NOTES

Viral Verses: Examining Competing First Amendment Rights in *Kennedy v. Warren*

I. OVERVIEW

Massachusetts Senator Elizabeth Warren's response to the COVID-19 pandemic probably saved lives, but it also landed her in legal trouble. In September 2021, Amazon's Chief Executive Officer received a letter from Warren urging the company to modify its algorithms.[1] These algorithms led customers toward the book *The Truth About COVID-19: Exposing the Great Reset, Lockdowns, Vaccine Passports, and the New Normal*.[2] Warren believed the book spread dangerous, false information about the virus and its vaccine.[3] Specifically, she claimed that the book disputed the safety of COVID-19 vaccines and promoted unproven alternative treatments.[4] Warren urged Amazon to stop directing customers to it through the search and "Best Seller" algorithms.[5] Amazon featured the book on its Best Seller list and as the number one best seller in the "Political Freedom" category.[6] Finally, Warren requested that Amazon review its algorithms, provide a public report on the virus misinformation it promotes, and devise a plan to remedy the algorithm.[7] Warren also published the letter on her official website.[8]

1. Kennedy v. Warren, 66 F.4th 1199, 1204 (9th Cir. 2023).
2. *Id.*
3. *Id.* at 1205.
4. *Id.*
5. *Id.* at 1204.
6. *Id.* at 1205.
7. *Id.*
8. *Id.*

Following this letter, the authors and publisher of the book sued Warren, claiming that the letter was an attempt to intimidate Amazon into suppressing the book and, consequently, a violation of their First Amendment Rights.[9] The plaintiffs include coauthors Joseph Mercola and Ronald Cummins, Robert F. Kennedy Jr., who wrote the foreword, and Chelsea Green Publishing Inc.[10] The plaintiffs sought a preliminary injunction ordering Warren to issue a public retraction, remove the letter from her website, and refrain from sending similar letters.[11] The district court denied the motion on the grounds that the plaintiffs did not raise a genuine First Amendment question and the equitable considerations did not favor the plaintiffs. The United States Court of Appeals for the Ninth Circuit *held* that Senator Warren's letter to Amazon was persuasive, not coercive, and did not violate the plaintiffs' First Amendment rights. *Kennedy v. Warren*, 66 F.4th 1199 (9th Cir. 2023).

II. BACKGROUND

The First Amendment protects freedom of speech.[12] Politicians do not lose their First Amendment right to criticize other speakers or create public discourse when selected for office.[13] However, an official's speech becomes concerning when it seems like she is using government power against the speaker to limit his free speech.[14] Courts have distinguished between persuasive and coercive speech to determine if a government official is participating in unlawful censorship.[15] An official's attempt to persuade is acceptable government speech, whereas coercion is considered illegal government censorship.[16]

In *Bantam Books, Inc. v. Sullivan*, the Supreme Court evaluated whether the Rhode Island legislature participated in censorship.[17] The Rhode Island Commission to Encourage Morality, created by the state legislature, worked to educate the public about obscene materials that would corrupt youths.[18] As part of their mission, the Commission sent letters to book and magazine distributors identifying allegedly obscene

9. *Id.*
10. *Id.* at 1199.
11. *Id.* at 1205.
12. U.S. CONST. amend. I.
13. *Kennedy*, 66 F.4th at 1201.
14. *Id.* at 1202.
15. *Id.* at 1207.
16. *Id.*
17. 372 U.S. 58, 59 (1963).
18. *Id.*

publications and requested distributors to stop circulating them.[19] The letters also stated that the Commission sent the local police the list of identified publications and noted that cooperation would eliminate the need to recommend prosecution to the Attorney General.[20] Following the notices, the police visited recipients to inquire about the steps taken to comply with the Commission's request.[21] The Court ruled that the notices' content and police visits constituted informal censorship designed to intimidate the distributors, thus violating their First Amendment rights.[22]

Following the Court's ruling, lower courts have worked to distinguish between persuasive and coercive government speech.[23] The Ninth Circuit has frequently dealt with evaluating a politician's speech when she is criticizing an intermediary for distributing another party's speech.[24] For instance, in 1987, the Ninth Circuit held that a deputy county attorney's threats to prosecute a telephone company unless it stopped carrying a third party's erotic message service was a violation of the First Amendment.[25] The Ninth Circuit was confronted again with a government speech issue in the 2002 case *American Family Association, Inc. v. City & County of San Francisco*.[26] American Family accused San Francisco officials of violating the First Amendment, as the politicians criticized the organization's anti-gay advertisements and urged channels to stop broadcasting the messages.[27] The Ninth Circuit concluded that the speech was not a Constitutional violation, as public officials can criticize practices they have no "[c]onstitutional ability to regulate, so long as there is no actual or threatened imposition of government power or sanction."[28]

In *National Rifle Association of America v. Vullo*, the Second Circuit created a four-factor framework to evaluate the constitutionality of a government official's persuasive speech.[29] These non-dispositive factors assess (1) the individual's word choice and tone, (2) whether the official has regulatory authority over the behavior on which she is commenting,

19. *Id.* at 61.
20. *Id.* at 62-63.
21. *Id.* at 63.
22. *Id.* at 71-72.
23. Kennedy v. Warren, 66 F.4th 1199, 1207 (9th Cir. 2023).
24. *Id.*
25. Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1296 (9th Cir. 1987).
26. 277 F.3d 1114, 1118 (9th Cir. 2002).
27. *Id.* at 1119.
28. *Id.* at 1125.
29. 49 F.4th 700, 715 (2d Cir. 2022).

(3) whether the recipient believed the message to be a threat, and (4) whether the communication references adverse consequences associated with not complying.[30]

Maria Vullo, the Superintendent of the New York State Department of Financial Services, investigated insurance agencies that provided coverage to the National Rifle Association (NRA).[31] Vullo then encouraged the businesses to end their partnerships with gun promotion organizations, and the NRA claimed that she used her regulatory power to threaten and coerce the insurance agencies.[32] Using the framework, the court held that Vullo participated in permissible government speech.[33] Although she had regulatory authority over the agencies, the tone of the message was not threatening and never alluded to adverse government action if the businesses failed to comply.[34] Because Vullo's speech was not coercive, the Second Circuit held that the NRA failed to plausibly allege that the communications violated the First Amendment.[35] The Ninth Circuit applied the Second Circuit's four-factor framework and its own case law to evaluate Senator Warren's letter.[36]

To obtain a preliminary injunction, a plaintiff has to prove that she is likely to succeed on the merits of her claim, likely to suffer irreparable harm without the relief, the balance of equities favors her, and the injunction aligns with the public interest.[37] Alternatively, the plaintiff can satisfy the first element by showing that the balance of hardship is in her favor and raises serious questions on the merits.[38] In a First Amendment case, the court will grant the plaintiff standing if she shows that an injunction could prevent the alleged disparagement.[39]

III. COURT'S DECISION

In the noted case, the Ninth Circuit found that Senator Warren's letter to Amazon was permissive government speech that did not violate the First Amendment.[40] The court reached its decision by applying the four-factor framework from *National Rifle Association of America v.*

30. *Id.*
31. *Id.* at 706.
32. *Id.*
33. *Id.* at 718.
34. *Id.* at 717.
35. *Id.* at 718.
36. Kennedy v. Warren, 66 F.4th 1199, 1201 (9th Cir. 2023).
37. Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008).
38. All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-32 (9th Cir. 2011).
39. Meese v. Keene, 481 U.S. 465, 472 (1987).
40. *Kennedy*, 66 F.4th at 1204.

Vullo.[41] First, the court concluded that although the letter was strongly worded, its overall tone did not imply coercion.[42] Second, an official acting alone with no regulatory authority over Amazon in this realm does not constitute a genuine threat.[43] Third, Amazon's minimal reaction to the letter demonstrates that the company likely perceived it as persuasive.[44] Fourth, because the letter did not address adverse consequences for non-compliance, it was not unduly coercive.[45] Accordingly, the Ninth Circuit affirmed the district court's denial of the plaintiffs' request for a preliminary injunction.[46]

The court first determined whether the plaintiffs had standing to bring this suit against Warren.[47] The plaintiffs claimed that Warren's letter caused injuries related to distributors suppressing the book, had a chilling effect on their speech, and caused reputational harm.[48] The court noted that reputational harm resulting from a government action is a sufficient injury to establish standing.[49] Warren's letter claimed that the book "perpetuates dangerous falsehoods that have led to countless deaths" and directly questioned Dr. Mercola's professional integrity.[50] Accordingly, the court determined that the plaintiffs met their burden of establishing a reputational injury that a preliminary injunction could remedy.[51] The court noted that causing injury to one's reputation does not prohibit officials from engaging in contentious political debate but does establish standing in this case.[52]

Next, the court concluded that the plaintiffs were not entitled to a preliminary injunction because they did not raise a legitimate question on the merits of their First Amendment claim.[53] Specifically, the claim that Warren's attempted to coerce Amazon into limiting the plaintiffs' speech, thus violating *Bantam Books*, was not legitimate.[54] The court applied the

41. *Id.* at 1207 (citing Nat'l Rifle Ass'n of Am. v. Vullo, 49 F.4th 700, 715 (2d Cir. 2022).
42. *Id.* at 1209-10.
43. *Id.* at 1210.
44. *Id.*
45. *Id.* at 1211.
46. *Id.* at 1204.
47. *Id.* at 1205.
48. *Id.* at 1205-06.
49. *Id.* at 1206.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 1206-07.
54. *Id.*

Second Circuit's four-factor framework from *Vullo* to reach its conclusion.[55]

Using this framework, the court first evaluated the nature of Warren's word choice and tone.[56] Warren described Amazon's book promotion as an "unethical, unacceptable, and potentially unlawful course of action from one of the nation's largest retailers."[57] The court acknowledged that although her letter used strong language, government officials are allowed to express their beliefs and garner support from citizens.[58] The court referenced its holding in *American Family*, where it concluded that politicians may criticize speakers and platforms that promote those messages, like Amazon.[59] Additionally, the court noted that Warren's letter did not directly suggest that Amazon's failure to comply would result in government sanction.[60]

The plaintiffs argued that the letter's reference to Amazon's "potentially unlawful" behavior made the letter coercive instead of persuasive.[61] Months before the letter in question, Warren wrote to Amazon to critique the company for promoting non-FDA approved face coverings.[62] Using the context of the earlier letter, the court concluded that the reference to illegality was more related to Amazon's selling unauthorized KN95 face masks than its promotion of the book.[63] The court highlighted that even if the phrase was about the book's promotion, an official's opinion or reference to potential legal liability is not necessarily coercion.[64] The court held that there is only a First Amendment issue when an official implies that she will use her governmental coercive power to ensure compliance.[65] Finally, the court concluded that Amazon and Warren's actions after the letter prove that it was not threatening.[66] Warren did not follow up on her communication,

55. *Id.*
56. *Id.*
57. Letter from Sen. Elizabeth Warren to Amazon on COVID Misinformation (Sept. 7, 2021), https://www.warren.senate.gov/imo/media/doc/2021.9.7%20Letter%20to%20Amazon%20on%20COVID%20Misinformation.pdf [https://perma.cc/T22X-K6TG].
58. *Kennedy*, 66 F.4th at 1208.
59. *Id.*
60. *Id.*
61. *Id.*
62. Letter from Sen. Elizabeth Warren to Amazon on COVID Misinformation, *supra* note 57.
63. *Kennedy*, 66 F.4th at 1208-09.
64. *Id.* at 1209.
65. *Id.*
66. *Id.*

and Amazon continued to sell the book—therefore, the letter was just an effort to persuade.[67]

Next, the court evaluated whether Warren had regulatory authority over Amazon.[68] It noted that lacking authority is not dispositive but assists in evaluating the nature of the message.[69] The court said that because Warren had no unilateral power to punish Amazon, it was a reasonable assumption that her letter relied on persuasive authority instead of governmental authority.[70] The court also rejected the plaintiffs' argument that Warren's record of targeting Amazon distinguishes her from an average Senator.[71] It concluded that her acts as a member of the Senate Finance Committee were not relevant to an ability to penalize Amazon for allegedly spreading misinformation about COVID-19.[72] A letter from a Senator, acting alone and without any legislative support, is not an instance of unconstitutional, coercive government power.[73]

The court then evaluated Amazon's perception of the letter, as the recipient's reaction to the message helps determine whether it was coercion.[74] However, a communication can still be a First Amendment violation even if the recipient does not act and the speaker abandons her efforts.[75] Here, Amazon did not change its algorithms despite Warren's request.[76] Although the company notified plaintiff Chelsea Green Publishing that it would not advertise the book, there was no evidence that it was being advertised before Warren's message.[77] The court believed the refusal to advertise was in response to general concerns about COVID-19 misinformation rather than a reaction to the letter.[78] Furthermore, even if the letter prompted the decision, it was likely motivated by Amazon's fear of public criticism.[79] The plaintiffs also raised concerns that Warren's posting the letter on her website caused Barnes & Noble, a leading bookseller, to remove the book from its online

67. *Id.*
68. *Id.* at 1210.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*; Rattner v. Netburn, 930 F.2d 204, 210 (2d Cir. 1991).
75. *Kennedy*, 66 F.4th at 1210.
76. *Id.* at 1211.
77. *Id.*
78. *Id.*
79. *Id.*

retail site.[80] The court maintained that this removal did not indicate coercion but that the letter likely prompted Barnes & Noble to reevaluate its policies out of persuasion or fear of public backlash.[81] Both explanations for the bookseller's removing *The Truth About COVID-19* from the website align with a government official's ability to spark public discourse and further her policy goals.[82] Overall, Amazon's lack of response to the letter implies persuasion rather than coercion.[83]

Finally, the court turned to the fourth prong of the Second Circuit's framework—whether the author referenced adverse consequences for not complying with the message's request.[84] Warren's letter did not mention adverse consequences, thus supporting her intent to mobilize the public and pressure Amazon rather than threaten the company.[85] The court conceded that threats can take a silent nature and do not have to be explicit.[86] Nevertheless, the letter lacked both silent and explicit threats.[87] The plaintiffs argued that Amazon could interpret Warren's language about the dangers of COVID-19 misinformation as implying charges for accomplice to homicide.[88] The lower court and the Ninth Circuit concluded that this theory required a "vivid imagination" and was an unreasonable interpretation.[89] Furthermore, Warren never linked the reference to potentially illegal behavior to the fatal consequences of COVID-19 misinformation.[90] The court noted that although the letter has to be evaluated holistically, construing unrelated segments as a threat is an inaccurate interpretation of the letter.[91] Warren's letter lacked explicit and implicit threats, thus supporting the conclusion that it served a persuasive purpose.[92]

The court concluded that the plaintiffs failed to raise a serious question about Senator Warren's letter violating the plaintiffs' First Amendment rights.[93] Accordingly, the court held that the district court did

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*; Nat'l Rifle Ass'n of Am. v. Vullo, 49 F.4th 700, 715 (2d Cir. 2022).
85. *Kennedy*, 66 F.4th at 1211.
86. *Id.*
87. *Id.* at 1212.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*

not abuse its discretion in denying the request for a preliminary injunction.[94]

Circuit Judge Bennett concurred.[95] He noted that the majority was erroneous to conclude that the plaintiffs failed to raise a serious question going to the merits of their claim.[96] Judge Bennett stated that a reasonable person could interpret some aspects of Warren's letter as coercive.[97] He highlighted that the phrase "potentially unlawful" is vague, Warren could have used her government connections and legislative power to target Amazon, and the request for an immediate response could all be construed as coercive by a reasonable reader.[98] Accordingly, he concluded that the plaintiffs did raise legitimate questions but agreed with the majority that these concerns did not meet the standard required for a preliminary injunction.[99]

IV. ANALYSIS

The court's analysis creates a much more liberal interpretation of persuasion in determining whether a government official's speech is unduly coercive. In *Bantam Books*, the basis of this court's decision, the Supreme Court noted that government officials are not allowed to work to achieve a book's suppression.[100] However, Senator Warren did precisely that.[101] She wrote to Amazon, the biggest bookseller in the world, and encouraged them to stop promoting the book.[102] Although not requesting the book be taken off the shelves entirely, strongly encouraging a seller to take it off the "Best Sellers" list when it rightfully earned a spot leans more toward coercion than persuasion.[103] The court's loose interpretation of persuasion establishes a standard that may allow government officials to pen and disseminate content that infringes on First Amendment rights.

Although Amazon did not react to Warren's communication, other booksellers' actions following the letter's publication show that it

94. *Id.*
95. *Id.*
96. *Id.* at 1213.
97. *Id.*
98. *Id.*
99. *Id.* at 1214.
100. 372 U.S. 58 at 72.
101. *Kennedy*, 66 F.4th at 1212.
102. *Id.* at 1204.
103. *Id.*

significantly impacted the book's availability.[104] The court fails to address the gravity of the letter's ripple effect. The day after Warren posted the letter to her website, Barnes & Noble removed the book from its online store.[105] Additionally, independent bookstores across the country stopped selling the book.[106] Warren's letter was not a meaningless note that Amazon ignored; it had real consequences for the plaintiffs' sales and a consumer's ability to acquire the book.[107] Regardless of whether the sellers' choices resulted from being inspired by Warren or fearful of implied repercussions, the letter significantly impacted the book's retail presence. Rather than rejecting it over the course of a few sentences, the court should have analyzed the plaintiffs' argument about other booksellers more thoroughly.[108]

Additionally, the court should have acknowledged the effect of allowing a United States Senator to employ such strong persuasion methods. The court primarily rests its decision on cases where the questioned government official did not have as much of a wide-reaching impact as Senator Warren.[109] In *Bantam Books*, the Rhode Island legislature used informal censorship to violate the First Amendment.[110] In *Carlin*, the deputy county attorney of Maricopa County, Arizona, was the government official in question.[111] In *American Family*, the criticized communications were advertisements around the San Francisco area.[112] Here, Warren is a federal official.[113] Not only is she a Senator, but a very high-profile one who was considered a front-runner in the Democratic primary for the 2020 presidential election.[114] Her actions and influence stretch across the country, not just a state or city. Although there is no binding case law involving an official of Warren's status to use for guidance, it is still a relevant factor in understanding the full extent of her influence. The court came to its conclusion by looking at the "totality of

104. Appellants' Opening Brief at 6, Kennedy v. Warren, 66 F.4th 1199 (9th Cir. 2023) (No. 22-35457).

105. *Id.* at 2.

106. *Id.* at 7.

107. *Id.*

108. *Kennedy*, 66 F.4th at 1211.

109. *Id.* at 1207.

110. 372 U.S. 58 at 59.

111. 827 F.2d at 1296.

112. 277 F.3d 1114 at 1119.

113. *Kennedy*, 66 F.4th at 1204.

114. Quint Forgey, *Warren Passes Biden in New Nationwide Poll*, POLITICO (Aug. 25, 2019, 7:24 AM), https://www.politico.com/story/2019/09/25/warren-beats-biden-national-poll-1510726.

the circumstances," yet the actual totality of the circumstances would likely include the weight of Warren's influence.[115]

This decision also perpetuates a concerning pattern of neglect in relation to "jawboning" in the digital age.[116] In this context, jawboning relates to government officials pressuring private platforms to promote or remove certain speech.[117] With the rise of social media, individuals now have access to hundreds of platforms to promote their messages.[118] Accordingly, government officials have targeted these intermediaries, urging them to take down content with which the politician disagrees.[119] These communications range in severity from Senator John Thune's request that Facebook answer questions about alleged political manipulation to Senator Ted Cruz's threatening Facebook, Google, and Twitter with antitrust and fraud violations for allegedly targeting conservative speech.[120] Government officials have even emphasized the dangers of unchecked jawboning as it relates to free speech.[121]

Despite the prevalence of jawboning and related concerns, courts have made it difficult for plaintiffs to win a government speech case.[122] In *R.C. Maxwell Co. v. New Hope*, the Third Circuit ruled in favor of the

115. *Kennedy*, 66 F.4th at 1214.

116. Nicole Saad Bembridge, *Ninth Circuit Sets a High Bar for First Amendment "Jawboning" Plaintiffs to Succeed in Kennedy v. Warren*, NETCHOICE (May 8, 2023), https://netchoice.org/ninth-circuit-sets-a-high-bar-for-first-amendment-jawboning-plaintiffs-to-succeed-in-kennedy-v-warren/ [https://perma.cc/GT7G-JY55].

117. *Id.*

118. Nicole Saad Bembridge, *Ninth Circuit Gets It Right in Government "Jawboning" Lawsuit, O'Handley v. Weber & Twitter*, NETCHOICE (Mar. 15, 2023), https://netchoice.org/ninth-circuit-gets-it-right-in-government-jawboning-lawsuit-ohandley-v-weber-twitter/ [https://perma.cc/2XFM-FBBQ].

119. *Id.*

120. Press Release, U.S. Senate Committee on Commerce, Science, & Transportation, Thune Seeks Answers from Facebook on Political Manipulation Allegations (May 10, 2016), https://www.commerce.senate.gov/2016/5/thune-seeks-answers-from-facebook-on-political-manipulation-allegations [https://perma.cc/3YUK-BWET]; Jessica Guynn, *Ted Cruz Threatens to Regulate Facebook, Google, and Twitter over Charges of Anti-conservative Bias*, USA TODAY (Apr. 10, 2019, 3:41 PM), https://www.usatoday.com/story/news/2019/04/10/ted-cruz-threatens-regulate-facebook-twitter-over-alleged-bias/3423095002/ [https://perma.cc/58XH-LCEW].

121. John Hendel, *Senate Democrat to Accuse Republicans of 'Bullying' Tech CEOs to Help Trump*, POLITICO (Oct. 28, 2020, 9:37 AM), https://www.politico.com/news/2020/10/28/schatz-republicans-bullying-tech-433199; Press Release, Senator Richard Blumenthal, Blumenthal Slams Republican Efforts to "Bully & Browbeat" Social Media Platforms Ahead of November Election (Oct. 28, 2020), https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-slams-republican-efforts-to-bully-and-browbeat-social-media-platforms-ahead-of-november-election [https://perma.cc/YV2R-8HYP].

122. Bembridge, *supra* note 116.

Borough Council of New Hope because it "could brandish nothing more serious than civil or administrative proceedings under a zoning ordinance not yet drafted."[123] In *VDARE Found v. City of Colorado Springs*, the Tenth Circuit also ruled in favor of the government, concluding that the City's statement did not contain plausible threats.[124] Most recently, in *Changizi v. HHS,* the Sixth Circuit held that the plaintiffs' First Amendment claim failed because they did not show that the executive branch's actions had a coercive effect on the intermediary.[125]

The aforementioned cases and this decision make it difficult for plaintiffs to win a case unless the official clearly references her government authority and has the power to take action against the speaker.[126] Courts have consistently applied the First Amendment to protect new forms of speech as they develop, yet the rise in government jawboning is left unchecked.[127] As the Supreme Court said — "the basic principles of freedom of speech do not vary with a new and different communication medium."[128]

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123. R.C. Maxwell Co. v. Borough of New Hope, 735 F.2d 85, 88 (3d Cir. 1984).
124. 11 F.4th 1151, 1164 (10th Cir. 2021).
125. 82 F.4th 492, 496 (6th Cir. 2023).
126. Bembridge, *supra* note 116.
127. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 786 (2011).
128. *Id.*

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