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## U.S. Supreme Court Clarifies the Standard for “True Threats”

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In *Counterman v. Colorado* (June 27, 2023, No. 22-138) 600 U.S. \_\_\_, the United States Supreme Court analyzed the First Amendment’s free speech protections in the context of “true threats.” While previous case law had established that true threats are not protected speech (and therefore may be restricted), the Supreme Court has now clarified that for a statement to be considered a true threat and thus unprotected speech, the speaker must have had “some subjective understanding of the statement’s threatening nature.” To meet the standard, the speaker must, at a minimum, act with recklessness.

**Background**

From 2014 to 2016, Bill Counterman sent hundreds of Facebook messages to C.W., a local Colorado singer and musician whom Counterman had never met. C.W. never responded to his messages, and while she blocked his accounts repeatedly Counterman created a series of new accounts and continued to contact her. Counterman’s messages ranged in intrusiveness from “Good morning sweetheart” to “Staying in cyber life is going to kill you” and “You’re not being good for human relations. Die.” C.W. believed that Counterman was threatening her life, and her resulting fear and anxiety caused her trouble sleeping and resulted in her declining social invitations, cancelling performances, and losing money.

Based solely on his Facebook messages, the State of Colorado charged Counterman under a “stalking” statute that makes it unlawful to “repeatedly ... make[] any form of communication with another person ... in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person ... to suffer serious emotional distress.” Counterman argued that his messages were protected under the First Amendment, but the Colorado court held that his messages were threats and thus not protected speech.

The Supreme Court heard the case on appeal.

**The *Counterman* Opinion**

While the First Amendment protects freedom of speech, it allows some restrictions on the content of speech in a few limited areas such as “true threats,” which are serious expressions that a speaker intends to commit an act of unlawful violence against a particular person or group of people. Even within unprotected categories of speech,

any limit on speech raises concerns about the potential chilling effects such limits could have on protected speech. Accordingly, although true threats fall outside the bounds of the First Amendment's protection, their prohibition must balance the benefits of banning dangerous threats with the risks of unintentionally deterring non-threatening, protected speech.

In *Counterman*, the Supreme Court held that for a statement to be a true threat, the speaker must have some subjective understanding of the statement's threatening nature. The minimum standard for the speaker's subjective understanding is recklessness, which is met by showing that the speaker "consciously disregarded a substantial risk" that the communication would be viewed as threatening violence. Counterman was prosecuted in Colorado using only an objective standard, where the state court required the prosecution to prove only that a reasonable person would understand the statements as threats. Because the state did not prove Counterman's state of mind, i.e., that he was subjectively aware that his statements would be understood as threats, whether in actuality or using the recklessness standard, the Supreme Court reversed the Colorado judgment and remanded for further proceedings.

## Takeaways

Public agencies should take note of the freshly articulated standard for true threats, which may be relevant to assessing threats, pursuing discipline against employees or students, and pursuing restraining orders.

If you have questions about this case or First Amendment protections, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcasts](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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