CARLTON FIELDS

Top 10 First Amendment Cases of the 2022-2023 Supreme Court Term

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The U.S. Supreme Court this term elevated First Amendment values over anti-discrimination laws and stalking statutes in two important cases. The most far-reaching case, *303 Creative LLC v. Elenis*, decided that a website designer who did not want to make wedding sites for same-sex marriages did not need to abide by Colorado's public accommodations law, passed to protect same-sex couples and other minority groups from discrimination.

As significant as its decisions were this term, the court pulled back from deciding some of its most important First Amendment cases. The court decided not to decide a case about the scope of Section 230, a federal law critical to the internet and the growth of social media companies. The court also relied on *New York Times Co. v. Sullivan* to decide a case about First Amendment protection for "true threats."

1. ***303 Creative LLC v. Elenis*** (compelled speech)

On the final day of the term, the court decided its biggest First Amendment case on the docket. This case pitted the First Amendment against Colorado's public accommodations law, which prohibits businesses open to the public from discriminating against people on the basis of race or gender. The plaintiff, web designer Lorie Smith, challenged the law because she objected to making wedding websites for same-sex marriages.

The conservative justices joined Justice Gorsuch's 6–3 decision for Smith. The court held that the First Amendment prohibited Colorado from compelling Smith to design a website conveying a message she did not endorse. Justice Sotomayor dissented, arguing that the law primarily regulated conduct, not speech, by prohibiting businesses from engaging in discrimination when offering services to the public.

The court decided the case based on stipulated facts that Smith's custom-made website involved expressive conduct. Moving forward, courts will need to decide how far to extend the holding. For example, will it apply to other types of expressive businesses, such as clothing designers, florists, architects, or tombstone makers?

2. ***Counterman v. Colorado*** (true threats)

The court decided to heighten the intent requirement for convicting a person of making a "true threat." The court again elevated free speech rights over concerns about other rights, here concerns about stalking and online harassment. In doing so, the court relied on the reasoning in the landmark defamation case *New York Times Co. v. Sullivan*, which Justice Thomas has previously called for overruling.

To convict someone of making a "true threat," the court held that the First Amendment requires prosecutors to prove the person consciously disregarded a substantial risk that people may view the words as threatening. In a 7–2 decision written by Justice Kagan, the court established recklessness as the intent standard needed to convict someone of making a true threat. The court held that a lower standard would likely chill protected expression. At a minimum, the court wrote, the First Amendment requires the speaker to have some understanding of the statement's threatening character, even though the First Amendment does not require the state to prove that the person intended to make a threat. Justices Thomas and Barrett dissented.

The case arose after a jury convicted Billy Raymond Counterman of stalking a musician by sending her hundreds of Facebook messages that she said made her fear for her safety. He claimed the charges violated his First Amendment rights to communicate with the musician.

3. ***Groff v. DeJoy*** (religious accommodations)

In several cases this term, the court effectively overruled long-standing precedents while saying it was not overruling precedent. This was one of those cases.

The court unanimously sided with a former U.S. Postal Service employee who sued after being denied a religious accommodation to avoid work on the Sunday Sabbath. The court "clarified" prior precedent that courts had long understood to mean that an accommodation created an "undue hardship" — and was not required — if it imposed even a *de minimis* cost on a business.

By clarifying and heightening that standard, the court effectively overturned precedent for denying religious accommodation requests under Title VII of the Civil Rights Act of 1964. The court held that a religious accommodation would impose an "undue hardship" if it resulted in "substantial increased costs in relation to the conduct of its particular business" rather than a *de minimis* cost.

4. *United States v. Hansen* (overbreadth doctrine)

In a 7–2 decision, the court upheld a federal criminal statute prohibiting people from encouraging or inducing illegal immigration. It did so by limiting the law's scope to criminal acts rather than mere speech. It reversed the Ninth Circuit, which had invalidated the entire statute as overbroad under the First Amendment's "overbreadth" doctrine. To avoid the constitutional "overbreadth" question, the court interpreted the law to limit it largely to illegal acts, holding that the words "encourage" and "induce" in the statute referred to criminal solicitation and facilitation rather than the everyday understanding of those words.

While the court avoided the "overbreadth" question, Justice Thomas, in a separate concurrence, urged the court to revisit the doctrine in its entirety in a later case. He wrote that the doctrine lacks support in the First Amendment's text or history and causes courts to usurp their judicial role. No other justice joined his concurrence, but the issue will likely return to the court.

Justice Jackson's dissent argued that the court could not limit the statute because Congress had already considered, and rejected, such a limiting revision. She would have invalidated the law as overbroad because its plain language prohibited speech that would merely inspire or influence someone to remain in the country illegally.

The defendant, Hansen, had promised hundreds of noncitizens a path to U.S. citizenship through a scam "adult adoption" program in violation of the law.

5. *Jack Daniel's Properties Inc. v. VIP Products LLC* (trademark)

This was one of the few cases this term in which the court favored other rights (here, intellectual property rights) over expressive values.

In a unanimous decision, the court sided with Jack Daniel's in enforcing its trademark rights to its iconic whiskey bottle against a canine chew toy that resembled the whiskey bottle. The court rejected the Ninth Circuit's holding that the toy is a humorous parody protected by the First Amendment. Because the chew toy used Jack Daniel's trademark as a form of its own trademark, rather than primarily as a form of expression, the court held found that the First Amendment did not require a heightened standard to decide Jack Daniel's trademark infringement claim.

The Jack Daniel's-inspired dog toy, created by VIP Products, was labeled "Bad Spaniels," and instead of "Old No. 7," it read, "The Old No. 2 on Your Tennessee Carpet."

6. *Andy Warhol Foundation for the Visual Arts Inc. v. Goldsmith* (copyright)

In a 7–2 decision written by Justice Sotomayor, the court upheld the Second Circuit's decision to reverse a ruling that Andy Warhol had not infringed on photographer Lynn Goldsmith's copyright of her picture of the late musician Prince. Warhol created a series of silk-screen images based on Goldsmith's copyrighted photograph of Prince.

The court's decision addressed only the "purpose and character" prong of the fair use defense raised by the Warhol Foundation. But it concluded that both Warhol's silk screen of Prince and Goldsmith's photograph of him shared the same purpose — they are both "portraits of Prince used to depict Prince in magazine stories about Prince."

The district court had granted summary judgment for the Warhol Foundation, finding that Warhol had "transformed" the original photograph by giving it a new "meaning and message." The Second Circuit reversed, holding that because Warhol's work remained "recognizably derived" from Goldsmith's original photograph, it failed to transform the original and could not constitute fair use of Goldsmith's copyrighted photograph.

Justice Kagan wrote a spirited dissent, joined by Chief Justice Roberts, arguing that Warhol's work deserved greater First Amendment protection as an artistic expression conveying a different meaning than Goldsmith's photograph.

7. ***Gonzalez v. Google LLC*** (Section 230)

The court's unanimous, unsigned decision was more significant for what it did not decide. The court accepted this case to potentially transform the scope of Section 230 of the Communications Decency Act, which gives social media companies broad immunity from lawsuits for content appearing on their sites. But the court sidestepped the issue, returning the case to the lower courts, after finding that the complaint did not state a claim for aiding and abetting terrorism under a federal anti-terrorism act.

The case arose when the family of a victim of a 2015 Islamic State group terrorist attack sought to hold Google liable for allowing the group to use its platform on YouTube to recruit members, and plan and carry out terrorist attacks.

The district court granted Google's motion to dismiss based on its immunity defense under Section 230, and the Ninth Circuit affirmed.

8. ***Twitter Inc. v. Taamneh*** (social media liability)

The court unanimously held that tech giants Twitter, Facebook, and Google were not liable for allowing members of the Islamic State group to use their platforms under a federal anti-terrorism

statute.

The case arose after Jordanian citizen Nawras Alassaf and 38 others were killed in an attack at an Istanbul nightclub in 2017. Alassaf's family claimed the social media companies aided and abetted the Islamic State group by helping it spread its message through computer algorithms to suggest content to users based on their viewing history. The court found that such alleged conduct did not amount to aiding and abetting terrorism under federal law.

9. ***Yeshiva University v. YU Pride Alliance*** (religion and gay rights)

In a 5–4 split, the court declined to stay a New York state court ruling requiring Yeshiva University to treat an LGBTQ+ student organization the same as other groups seeking university recognition. Yeshiva University, a private Jewish university in New York City, refused to officially recognize the YU Pride Alliance on the grounds that doing so would violate the university's religious beliefs. The students sued under a New York City human rights law that prohibits places of public accommodations from discriminating based on sexual orientation and gender identity.

The court did not rule on the merits but instead explained that the university could get relief from the New York state courts. It also left open the possibility that the case could return to the court.

Although the case appeared on the court's docket without full merits briefing, Justice Alito predicted that at least four of the justices would grant certiorari — and rule on the merits for Yeshiva — if the state courts reject Yeshiva's First Amendment arguments. Watch for this case or others that present the same question to land on the court's merits docket in future terms.

10. ***A v. Hochul*** (COVID restrictions)

The court has heard many COVID-related cases — most on its emergency docket — in the last few terms, but it may not have an appetite for more of these cases.

In a 6–3 vote, the court declined to take up a challenge to New York's requirement that health care workers be vaccinated against COVID-19 unless the vaccines would be detrimental to their health. Justice Thomas dissented, saying he would have granted certiorari to resolve the recurring question of whether the mandate violated the free exercise clause by providing a secular exemption without a religious exemption. Justices Alito and Gorsuch joined the dissent.

A group of health care workers had challenged the mandate on free exercise grounds. They argued that the vaccines, which they said were developed using aborted fetal cells, violate their religious beliefs.

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