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"True Threats" and First Amendment Considerations
Recent Supreme Court and Supreme Judicial Court Cases
(Prepared for 2025 MMA Connect 351 Conference)

On December 13, 2024, the Massachusetts Supreme Judicial Court ("SJC") issued a decision in Commonwealth v. Cruz, 495 Mass. 110 (2024) ("Cruz") interpreting and applying the United States Supreme Court's recent opinion in Counterman v. Colorado, 600 U.S. 66 (2023) ("Counterman"). Both cases concern the relationship between the First Amendment and alleged criminal conduct for "true threats"—i.e., speech that, as a general matter, loses constitutional protection and can be limited or subject to potential criminal proceedings because of its potential for harm to another. As public bodies face First Amendment issues whenever the public is allowed to speak at meetings, these recent interpretations of speech constituting "true threats" warrant careful consideration in analyzing the adoption and implementation of content neutral public comment policies.

A long line of case law establishes that the First Amendment does not protect true threats of violence towards another. In Counterman, an individual sent hundreds of messages on social media to a musician, some of which were objectively threatening while others were generally inappropriate. The main issue was whether the defendant could be criminally prosecuted for true threats without a showing that Counterman had "consciously disregarded a substantial risk that his communications would be viewed as threatening." The Supreme Court ultimately concluded that such a showing was required, and remanded the case to the Colorado Appeals Court for further proceedings. Justice Barrett suggests in her dissenting opinion that the Supreme Court's reasoning in Counterman will be applicable to all instances in which a government actor regulates or punishes allegedly threatening speech. She provides two examples of relevance here, expressing her concern that under Counterman, in order to take action to ban a person from a public place after making bomb threats, or expel a child from school for sending vulgar and threatening messages to another, a finding will be required that the speaker was aware of the substantial risk that their speech would be interpreted as threatening real violence.

In Cruz, the defendant sent his former partner objectively threatening texts. Tried at the Superior Court before Counterman was decided, Cruz argued to the SJC that to be prosecuted criminally for threatening to commit a crime against his former partner, the jury needed to find that he intended his statement to be viewed as threatening real violence. The SJC vacated the defendant's conviction and ordered a new trial, as the jury in the lower court was not instructed that "they needed to find beyond a reasonable doubt that he acted with the required mens rea." Of note, the SJC recognized in Cruz as follows:

> The Supreme Court recently concluded, however, that the First Amendment shield[s] some true threats from liability. A true threat may be punished criminally only if the speaker had some subjective understanding of the threatening nature of [the] statements. Specifically, to convict a person for making

> a true threat, the State must prove that the person acted at least recklessly -- that is, the person is aware that others could regard his statements as threatening violence and delivers them anyway.

Thus, although Counterman and Cruz may not be directly applicable in the civil context, following the analysis by Justice Barrett, the holdings may nevertheless be relevant to the assessment by a governmental body or official of whether particular speech constitutes "true threats" under the First Amendment. In the Commonwealth, this suggestion may be particularly relevant due to the SJC holding in Barron v. Kolenda, 491 Mass. 408 (2023). In Barron, the SJC analyzed the application of the Massachusetts Declaration of Rights to a speaker at a meeting of a select board in light of a so-called "civility" public comment policy, a policy limiting critique and rude or disparaging remarks. The SJC concluded that the policy violated Articles 19 and 16 of the Massachusetts Declaration of Rights, observing that "[a]lthough civility can and should be encouraged in political discourse, it cannot be required."

While the Open Meeting Law, G.L. c.30A, §§18-25, does not require public bodies to provide public comment periods during their meetings, some public bodies are required to do so by a charter or special act, while others choose to allow such participation. Some public bodies also allow the public to ask questions and make comments during public body deliberations. In each of these scenarios, consideration needs to be given as to how best to regulate such participation to avoid constitutional concerns.

In conclusion, as both state and federal court cases reaffirm and expand on constitutional protections for speech, public participation at meetings of public bodies will continue to pose a potential risk of liability. Public officials and employees should continue to use restraint when dealing with unpleasant or critical speech, prohibiting or limiting such speech only in the rare event that it is evident that the speaker is aware of the substantial risk that their speech would be interpreted as threatening real violence. Involvement of law enforcement at public meetings to maintain order or otherwise limit the speech of a particular individual, typically used as a last resort, may also lead to challenges in the civil or criminal context. As a best practice, therefore, adoption of a content neutral public participation policy is an important first step in avoiding unnecessary or improper restrictions on speech due to its content. Initial and periodic training of board chairs will assist with implementation of such policies, making it more likely that actions can be avoided that might be perceived as impermissibly content-based restrictions on individuals' speech.

This is an evolving area of law and we will continue to notify you of important developments.

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