High Court Ruling Boosts New York Times v. Sullivan Vitality

By **Elizabeth McNamara, John Browning and Raphael Holoszyc-Pimentel** (July 24, 2023)

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The future appears bright — or at least brighter — for the U.S. Supreme Court's seminal 1964 decision New York Times v. Sullivan after six justices endorsed its core principles in the recent Billy Raymond Counterman v. Colorado **decision** involving the First Amendment and "true threats."

Although Justices Clarence Thomas and Neil Gorsuch had questioned Sullivan in prior dissenting opinions and urged the court to revisit its actual malice standard — a standard that has provided important breathing space to publish critical reporting and controversial content for nearly 60 years — Sullivan's outright overruling now seems unlikely.

This is welcome news for media and news organizations and, indeed, anyone who reports, publishes or disseminates speech. But determined opponents may continue to attack Sullivan's actual malice standard and attempt to reduce its protections at the doctrine's margins.

Background

The Counterman case considered the mental state required to establish criminal liability for so-called true threats of violence, a category of speech that the First Amendment does not protect.[1] The case arose from the criminal conviction of Counterman, a Colorado man who had sent hundreds of Facebook messages — many threatening — to a local singer and musician.[2]

Counterman was convicted under a Colorado stalking statute that required the government to show that a reasonable person would have viewed the Facebook messages as threatening, and state courts upheld the conviction on appeal.[3]

The Supreme Court granted review to consider whether the statute's objective reasonable person standard of fault was sufficient to prosecute a true threat, or whether the First Amendment requires a higher showing of the defendant's subjective intent, such as that the defendant purposefully, knowingly or recklessly made the threatening statements.[4]

Vacating and remanding the case, the court held that the First Amendment requires a recklessness standard for true threats prosecutions, and the government "must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence."[5]

Justice Elena Kagan delivered the opinion of the court, joined by Chief Justice John Roberts and Justices Samuel Alito, Brett Kavanaugh and Ketanji Brown Jackson. Justice Sonia Sotomayor wrote a concurrence that Justice Gorsuch partly joined. Only Justices Thomas and Amy Coney Barrett dissented.

Sullivan Takes Center Stage in the Majority Opinion

A case about criminal stalking might seem to have little to do with Sullivan's protections for publishers, but Counterman relied on the seminal decision's core principles to explain why the First Amendment requires a heightened mental state before holding speakers liable for the speech they publish or utter. Specifically, Justice Kagan's majority opinion reaffirmed several key holdings from Sullivan:

- The court reiterated the actual malice standard for defamatory statements: A "public figure cannot recover for the injury 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.'"[6]

- The court also underscored the rationale for the actual malice standard, explaining that the "rule is based on fear of 'self-censorship'—the worry that without such a subjective mental-state requirement, the uncertainties and expense of litigation will deter speakers from making even truthful statements."[7] An objective reasonableness standard, in contrast, "would discourage the 'uninhibited, robust, and wide-open debate that the First Amendment is intended to protect.'"[8]

Counterman also relied on and reaffirmed several important decisions from Sullivan's progeny.

Those include the defamation cases Garrison v. Louisiana in 1964, Gertz v. Robert Welch Inc. in 1974 and Philadelphia Newspapers Inc. v. Hepps in 1986, as well as other First Amendment decisions influenced by Sullivan's reasoning, such as Watts v. U.S. in 1969, Miller v. California in 1973, National Association for the Advancement of Colored People v. Claiborne Hardware Co. in 1982 and U.S. v. Alvarez in 2012.[9]

In an unqualified vindication of Sullivan and the First Amendment's limits on liability for speech, the court repeatedly cited the decision to support extending a similar subjective recklessness standard to true threats.

It did so even though "the protected speech near the borderline of true threats ... is, if anything, further from the First Amendment's central concerns than the chilled speech in Sullivan-type cases (i.e., truthful reputation-damaging statements about public officials and figures)."[10]

Counterman thus stands as a testament not just to Sullivan's specific holdings, but to its broader principle that liability must yield to breathing room for the uninhibited and robust debate that the First Amendment protects.[11]

An Important Concurrence Confirms Sullivan's Standard

Justice Sotomayor would have decided Counterman on the ground that the conduct at issue involved repeated stalking, not pure speech, such that there was no need to reach the true threats doctrine at all.[12]

But since the majority opinion relied heavily on the Sullivan framework, Justice Sotomayor's concurring opinion elaborated on the Sullivan standard and endorsed its continued application.[13]

Importantly, lest there were doubt as to what "recklessness" means under Sullivan, Justice Sotomayor clarified:

> The equivalent to Sullivan for true threats would require a high degree of awareness that a statement was probably threatening or serious doubts as to the threatening nature of the statement.[14]

Justice Sotomayor explained that this approach can "avoid the chilling that would arise from a more amorphous and easily satisfied standard."[15]

Her opinion, together with the five-justice majority, demonstrates that six justices are comfortable relying on Sullivan and its progeny to support bedrock propositions at the heart of First Amendment jurisprudence.

Two Justices, Including a Longtime Sullivan Critic, Dissent

At least two critics of Sullivan remain. Justice Thomas remains a steadfast opponent and, in dissent, wrote "separately to address the majority's surprising and misplaced reliance on New York Times Co. v. Sullivan."[16]

Justice Thomas complained that the majority "prominently and uncritically" extended Sullivan to true threats.[17] Justice Thomas reiterated his criticism that Sullivan "and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law," and urged the court to reconsider this jurisprudence.[18]

Notwithstanding Justice Thomas' assertion that he is "far from alone" in his criticism, no other Justice joined his dissent.[19]

Justice Gorsuch did nothing in Counterman to retreat from his prior skepticism of Sullivan. Though he joined parts of Justice Sotomayor's concurrence, he did not join the section of her opinion discussing and endorsing Sullivan.[20]

Justice Gorsuch thus gave no further indication of his views since his dissent from the 2021 denial of certiorari in Berisha v. Lawson, urging the court to reexamine the actual malice standard.[21]

Finally, Justice Barrett's view of Sullivan remains unclear. Justice Barrett wrote her own dissent in Counterman, joined by Justice Thomas, arguing that prosecutions for true threats can be based on an objective reasonable person standard without offending the First Amendment.[22]

But while Justice Barrett disagreed with extending Sullivan's recklessness standard to true threats, she gave no indication as to whether she would support overruling or limiting Sullivan in a future case.[23]

Takeaways

A significant majority of the court — six justices — signed opinions in Counterman affirming and applying Sullivan's core principles. This suggests that Sullivan's detractors may lack the four votes needed to grant a certiorari petition to reconsider its holding, let alone the five needed to overturn it.

Moreover, the court's reliance on Sullivan, a defamation case, to decide a novel issue concerning true threats affirms its continuing primacy in the field of free speech.

By also citing Sullivan's progeny — both within and beyond the defamation context — the court underscored its essential position within the architecture of First Amendment protections.

The court thus may recognize that reversing Sullivan would not only harm media defendants, but potentially destabilize "the entire body of First Amendment law that it incrementally built upon Sullivan over decades."[24]

But nothing is assured. Justice Thomas' and Justice Gorsuch's skepticism of Sullivan may continue to invite pressure to claw back or diminish its protections. And avenues may remain open to do so.

Opponents of Sullivan may, for instance, seek to limit the class of individuals who qualify as public officials or public figures required to prove actual malice. Challengers may also seek to limit the ability of courts to assess allegations of actual malice on a Rule 12(b)(6) motion to dismiss — which would have the practical effect of driving up the costs of defending against a defamation claim.

Some libel plaintiffs may even cite Justice Kagan's opinion to suggest — incorrectly, as Justice Sotomayor's concurrence clarifies — that Counterman somehow relaxed Sullivan's recklessness standard.

Finally, it is important to emphasize that Counterman is not a defamation case, and it is possible that some of the six justices who backed Sullivan's general principles in Counterman might nonetheless consider loosening the standard of fault for libel claims in certain factual scenarios.

For now, Counterman is a welcome — if unexpected — development for media organizations and others who rely on Sullivan's guarantee of breathing space for free speech.

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[1] Slip op. at 1.

[2] Id. at 1–2.

[3] Id. at 2–3.

[4] Id. at 3–4, 10–11.

[5] Id. at 1.

[6] Slip op. at 7 (quoting Sullivan, 376 U.S. at 280).

[7] Id. at 8 (quoting Sullivan, 376 U.S. at 279).

[8] Id. at 10 (quoting Rogers v. United States, 422 U.S. 35, 48 (1975) (Marshall, J., concurring) (quoting Sullivan, 376 U.S. at 270)).

[9] Slip op. at 5–8, 11–13.

[10] Id. at 12.

[11] Id. at 7 (quoting Alvarez, 567 U.S. at 733 (Breyer, J., concurring in the judgment)).

[12] Slip op. at 3–4 (Sotomayor, J., concurring in part and in the judgment).

[13] Id. at 20–21.

[14] Id. at 21–22 (citing Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 667 (1989)).

[15] Id. at 22.

[16] Slip op. at 1 (Thomas, J., dissenting).

[17] Id. at 2.

[18] Id. at 1–2 (quoting McKee v. Cosby, 139 S. Ct. 675, 676, 682 (2019) (Thomas, J., concurring in denial of certiorari)).

[19] Id.

[20] See slip op. at 1 (Sotomayor, J., concurring in part and in the judgment).

[21] 141 S. Ct. 2424, 2425–30 (2021) (Gorsuch, J., dissenting from denial of certiorari).

[22] Slip op. at 1 (Barrett, J., dissenting).

[23] Id. at 6–7.

[24] Brief in Opposition to Petition for Writ of Certiorari at 10, 18–19 & nn.3, 6, Berisha v. Lawson, 141 S. Ct. 2424 (2021) (No. 20-1063) (citing Gertz, Hepps, and Alvarez, among other cases).