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Higher Education Alert

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Supreme Court issues significant First Amendment rulings

By Steven M. Richard

Recent Supreme Court rulings impact free speech on campuses.

What's the Impact

- Colleges and universities must continue to understand the evolving free speech considerations applicable to speech over the Internet.
- The Court ruled that true threats require a subjective element to prosecute the speaker, which could impact how schools intervene when speech raises security concerns.
- The Court ruled that First Amendment rights can override the enforcement of public accommodations laws, raising implications for the provision of goods and services on equal terms.

As the United States Supreme Court's term approached its end, anticipation centered on the Court's opinions addressing race conscious admissions and the student loan forgiveness program. The Court's decisions in both matters have garnered considerable analysis and debate on their impacts going forward. At the same time, the Court issued two significant rulings addressing First Amendment concerns with implications upon common issues arising in campus communities, which are addressed in this alert.

The First Amendment and True Threats

Counterman v. Colorado, 2023 WL 4277208 (June 27, 2023)

The case raised the following issue: Whether, to establish a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective "reasonable person" would regard the statement as a threat of violence.

Billy Counterman sent hundreds of Facebook messages to C.W., a singer and musician in Colorado, even though the two had never met and C.W. repeatedly sought to prevent Counterman's social media outreaches. Counterman, who suffers from mental illness believed that he was engaged in an ongoing dialogue with C.W., but she never responded to him. Counterman's messages were mundane at times, but others were threatening and stalking in their nature. Living in fear, C.W. cancelled performances and avoided being alone in public places.

Colorado charged Counterman under a statute making it unlawful to "[r]epeatedly . . . make [] any form of communication with another person" in "a manner that would cause a reasonable person to suffer some serious emotional distress and does cause that person . . . to suffer serious emotional distress." During criminal proceedings, Counterman contended that his statements were not true threats and entitled to First Amendment protection. Colorado law applies an objective test to determine whether a statement is a true threat, requiring the prosecution to show that a reasonable person would have viewed Counterman's Facebook messages as threatening. The trial court ruled that the First Amendment posed no bar to prosecution, and Counterman was convicted by a jury. The Colorado Court of Appeals affirmed the conviction.

The Supreme Court issued a writ of certiorari because courts have divided about (1) whether the First Amendment requires proof of a defendant's subjective mindset in true-threat cases and (2) if so, what *mens rea* standard is sufficient. Seven justices concluded that the state erred in convicting Counterman, and the Court remanded the case for further proceedings consistent with its ruling. In the majority opinion written by Justice Kagan, she was joined by an interesting alignment of Chief Justice Roberts and Justices Alito, Kavanagh, and Jackson. Justices Sotomayor and Gorsush concurred with the Court's judgment, with Justices Thomas and Barrett dissenting.

Five decades ago, the Court held that true threats are not protected speech. *Watts v. United States*, 394 U.S. 705 (1969) (distinguishing between a true threat and political hyperbole). In 2003, the Court elaborated that "'true threats' encompass those statements when the speaker means to communicate a serious intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat." *Virginia v. Black*, 538 U.S. 343 (2003).

In *Counterman*, the Court held to establish that a statement is a true threat unprotected by the First Amendment, the state must prove that the defendant had a subjective understanding of the statement's threatening nature, based on a showing of at least recklessness. The Court declined

to require that the state must prove that the defendant had a specific intention to threaten the victim. While acknowledging that a subjective mental-state requirement could occasionally shield true threats from liability, the requirement of a subjective understanding is necessary to avoid a chilling effect on speech that can occur under a standard focusing purely on the objective nature of the speech itself. Without a subjective requirement, "[a] speaker may be unsure about the side of a line which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not." Imposing a recklessness standard in the true threat context means that a speaker is aware "others could regard his statements as" threatening and "delivers them anyway."

In an interesting analogy, the majority concluded that a recklessness standard in the context of true threats is comparable to its analysis in defamation cases. While false and defamatory statements of fact have no constitutional value, the Court ruled in *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964), that a public figure cannot recover for the injury that such a statement causes unless the speaker acted with "knowledge that it was false or with reckless disregard of whether it was false or not." Looking at the five-decades of *Sullivan's* application, the majority wrote that "few have suggested that it needs to be higher—in order words, that still more First Amendment 'breathing space' is required. And we see no reason to offer greater insulation to threats than to defamation."

In the concurring opinion, Justice Sotomayor would have decided the case on the ground that the issue involved repeated stalking, not pure speech, such that there would not be a reason to address the true-threat doctrine. In a dissent, Justice Thomas criticized the majority's "surprising and misplaced reliance on *New York Times v. Sullivan*." Justice Thomas reiterated his criticism of *New York Times* and belief that its precedent should be overruled, noting that it is "unfortunate that the majority chooses not only to prominently and uncritically invoke *New York Times*, but also to extend its flawed, policy-driven First Amendment analysis to true threats, a separate area of this Court's jurisprudence."

Justice Barrett dissented and would have upheld the conviction because true threats are not protected by the First Amendment and "carry little value and impose great cost." In her view, an objective test is appropriate to determine whether there is true threat because neither the societal value of a threat "nor its potential for 'injury' depends on the speaker's subjective intent."

Counterman is a significant ruling for colleges and universities to understand, where its community members communicate frequently with and about each other through social media—including with unflattering, vitriolic, and at times threatening tones. Administrators often must address whether to respond to and punish faculty and student speakers for such communications. The person who made the speech may claim that he or she had no intention of causing fear and was just expressing frustration or hyperbole. If disciplinary processes are challenged in court, courts may apply *Counterman* to the college and university setting, inquiring whether a speaker consciously disregarded that his or her communication conveyed a threatening tone or message. Yet, schools must remain cognizant of where the line lies in their responsibilities, because courts have recognized that threatening language can require

responsive measures to prevent its continuation. *See Feminist Majority Foundation v. Hurley*, 911 F.3d 674 (4th Cir. 2018) (a Title IX complaint pled plausible claims that a university could have addressed harassing and threatening social media communications without exposing itself to First Amendment liability).

The Interplay Between the First Amendment and Public Accommodation Laws

303 Creative LLC v. Elenis, 2023 WL 4277208 (June 30, 2023)

Many states have enacted laws forbidding businesses from engaging in discrimination when they sell goods and services to the public. Colorado's Anti-Discrimination Act (CADA) "restricts a public accommodation's ability to refuse to provide services based on a customer's identity." CADA's Accommodation Clause restricts a public accommodation's ability to "directly or indirectly . . . refuse . . . to an individual or group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." The law defines a "public accommodation" broadly to include almost every public-facing business in Colorado.[1]

Lorie Smith operates 303 Creative LLC offering website and graphic design, marketing advice, and social media management services. Smith decided to expand her offerings to include services for couples seeking websites for their weddings. Smith provides her website and graphic services to customers regardless of their race, creed, sex, or sexual orientation. But she has never created expressions that contradict her sincerely held religious convictions. Smith filed a lawsuit seeking an injunction to prevent CADA's enforcement that would require her to create wedding websites celebrating marriages that defy her beliefs. Specifically, Smith believed that, if she enters the wedding website business, Colorado will force her under CADA to convey messages inconsistent with her belief that marriage should be reserved to unions between a man and a woman. The district court ruled against Smith, and the Tenth Circuit affirmed in a 2–1 panel split. The majority held that Colorado has a compelling interest in ensuring equal access to publicly available goods and services, but a dissenting opinion warned that compelling access to a particular person's voice, expression, or artistic talent infringes upon free speech rights.

Of significance to the Supreme Court's review of the record, Smith and Colorado stipulated in the litigation to material facts, including Smith's willingness to serve individuals with protected status but not in contravention of her beliefs, her graphic and website design services are "expressive" and "original, customized" creations, and her services "will be expressive in nature." In a 6–3 split along its ideological lines (with the six conservative justices forming the

[1] CADA also contains a Communications Clause that restricts a public accommodation's ability to "directly or indirectly . . . publish . . . any . . . communication . . . that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a public place of accommodation will be refused . . . or that an individual's patronage . . . is unwelcome, objectionable, unacceptable, or undesirable because of . . . sexual orientation." The Court's ruling in 303 Creative rested on CADA's Accommodations Clause because the Colorado conceded that its authority to apply the Communication Clause stands or falls with the enforceability of the Accommodations Clause.

majority), the Court reversed the judgment because Smith seeks to engage in protected First Amendment speech and Colorado seeks under CADA to compel speech she does not wish to provide.

In the majority opinion written by Justice Gorsuch, the Court warned that Colorado's position could lead to "dangerous" consequences. Colorado argued that the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic implicates the customer's statutorily protected status. Rejecting that assertion, Justice Gorsuch wrote: "Taken seriously, that principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on the pain of penalty." As examples, Justice Gorsuch warned that the state could compel a Muslim movie producer to make a film with a Zionist message or an atheist muralist to produce a work celebrating evangelicalism, so long as these artists produce works for other members of the public with different messages. "[T]he First Amendment tolerates none of that."

Justice Gorsuch acknowledged the importance of laws prohibiting discrimination in access to public accommodations, which have expanded their scope to include protections based on sexual orientation. "At the same time, the Court has also recognized that no public accommodations law is immune from the demands of the Constitution . . . When a state public accommodations law and the Constitution collide, there can be no question which must prevail."

In a strongly worded dissent, Justice Sotomayor portrayed the majority's analysis as "profoundly wrong," noting that CADA targets conduct, not speech, for regulation and the *act* of discrimination has never constituted protected expression under the First Amendment. "Our Constitution contains no right to refuse service to a disfavored group." The dissent warned that preventing the "unique evils" caused by "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages" is compelling state interest. "Moreover, a law that prohibits only such acts by businesses open to the public is narrowly tailored to achieve that compelling interest," which responds to "the harm from status-based discrimination in the public marketplace." Justice Sotomayor contended that "[t]he First Amendment does not entitle petitioners to a special exemption from a state law that simply requires them to serve all members of the public on equal terms. Such a law does not directly regulate petitioners' speech at all, and petitioners may not escape the law by claiming an expressive interest in discrimination."

In some respects, the result in *303 Creative LLC* was foreseeable given the stipulated facts in the record, acknowledging the unique and expressive nature of Smith's intended wedding website services, which made the result predictable before the Court with a strong inclination to protect an individual's right to speak or not speak consistent with religious beliefs. Future cases with more nuanced record facts could pose vexing considerations in reaching the proper balance between free speech rights and the interests of promoting nondiscrimination.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

Steven M. Richard
401.454.1020
srichard@nixonpeabody.com

Tara E. Daub
516.832.7613
tdaub@nixonpeabody.com

Tina Sciocchetti
518.427.2677
tsciocchetti@nixonpeabody.com

Matthew Netti
617.345.1048
mnetti@nixonpeabody.com