.gov/forms/download.aspx?id=266848.

duties and on State Technology Resources."[12] The interim policy adopts five statements:

1. **Authorized User Remains Responsible.** Any use of GenAI output is ultimately the responsibility of the Authorized User. Authorized Users are responsible to ensure the accuracy of all work product and must use caution when relying on the output of GenAI.
2. **Informed Use.** Authorized Users should not use Approved GenAI without a working knowledge and understanding of the tools. Authorized Users should be trained in the technical capabilities and limitations of Approved GenAI prior to use.
3. **Decision Making.** Authorized Users may not delegate their decision-making function to Approved GenAI.
4. **Compliance with Laws and Judicial Branch Policies.** Use of GenAI must comply with all applicable laws and judicial branch policies.
5. **Non-Approved GenAI.** Authorized Users may not input any Non-Public Information into Non-Approved GenAI. Non-Approved GenAI may not be used on State Technology Resources.[13]

Notably, although Delaware's interim policy imposes a human oversight requirement akin to the gatekeeper obligations set forth in the individual rules discussed above, it does not require affirmative disclosure of AI usage, thus emphasizing the interim policy's focus on user responsibility and non-delegation of decision-making functions.

B. *Case Law*

In addition to individual rules and court-wide standing orders, judges are also addressing the appropriate usage of generative AI through traditional case law. In November 2023, a decision from the United States Bankruptcy Court for the Southern District of New York in *In re Celsius Network LLC*, applied Rule 702 of the Federal Rules of Evidence to exclude an AI-generated expert report.[14] The court found that the report, written by AI with the direction and guidance of a party's expert, was not based on sufficient facts or data, and notably contained almost no citations to facts or the underlying data source material.[15] The court further found that the report was not the product of reliable or peer-reviewed principles and methods

12. *Id.*, Exhibit A.
13. *Id.*
14. *In re* Celsius Network LLC, 655 B.R. 301, 308 (Bankr. S.D.N.Y. 2023).
15. *Id.* at 307.

and, as such, excluded the report from the record.[16] Despite the preclusion of the report, the court did end up admitting the expert's live testimony.[17]

Similarly, in what appears to be an issue of first impression in the New York state courts, a New York Surrogate's Court rejected the admissibility of a party expert report as evidence.[18] During a hearing regarding a breach of fiduciary duty claim in *Matter of Weber*, a party expert testified that he utilized Microsoft Copilot (Copilot), a large language model generative AI chatbot, to cross-check the damages calculations in his expert report.[19] Although the court found the expert report to be unreliable, independent of its use of AI, the court nonetheless conducted a separate and distinct inquiry that focused on how AI was applied.[20] The court ultimately concluded that, while the report did not suggest any misapplication of Copilot on its face, the court could not "blindly accept as accurate, calculations which are performed by artificial intelligence" and instead opined that AI-generated evidence offered for admission should be the subject of a full *Frye* hearing to determine its reliability.[21]

In so ruling, the *Weber* court placed substantial weight on the expert's inability to detail the data inputted into Copilot, the processes and sources relied upon by Copilot, and how Copilot produced its damages assessments.[22] The court also initiated its own investigation into the reliability of Copilot by inputting its own calculation into Copilot and found that three separate computers utilizing Copilot returned different results to the same query.[23] The court noted that, irrespective of the relatively small variations produced by Copilot across the three different computers, the mere existence of variations created uncertainty in its reliability and accuracy.[24] Notably, the court also highlighted the expert's failure to disclose the use of artificial intelligence prior to the hearing.[25]

In re Celsius Network LLC and *Matter of Weber* demonstrate that courts tend to apply the legal standard applicable to expert evidence when considering the admissibility of AI-generated evidence. Further, these decisions suggest that any AI-generated evidence should contain citations to facts or other underlying data source material, and the conclusions drawn

16. *Id.* at 308.
17. *See id.*
18. *See* Matter of Weber, 85 Misc. 3d 727 (N.Y. Sur. Ct. Oct. 10, 2024).
19. *See id.* at 741.
20. *See id.* at 741–42.
21. *See id.* at 742.
22. *See id.* at 741 & n.25 ("This brings to mind the old adage, 'garbage in, garbage out.'").
23. *See id.*
24. *See id.*
25. *See id.* at 743.

by AI-generated evidence should be reproduceable. Notably, adhering to these considerations essentially requires litigators to employ human oversight over their AI-generated evidence, thus imposing the same type of gatekeeping responsibility that non-case-specific individual rules and standing orders have imposed with respect to the use of generative AI in other aspects of litigation.

C. *Other Commentaries*

In addition to courts and judges, various state bar associations have weighed in on the question of incorporating AI into litigation. For example, the New York State Bar Association (NYSBA) convened a specialized Task Force on Artificial Intelligence that in April 2024 issued a Report and Recommendations addressing AI's intersection with the legal system and evaluating potential regulations and protections for its use.[26] The *NYSBA Report* references potential amendments to New York practice rules regulating the admissibility of AI-generated evidence in legal proceedings, including a proposed amendment to the Criminal Procedure Law and Civil Practice Law and Rules to address "the admissibility of evidence created or processed by artificial intelligence."[27] The proposal would require evidence processed, in whole or in part, by AI "to establish the reliability and accuracy of the specific use of AI in processing the evidence."[28] The proposal would also require the proponent of AI-generated evidence to "substantially support[] by independent and admissible evidence" the reliability of the same.[29] As of this publication, the aforenoted proposal has not yet been adopted.

Following suit, on April 11, 2024, the New York State Chief Administrative Judge Joseph A. Zayas enacted a statewide advisory panel to evaluate the impact of artificial intelligence in New York courts.[30] The advisory panel is currently developing potential recommendations for identifying AI opportunities and minimizing AI risks.

The Georgia Supreme Court similarly established the Judicial Council of Georgia Ad Hoc Committee on Artificial Intelligence "charged with assessing the risks and benefits of the use of Generative Artificial

26. *See* Report and Recommendations of the New York State Bar Association Task Force on Artificial Intelligence (Apr. 2024), https://nysba.org/app/uploads/2022/03/2024-April-Report-and-Recommendations-of-the-Task-Force-on-Artificial-Intelligence.pdf [hereinafter NYSBA Report].

27. *See id.* at 68.

28. *See id.*

29. *See id.*

30. *See* News Release, N.Y. State Unified Ct. Sys., Chief Administrative Judge Joseph A. Zayas Names Advisory Panel to Study the Impact of Artificial Intelligence on the New York State Courts (Apr. 11, 2024), https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR24_16.pdf.

Intelligence (AI) on the courts and to make recommendations to ensure that the use of AI does not erode public trust and confidence in the judicial system."[31] Comprised of sixteen members, including judges, state attorneys, and a representative from the state bar association, the Committee held its first meeting on October 23, 2024.[32] While still in its infancy, Justice Andrew A. Pinson, an appointed member, acknowledged the "opportunities and threats associated with AI are unknown at this point" and iterated the "committee will educate and guide the judiciary as [it] explore[s] this new technology."[33]

D. *Conclusion*

As the use of generative AI becomes more commonplace amongst attorneys and in legal research tools and document-review platforms, "judicial work—particularly at the trial level—will be significantly affected by AI."[34] The rise of generative AI will result in its regulation in litigation practice. While it remains to be seen what actions courts and other regulators will ultimately take, litigators must be on notice when incorporating AI into their practice. Although, as the *Weber* court acknowledged, there is no bright-line rule for the admissibility of AI-generated evidence, practitioners should be forewarned that due process issues may arise when relying upon generative AI. Accordingly, full disclosure of such reliance and, with respect to AI-generated evidence, full compliance with the standard of law applicable to the admission of expert opinions, is recommended.

II. BALANCING THE SCALES: ALLOWING THE TORTFEASOR TO PRESENT MEDICAL BILLING EXPERT TESTIMONY

Past and future medical costs are often the largest element of economic damages in personal injury cases. Consequently, one of the most contentious issues in personal injury cases revolves around the medical expenses related to the plaintiff's injuries. Interestingly, experts have estimated that

31. *See* Supreme Court of Georgia, In Re: Judicial Council Ad Hoc Committee on Artificial Intelligence and the Courts, (Oct. 22, 2024), https://www.gasupreme.us/wp-content/uploads/2024/10/AI-Committee-Order-_Issued-10.22.24-1.pdf.

32. *See id.*

33. *See* Supreme Court of Georgia, Chief Justice Establishes Committee to Examine Impacts of Artificial Intelligence on the Judiciary, (Oct. 22, 2024), https://www.gasupreme.us/10-22-2024-chief-justice-establishes-committee-to-examine-impacts-of-artificial-intelligence-on-the-judiciary/#:~:text=%E2%80%9CWe%20recognize%20that%2C%20while%20there,we%20explore%20this%20new%20technology.%E2%80%9D.

34. John G. Roberts, Jr., Chief Justice, 2023 Year-End Report on the Federal Judiciary (Dec. 31, 2023), https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf.

nearly eighty percent of medical bills contain errors.[35] It should be no surprise that rising medical costs aid in plaintiffs' ability to support the reasonableness of significant damages claims. Furthermore, it is no secret that medical providers charge their patients different rates based on several factors, such as whether the patient has insurance or the type of the patient's insurance. Another point of contention is how providers arrive at their rates and what one patient is charged versus the next. Simply put, there is no uniformity in determining appropriate or reasonable medical expenses. However, there can be a balancing of the scales if tortfeasors are allowed to present expert testimony regarding the reasonableness and customary nature of medical expenses.

Recently, the Texas Supreme Court issued a new opinion reaffirming that both plaintiffs and defendants are allowed to present medical billing experts to testify about the reasonableness and customary nature of medical expenses. California and Texas courts have, within the last two decades, been protective of tortfeasors with regard to this subject. As in California, Texas courts generally permit such expert testimony as long as it complies with evidentiary rules, such as relevance, qualification of the expert, and adherence to the *Daubert* standards, depending on the state.

In California, the ability of both plaintiffs and defendants to present expert testimony regarding the reasonableness and customary nature of medical expenses is governed by California Evidence Code § 801, which addresses expert testimony, and by case law interpreting how medical expenses are treated in personal injury cases. Similar to Federal Rule of Evidence Rule 702, California Evidence Code § 801 allows expert witnesses to testify if their specialized knowledge, skill, experience, training, or education can assist the trier of fact in understanding the evidence or determining a fact in issue. Medical billing expert witnesses in California may testify about whether medical bills are reasonable and customary based on their review of prevailing medical billing practices, data, and scales in the relevant geographic area.

In *Howell v. Hamilton Meats & Provisions, Inc.*, the California Supreme Court ruled that that a plaintiff in a personal injury case may only recover the reasonable cost of medical services that were *actually* paid or incurred, rather than the billed amount in excess of what was accepted as full payment by the healthcare provider.[36] This ruling effectively opened the door for both plaintiffs and defendants to present evidence in the form of expert testimony about the reasonable value of medical services.

35. Stephanie Booth, *Up to 80% of Hospital Bills Have Errors. Are You Being Overcharged?*, Healthline (May 21, 2019), https://www.healthline.com/health-news/80-percent-hospital-bills-have-errors-are-you-being-overcharged [https://perma.cc/TQM5-JRJS].

36. Howell v. Hamilton Meats & Provisions, Inc., 257 P.3d 1130, 1146 (Cal. 2011).

It goes without saying that the *Howell* ruling significantly benefited defendants in personal injury cases in California. The ruling ensured that plaintiffs can only recover the reasonable value of medical services that were actually paid or incurred instead of the customarily inflated amounts billed by healthcare providers. Defendants are no longer responsible for paying damages that do not reflect the actual cost of the case. By focusing on actual amounts paid, *Howell* often leads to lower damages awards for medical expenses and helps curtail "windfall" awards that California juries are notorious for awarding. *Howell* has created more consistency in jury awards for economic damages by setting a clear standard for the recovery of medical expenses. California juries now evaluate damages based on actual costs, rather than inconsistent or arbitrary billed amounts.

Similar to California, the Texas Civil Practice & Remedies Code limits recovery of medical expenses to the amount actually paid or incurred.[37] The statute states that "[i]n addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant." In *Haygood v. De Escabedo*, the Texas Supreme Court issued a significant opinion addressing and interpreting Section 41.0105 of the Texas Civil Practice & Remedies Code instructing trial court judges to limit not just a claimant's recovery, but also the evidence admitted at trial. Evidence of costs that a medical provider billed, but will not ultimately be paid, is irrelevant and inadmissible.[38] Accordingly, only evidence of *recoverable* medical expenses is admissible at trial.

Further, in Texas, a plaintiff seeking to recover past medical expenses must prove that the expenses are reasonable and necessary.[39] Recently, the Texas Supreme Court reviewed counter affidavit requirements in *In re Chefs' Produce of Houston, Inc.*,[40] and reaffirmed its ruling in *In re Allstate Indemnity Insurance Co.*, holding that opinions in counter-affidavits need not be admissible to meet the reasonable notice requirement under Section 18.001(f) of the Texas Civil Practice and Remedies Code.

In *Chefs' Produce*, the plaintiff offered his affidavit to support his claimed medical expenses, pursuant to section 18.001 of the Texas Civil Practice & Remedies Code, establishing that he incurred reasonable and necessary medical expenses. The defendants, in response, tendered a counter-affidavit from a medical doctor of their choosing to challenge the reasonableness and

37. Tex. Civ.Prac. & Rem. Code § 41.0105.

38. Haygood v. De Escabedo, 356 S.W.3d 390, 398 (Tex. 2011).

39. *In re* Allstate Indem. Co., 622 S.W.3d 870, 876 (Tex. 2021) (orig. proceeding).

40. *In re* Chefs' Produce of Houston, Inc., 667 S.W.3d 297, 301 (Tex. 2023) (orig. proceeding) (per curiam).

necessity of said medical expenses. The plaintiff moved to strike the counter affidavit because it mentioned and included a dispute related to causation.

The Texas Supreme Court held that the trial court abused its discretion in striking the counter-affidavit because it satisfied the requirements of Section 18.001(f). That is, the counter-affidavit appropriately provided the plaintiff with reasonable notice of the basis on which the defendant intended to challenge the reasonableness and necessity of the plaintiff's medical expenses at trial. In relying on its prior landmark opinion interpreting section 18.001, *In re Allstate Indemnity Co.*,[41] the court reiterated that "reasonable notice" is *not* predicated on the admissibility of the counter-affiant's testimony—such as references or a dispute related to causation. This allows the tortfeasor's counter affidavit to be challenged by a *Daubert* motion or on cross examination—rather than simply being stricken before trial.

The *Chefs' Produce* court held that the striking of the counter-affidavit and the defense expert's testimony severely compromised the defendants' ability to challenge the claimed medical expenses, a key component of plaintiff's damages. This ruling emphasizes that reasonableness is a factual issue requiring a weighing of evidence, not merely an assumption based on billing statements. This decision reinforces fairness in the adjudication of damages and aligns with Texas courts' broader commitment to ensuring equitable outcomes in personal injury litigation.

As shown by the various court decisions discussed above, tortfeasors should be permitted to present medical billing experts to testify about the reasonableness, necessity, and customary nature of the plaintiff's medical expenses. This ruling brings more fairness to the judicial system while preventing "windfalls" benefitting plaintiffs and healthcare providers—who have historically been recovering amounts billed but not owed or paid by the plaintiff.

The failure of more courts, including my home state of Louisiana, to allow defendants to challenge the accuracy and reasonableness of medical billing expenses is a disservice to the judicial system and our country's principled system of checks and balances. Allowing plaintiffs to present medical expenses unchecked is a disservice to the judicial system and allows medical providers to generate expenses with no reasoning whatsoever. Unfortunately, the scales are still largely unbalanced, but, if more court follow the trends in California and Texas, a fairer approach to evaluating medical expense damages will be achieved.

41. *In re* Allstate Indem. Co, 622 S.W.3d 870.

III. SOCIAL MEDIA REGULATION

During the 2023–24 term, the United States Supreme Court addressed the intersection of social media regulation and First Amendment free speech protections in a line of rulings: *Lindke v. Freed*, *Murthy v. Missouri*, and *Moody v. NetChoice, LLC*. When taken together, the three decisions provide significant insight regarding both the government's and private social media platforms' ability to influence the social media content that a private citizen can post and consume. Each decision is discussed in turn below, followed by a discussion of the key takeaways.

A. Lindke v. Freed

In March 2024, the Supreme Court issued a unanimous decision in *Lindke v. Freed*, which focused on when a public official's social media activity should be treated as state action rather than private action.[42] In *Lindke*, a city manager used a public Facebook page to post about his personal life and share information related to his position in the city government, including soliciting feedback from the public on community matters and communicating the city's approach to the COVID-19 pandemic. A local resident began commenting on the Facebook page to express his displeasure with the city's pandemic response, including calling the city's approach to the COVID-19 pandemic "abysmal." The city manager deleted the resident's comments, and eventually blocked the resident from commenting on the page at all. In response, the resident sued, alleging that the city manager had violated the First Amendment by engaging in viewpoint discrimination. The resident argued that he had a right to comment on the Facebook page because it was an online "public forum."[43]

In vacating and remanding the case, the Supreme Court emphasized that an individual's status as a public official is not determinative of whether the official "engaged in state action or functioned as a private citizen" in using social media.[44] Rather, a public official's social media activity, including preventing a social media user from interacting with the official's social media page, is considered state action that would trigger the First Amendment's protections for the user *only if* the official both (1) possessed actual authority to speak on the state's behalf on a particular matter; *and* (2) purported to exercise that authority when speaking in the social media post.[45]

42. Lindke v. Freed, 601 U.S. 187 (2024).
43. *Id.* at 193.
44. *Id.* at 196.
45. *Id.* at 199.

With respect to the first prong of the test, the Supreme Court made clear that the mere appearance of authority is not sufficient to qualify as state action. Rather, the public official's social media activity must be traceable to some actual governmental authority.[46] The Supreme Court noted, however, that the appearance and function of the official's social media activity may be relevant under the second prong of the test.[47] The Supreme Court also provided additional guidance for government figures using social media moving forward, including cautioning against blocking a user entirely and suggesting that a page-wide label or disclaimer can give a social media page context and create a rebuttable presumption that the page is for personal use.[48]

B. Murthy v. Missouri

In June, 2024, the Supreme Court decided *Murthy v. Missouri*, on non-substantive grounds, finding that no plaintiff had established standing to seek an injunction against the federal government.[49]

In *Murthy*, the plaintiffs—the states of Louisiana and Missouri, and five individual social media users—argued that the federal government had "engaged in a years-long pressure campaign" urging private social media platforms, such as Facebook, Twitter, and YouTube, to suppress certain content and recommending policy changes in an attempt to censor third-party speech that challenged the government's viewpoint.[50] Against that backdrop, the Supreme Court was asked to consider the government's involvement in both using *and* regulating social media. In particular, the case concerned whether the government's involvement in social-media content moderation, including the government flagging false and misleading content on the platforms and communicating with the platforms about such misinformation, constituted legitimate governmental advocacy or violated the First Amendment's free speech clause by impermissibly pressuring the platforms to censor disfavored speech relating to the COVID-19 pandemic and 2020 election season.[51]

In the majority opinion authored by Justice Amy Coney Barrett, the Supreme Court held that the plaintiffs had not shown a "clear link" between the platforms' allegedly adverse content moderation and the federal government's conduct in communicating with the platforms.[52] Without showing that any prior restrictions on the plaintiffs' social media use

46. *Id.* at 198.
47. *Id.*
48. *Id.* at 202.
49. Murthy v. Missouri, 603 U.S. 43 (2024).
50. *Id.* at 60.
51. *Id.* at 91.
52. *Id.* at 68 n.8.

were "fairly traceable" to state action, rather than private action undertaken by the platforms themselves, the plaintiffs lacked standing against the federal government.[53]

Underlying the *Murthy* decision was the Supreme Court's emphasis that the federal government's conduct is not actionable where the content moderation is a result of the platforms' editorial discretion rather than the government's "coercive impact."[54] Indeed, in the majority opinion, Justice Barrett noted that, at least in some instances, the platforms began to restrict user-posted content *before* the government communication started and stressed that the platforms are free to independently apply their own judgment to moderate content in the future.[55]

C. Moody v. NetChoice, LLC

Finally, in the consolidated case *Moody v. NetChoice, LLC*, decided in July, 2024, the Supreme Court considered governmental regulation of private social media platforms, including Facebook and YouTube.[56] In *Moody*, the issue involved whether Florida's S.B. 7072 and Texas's H.B. 20—both of which restricted a platform's ability to engage in content moderation of user-posted content and required the platform to provide an individualized explanation to a user regarding the platform's editorial discretion to filter, alter, or label that specific user's content—were facially constitutional under the First Amendment.[57] While the Supreme Court did not rule on that issue, in writing the opinion of the court Justice Elena Kagan set out "the relevant constitutional principles" involving governmental regulation of social media content moderation for the lower courts to apply on remand.[58]

First, Justice Kagan noted that the Supreme Court "ha[s] repeatedly held" that when a private actor is engaging in "expressive activity," including compiling, curating, and moderating third-party speech, the actor is protected under the First Amendment when it is directed by the government to accommodate speech it would prefer to exclude. In applying that general principle to social media, Justice Kagan emphasized that Facebook and YouTube are "indeed engaged in expression" when the platforms use their algorithms and community standards and guidelines to ban a user or to decide what user-posted content to suppress, demote, or "display, or how the display will be ordered and organized."[59] Further, Justice Kagan

53. *Id.* at 57.
54. *Id.* at 80.
55. *Id.* at 88.
56. Moody v. NetChoice, LLC, 603 U.S. 707 (2024).
57. *Id.* at 717.
58. *Id.* at 718.
59. *Id.* at 740.

stressed that a government interest "in better balancing the marketplace of ideas" is not a substantial basis to compel a private actor's speech.[60] Consequently, a state may not interfere or otherwise prohibit Facebook's or YouTube's protected speech in the private curation of their social media feeds "to advance its own vision of ideological balance."[61]

D. *Key Takeaways:*

- Possibly the most important takeaway from these recent decisions is the Supreme Court's acknowledgment that social media should be afforded the same treatment as traditional media. Indeed, in *Moody*, Justice Kagan enumerated several "governing constitutional principles" regarding governmental regulation of social media, which were based on previous Supreme Court precedents applying the First Amendment's protections to newspapers, editorial pages, and cable broadcasters to name a few. Further, a majority of the Court determined that a platform's content moderation practices constitute "expressive activity" and that the platform's decision-making about which third-party speech to include or exclude on its social media feed is similar to a newspaper's editorial choice about what message to convey in an opinion page.
- *Moody*'s guidance on social media content moderation will likely be important as private social media platforms continue to grapple with the growth of social media and how to moderate the often overwhelming amount of content shared and uploaded to their platforms on a daily basis.
- Second, following the *Moody* decision, direct governmental regulation of social media content moderation is arguably on unstable ground. In particular, *Moody* held that Texas's objective in enacting H.B. 20—"to correct the mix of speech that the major social media platforms present"—is neither a valid nor substantial governmental interest that would meet even intermediate scrutiny. In contrast to *Moody*, the *Murthy* decision effectively permitted the federal government to informally influence private social media platforms to limit certain content that the government considered false or misleading or otherwise disagreed with because of the difficulty in establishing a "clear link" between the government's conduct and the platforms' content moderation. Considering *Moody* and *Murthy* together, going forward, the government may attempt to exert more informal influence over private social media platforms by communicating with them directly about their practices, rather than by passing formal legislation.

60. *Id.* at 727.
61. *Id.* at 741.

- Finally, the *Lindke* decision is important as increasingly more communication occurs online via social media rather than offline via traditional media. In articulating the two-prong test for determining whether a public official's social media activity would qualify as state action, the Supreme Court confirmed that a public official's right to free speech as a private citizen can encompass the right to post or comment on social media, but that right may be curtailed in certain circumstances where the government has created an online "public forum" within the meaning of the First Amendment.