

Westword

Supreme Court Hearing Colorado Social Media Stalking Case April 19

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April 18, 2023

On Wednesday, April 19, the U.S. Supreme Court will take up the [case of 61-year-old Billy Raymond Counterman](#), who was convicted of stalking Colorado singer-songwriter Coles Whalen and making "true threats" against her online. The legal question: Whether six years of "creepy" Facebook messages and sick remarks constitute harassment or qualify as free speech.

Supporters of Counterman's high-court appeal argue that his 2017 stalking conviction — while extremely unsettling from the outside looking in — is much bigger than the actual circumstances and facts surrounding the case, and could ultimately set a "chilling" precedent that, if upheld, would allow thin-skinned politicians to one day weaponize the court's ruling against online critics.

"This case is way bigger than the facts of this case," says Jay Schweikert, a research fellow at the Cato Institute, one of several advocacy groups supporting Counterman and his free-speech argument, including with the American Civil Liberties Union.

"If the court upholds this conviction, it will allow a huge swath of online speech to be potentially criminally prosecuted," Schweikert tells *Westword*. "Can you imagine people arguing with politicians they disagree with on Twitter, the types of comments that they leave...? The point is, if and when some public figure has some other reason to go after someone, this could form the basis for what is, in effect, their threat against a critic. Like, 'Hey, you keep talking to me like that, you could be criminally prosecuted.' So it's really a lot more about the chilling effect this would have on speech, and the ability that public figures — especially political figures — would be able to have to use this sort of implicit or explicit threat of criminal prosecution to shut down their critics."

Whalen and people who support the Counterman conviction, meanwhile, argue that it's grossly negligent for the Supreme Court to even hear such a case after everything Whalen and other stalking victims have gone through — especially since Counterman is no longer behind bars and could keep messaging Whalen with the court's blessing.

"As the Supreme Court weighs this issue, I hope it will consider how dangerous stalking is for victims and their families all over this country," Whalen says in a statement posted on her personal website. "The threat was very real and caused me significant and enduring harm. I am grateful that when I reported these alarming messages, they were taken seriously, and many folks in law enforcement and the criminal justice system did everything they could to protect me."

Whalen, who grew up in Colorado and briefly lived in Nashville before moving back to Denver in 2012, was stalked on Facebook by Counterman from 2010 to 2016. He sent messages such as "Was that you in the white Jeep?" and "Five years on Facebook. Only a couple of physical sightings."

The messages got creepier: "I've had tapped phone lines before. What do you fear?"

Other texts were more menacing. "Your arrogance offends anyone in my position," he said at one point. "You're not being good for human relations. Die. Don't need you."

Counterman's odd and rambling Facebook screeds would often include vague remarks like "I'm currently unsupervised. I know, it freaks me out too, but the possibilities are endless." Regardless of their actual intent or meaning, Whalen says the comments left her scarred.

"The thousands of unstable messages sent to me were life threatening and life altering," Whalen says in her online statement. "I was terrified that I was being followed and could be hurt at any moment; I had no choice but to step back from my dream, a music career that I had worked very hard to build."

Whalen stopped touring as a result of the harassment — a major setback for an artist who had relied on traveling to support herself. Counterman was eventually arrested in Denver in 2016 on two counts of stalking: one for making a credible threat and another for causing serious emotional distress, as well as a harassment charge.

The second stalking charge was dropped before trial, but Counterman was still convicted by an Arapahoe County jury of two Class 5 felonies, one for stalking that caused serious emotional distress and another for harassment. He was sentenced to four and a half years in prison and released in January 2020.

After he appealed his conviction, the Colorado Court of Appeals upheld the state's case against him, determining that his online harassment qualified as "true threats." Colorado law states that threats become illegal when a "reasonable person" suffers "serious emotional distress" as a result of what's being said.

Free-speech supporters argue that it's a slippery slope.

"Just look at the way people discuss politics and other sorts of contentious social issues online — especially when people fiercely disagree and don't really go out of their way to moderate their language," Schweikert says.

"And if the only question is, 'Would a reasonable person interpret this statement as threatening without needing to prove that the statement was a threat?' — imagine the politician that you trust least in the world deciding how uncomfortable they feel with your messages to them on Twitter, and deciding whether to report that to a prosecutor or not. Because that's what's really at stake here: It's whether the government is going to use the criminal law to police standards for online speech."

Counterman was able to challenge his conviction with the help of the Cato Institute, which has contended that his "admittedly abrasive online messages" weren't true threats but rather "obscenity, defamation, and other exceptional categories of unprotected speech."

Although Counterman had a criminal record before his arrest — he was jailed for threatening women in 2002 and again in 2011 — he argues that he didn't intend to commit any of the threats he sent Whalen on Facebook.

The Supreme Court will be tasked with determining whether government prosecutors in similar cases need to prove that a person intended their comments to be threatening in order to charge that individual with stalking. A 2015 ruling by the high court, which involved a [Pennsylvania man issuing threats on Facebook against his ex-wife, co-workers, a kindergarten class, the local police and an FBI agent](#), saw his federal charges and case thrown out following an [8-1 vote](#).

Westword reached out to lawyers for both Counterman and Whalen but did not receive responses.

As disturbing as Counterman's history and messages might be, his claim that they are not true threats is supported by groups such as the Foundation for Individual Rights and Expression (FIRE), and the Reporters Committee for Freedom of the Press, both reputable free-speech advocates.

"True threats,' which are outside the First Amendment's protection, should only be found where there is evidence of the speaker's specific intent to threaten," FIRE says in a statement about the case. "The risk to protected speech — including examples of jokes and political hyperbole that not even a reasonable person would find threatening, at the core of the First Amendment's protections — far outweighs the risk that speakers who actually intend to threaten others will go unpunished."

FIRE, like Schweikert and the Cato Institute, contends that ruling against Counterman would threaten protected speech and prove to be a bigger danger than the risk of letting people who truly intend harm go unpunished. The RCFP agrees, saying Counterman's conviction "violates the First Amendment and threatens important journalism."

But Allyson N. Ho, an attorney from Dallas, turned the free-speech argument on its head in [an amicus brief she filed in March](#), saying: "If anything, Counterman's campaign of terror silenced Cole's own voice as an artist, a musician and a songwriter."

Ho adds, "Nothing can restore Coles to the person she used to be. But this Court can affirm that nothing in the First Amendment requires Counterman's threatening messages to take precedence over Coles' physical safety. Nothing about the rigorous, objective standard applied in this case to convict Counterman poses any danger to free speech."

Colorado's court decision has the support of a couple of dozen attorneys general from across the country who are arguing that states need to be able to protect stalking victims like Whalen.

A bipartisan group of 26 attorneys general [wrote in an amicus brief](#) that the Supreme Court should reject Counterman's argument because "it would jeopardize a host of present-day state laws — both civil and criminal — that safeguard public health and safety."

"Of course, the States also have an interest in free-speech protections. But threats of violence are of 'such slight social value,'" the brief reads, using the phrase "slight social value" from another case that deals with a state's rights to protect its residents. "This Court should decline the petitioner's invitation to upend centuries of state efforts to protect their residents from the undisputed harms that flow from the very utterance of threats of violence."