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The Intersection of Speech and Expressive Conduct in the First Amendment

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The Intersection of Speech and Expressive Conduct in the First Amendment

June 17, 2026

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The Reach of the First Amendment

Reach of the First Amendment

The reach of the First Amendment is a continuing controversy:

1. Freedom of Speech is not absolute.
2. Issues:
   - 2.1 Conduct that is not speech
   - 2.2 Forum
   - 2.3 Defamation

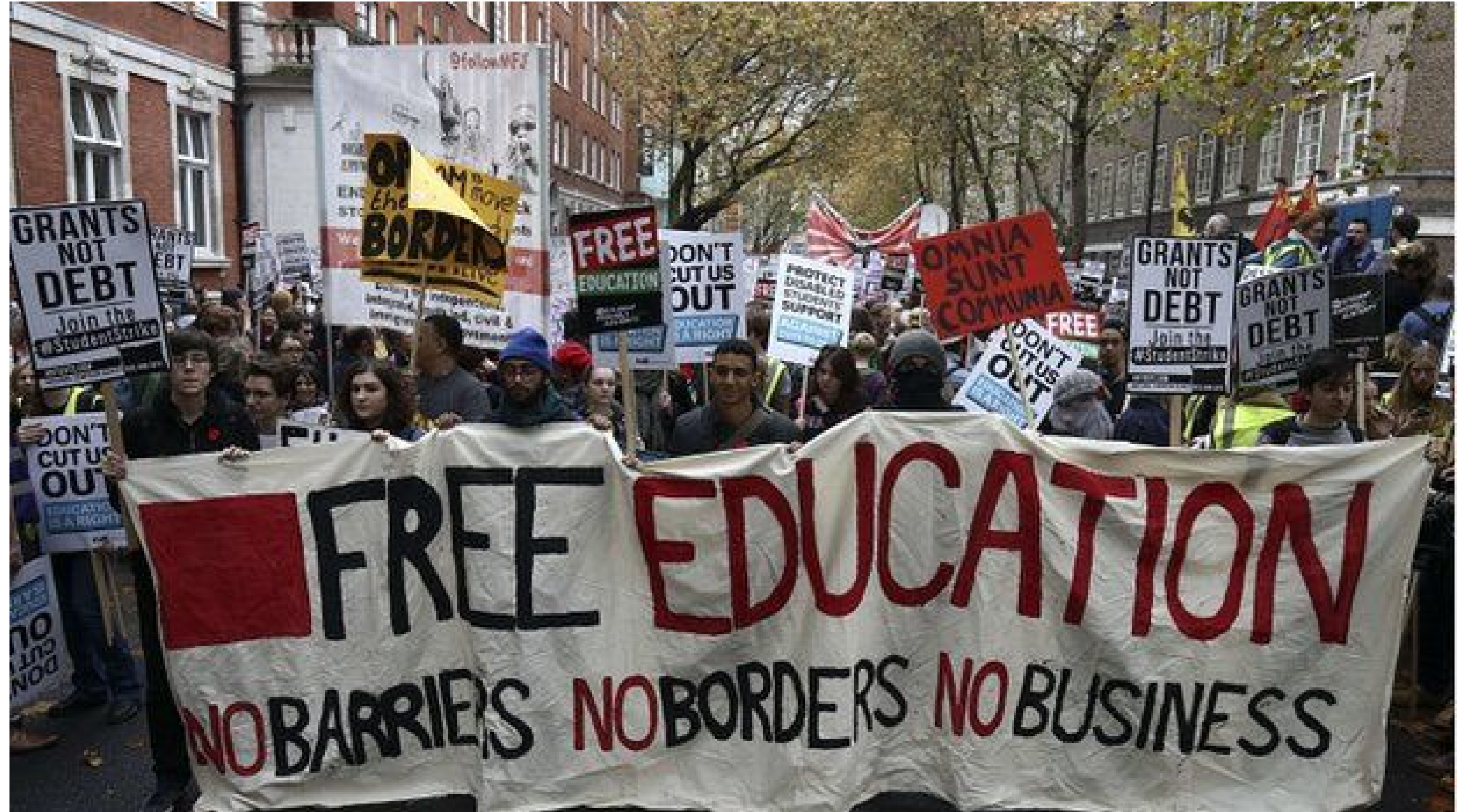
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)

- First Amendment protections are binding on the states by the 14th Amendment.
- The First Amendment forbade a school district from punishing a student for wearing an arm band as part of an anti-war protest.
- Caveat: Unless school district could show that the expressive conduct would substantially interfere with school discipline or the rights of others.

Brandenburg v. Ohio, 395 U.S. 444 (1969)

Government cannot punish speech unless the speech is utilized to incite or produce imminent lawless action.

And is likely to produce such a result.



United States v. Eichman 469 U.S. 310 (1990)

- Flag burning in violation of Flag Protection Act of 1989.
- Government’s interest in preserving the flag’s function as an incident of sovereignty could not justify the Act’s infringement on the constitutional right of free speech by suppressing expression out of concern for its likely communicative impact.

R.A.V. v. St. Paul 505 U.S. 377 (1992)

- Petitioner charged with violating St. Paul Bias-Motivated Crime Ordinance for burning a cross in the yard of an African American family.
- Ordinance prohibited display of a symbol which a person knows or has reason to know arouses anger, alarm, or resentment on the basis of race, color, creed, religion, or gender.

R.A.V. v. St. Paul
505 U.S. 377 (1992)

- Even if the expression reached by the ordinance was proscribed under the "Fighting Words" Doctrine, the ordinance was facially unconstitutional because it prohibited otherwise permitted speech solely on the basis of the subjects the speech addressed.
- While the statute served a compelling interest, there were content-neutral alternatives available.
- Court reversed and struck down the bias-motivated crime ordinance as facially unconstitutional.

Madsen v. Women's Health Center
512 U.S. 753 (1994)

- Anti-abortion protestors challenged the constitutionality of an injunction entered by a Florida State Court which prohibited them from demonstrating in certain places and in various ways outside of a health clinic that performed abortions.
- Court upheld noise restrictions and buffer zone around clinic entrances and driveway because they did not burden speech more than necessary to eliminate unlawful conduct.

Madsen v. Women's Health Center
512 U.S. 753 (1994)

- Court struck down as unconstitutional buffer zone as applied to private property to the north and west of the clinic, the images observable provision, the no-approach zone around the clinic, and a larger buffer zone around the residences.
- The provision swept more broadly than necessary to accomplish the permissible goal of the injunction.

Schneck v. Pro-Choice Network of W.M.Y. 519 U.S. 357 (1994)

- Court upheld injunction imposing “fixed buffer zone” prohibiting demonstration within so many feet of doorways, parking lot entrances, driveways, etc.
- Court invalided provision creating “floating buffer zones” which banned demonstrations within 15 feet of any person or vehicle seeking access or to leave the clinic because the restriction on free speech was more than was necessary to serve the relevant government interest.
- Court upheld the cease-and-desist provision that required counselors within the fixed zones to retreat 15 feet from any person who indicated the desire not to be counseled because the restriction was not a content-based speech restriction contrary to the First Amendment.

Virginia v. Black
538 U.S. 343 (2003)

- State law forbade cross burnings within intent to intimidate.
- Prohibition of cross burning with intent to intimidate was not unconstitutional since it banned conduct rather than expression.
- Cross burning could constitute expression, and it was proscribed unless it was done with intent to intimidate, and targeting cross-burning was reasonable because the cross was historically a particular virulent form of intimidation.
- Plurality of Supreme Court asserted that statutory provision that any cross burning was *prima facie* evident of intent to discriminate by itself could support a conviction without further evidence of intent would be an unconstitutional restraint on speech.

United States v. Williams 553 U.S. 285 (2008)

- Criminal statute outlawing offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment.

Brown v. Entm't Marchs Association 564 U.S. 786 (2011)

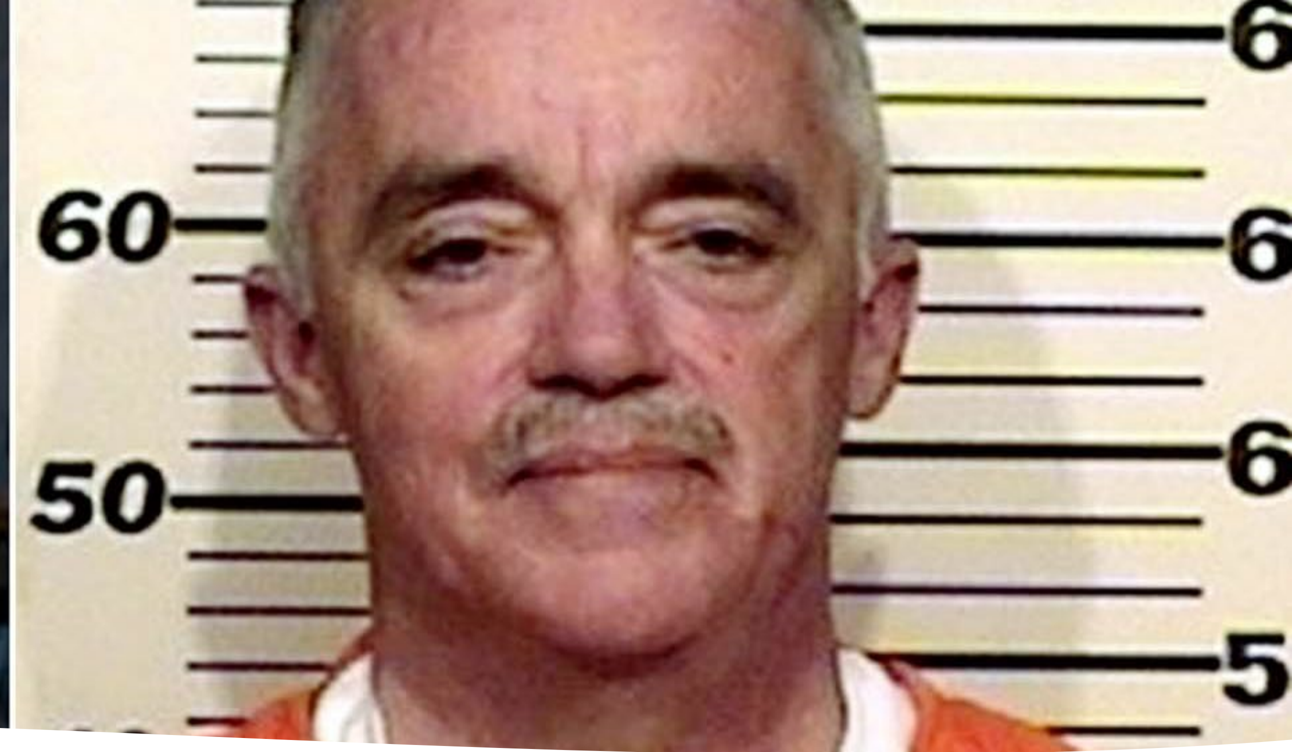
- State of California passed a law prohibiting sale or rental of violent videogames to minors.
- The statute violated the First Amendment.
- Videogames were a protected means of expression of the First Amendment.
- The First Amendment protections found the law both underinclusive and overinclusive.

Brown v. Entm’t Marchs Association 564 U.S. 786 (2011)

- It was underinclusive because it did not provide minors from having access to information about violence in other forms, only in videogames.
- It was overinclusive because it abridged the First Amendment rights of young people whose parents and others thought the violent videogames were a harmless pastime.
- Did not survive strict scrutiny analysis.

Snyder v. Phelps
562 U.S. 443 (2011)

- Petitioner, father of a Marine, who was killed in the line of duty won a jury verdict from defendant protestors who picketed for 30 minutes before the funeral began on public land 1,000 feet from the church where the funeral was held.
- The protestors had a right to be where they were.
- Local authorities had been alerted to the funeral protest and the protestors complied with police guidance on picketing.
- Picketing was conducted under police supervision 1,000 feet from the church out of sight of those at the church.
- Protest was not unruly; no shouting, profanity, or violence.



Counterman v. Colorado 600 U.S. 66 (2023)

- True threats of violence are outside the bounds of the First Amendment protection.
- The First Amendment still requires proof that defendant had some subjective understanding of the threatening nature of the statements.
- A mental state of recklessness is sufficient because it offers enough breathing space for protected speech.
- Threatening messaging; stalking by communication.

Counterman v. Colorado *600 U.S. 66 (2023)*

- State must show that defendant consciously disregarded a substantial risk that his communication would be viewed as threatening violence.
- Petitioner's prosecution in accordance with an objective standard was a violation of the First Amendment. The state had to show only that a reasonable person would understand the statements as threats, and they did not have to show any awareness on his part that the statements could be understood that way.

NRA of America v. Vullo
602 U.S. 175 (2024)

- Opinion of the court delivered by Justice Sotomayor for a unanimous court.
- Government entity’s threat of invoking legal sanctions and other means of coercion against a third party to achieve the suppression of disfavored speech violates the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).
- In *NRA of Am. v. Vullo*, superintendent of New York Department of Financial Services, Vullo, allegedly pressured regulated entities (insurance companies) to help her stifle the NRAs pro-gun advocacy by threatening enforcement actions against those entities that refused to disassociate from the NRA and other gun-promotion advocacy groups.

NRA of America v. Vullo
602 U.S. 175 (2024)

- At this point, the court was only at the pleading stage. Major businesses, including regulated entities, spoke out against the NRA and even cut some tie to the organization after a gun shooting murdering 17 students and staff members.
- The State of New York, through its insurance licensing bureau, issued Guidance Letters and Governor Cuomo issued a joint release with Vullo urging all insurance companies and banks doing business in New York to join those that had already discontinued their arrangements with NRA.

NRA of America v. Vullo
602 U.S. 175 (2024)

- The court reaffirmed that the government violates free speech through coercion of a third party.
- A plaintiff must plausibly allege conduct that, viewed in context, could reasonably be understood to convey a threat of adverse government action in order to punish or suppress plaintiff's speech.
- According to the well-pled factual allegations, the NRA plausibly alleged that Vullo violated the First Amendment by coercing DFS-regulated entities into disassociating with the NRA in order to punish or suppress the NRA's gun-promotion advocacy.

Oberholzer v. Galapo
322 A.3d 153 (Pa. 2024)

Majority opinion joined by Chief Justice Todd and Justices Donohue and Mundy. Justice Brobson and Justice Wecht filed dissenting opinions.

At issue:

> Whether signs decrying hatred and racism placed by a Jewish family on their own lawn after a neighbor called one of the family members a "fucking Jew," was properly enjoined by trial court.
>
> Free speech found in Article I, Section 7 of the Pennsylvania Constitution. The Court found that the injunction entered by the trial court violated free speech.
>
> The neighbors had a right to put up the signs.

Oberholzer v. Galapo 322 A.3d 153 (Pa. 2024)

The Galapos erected many signs displaying anti-hate messages along the back tree line abutting the Oberholzers' property line, pointing directly at the Oberholzers' house and in direct sight of other neighbors' houses. 23 signs were posted.

Oberholzer v. Galapo
322 A.3d 153 (Pa. 2024)

- Lower court granted an injunction against posting of the signs, based on private nuisance, intrusion upon seclusion, defamation, false light, and infliction of emotional distress.
- Majority of the Court concluded that the trial court wrongly applied the time, place, and manner test when it should have applied the heightened, more rigorous standard when tailoring its injunction.
- Court said the challenged provisions of the injunction cannot burden speech more than necessary to serve a significant government interest.

Oberholzer v. Galapo
322 A.3d 153 (Pa. 2024)

The Court's reasoning:

- The Galapo's signs are stationed exclusively on their own property and lack any coercive or threatening element towards the Oberholzers, nor do they have excessive illumination or noise associated with them.
- All homeowners at one point are forced to gaze upon signs they do not like on their neighbor's property, whether it be about a political candidate, advocating for a cause, or the expression of support or disagreement with some issue.

Oberholzer v. Galapo
322 A.3d 153 (Pa. 2024)

- As the dissent hinted at, the door can swing both ways on First Amendment issues.
- Justice Brobson indicated that he believed the Court could enjoin residential speech that rises to the level of private nuisance and disrupts the quiet enjoyment of a neighbor's home.
- An important aspect of "residential privacy" is the protection of the "unwilling listener."
- Individuals are not required to welcome unwanted speech into their own homes.

Oberholzer v. Galapo
322 A.3d 153 (Pa. 2024)

- Justice Wecht explored the history of the rule that equity lacks the power to enjoin defamatory matter.
- It was Justice Wecht’s view that the injunction in the case was not a prior restraint and did not violate the no-injunction rule.
- The injunction in this case was content neutral and the injunction was not content based.
- The speech is “tortious.”

Lindke v. Freed
601 U.S. 187(2024)

- James Freed maintained a Facebook account
- Freed deleted comments and blocked those who made them.
- Kevin Lindke sued Freed for violating his right to free speech.
- Freed is not only a private citizen, but also city manager of Port Huron, Michigan.
- Freed insists that his Facebook account was strictly personal.
- Lindke argued that Freed acted in his official capacity when he silenced Lindke's speech.

Lindke v. Freed
601 U.S. 187 (2024)

- Speech is attributable to the state only if the official: (1) possessed actual authority to speak on the state's behalf, and (2) purported to exercise an authority when he spoke on social media.
- Lindke must show more than that Freed had some authority to communicate with the residents on behalf of Port Huron.
- Alleged censorship must be connected to speech on a matter within Freed's bailiwick.

Falcone v. Dickstein
92 F.4th 193 (3d Cir. 2024)

- Whether masking policy implicates First Amendment.
- School district measures require those who spoke at school board to wear masks.
- Policy of the school district was not subject to debate or policy change but to a summons and an arrest.
- It was claimed that the summons and arrest were retaliation for exercising First Amendment rights.
- Circuit Court reversed and remanded the court's order against George Falcone and affirmed the court's order against Gwyneth Murray-Nolan.
- There is a right to symbolically protest and not be punished for it by not wearing a mask.
- There is no First Amendment right to refuse to wear a mask as required by valid health and safety orders put in place during a recognized public health emergency.

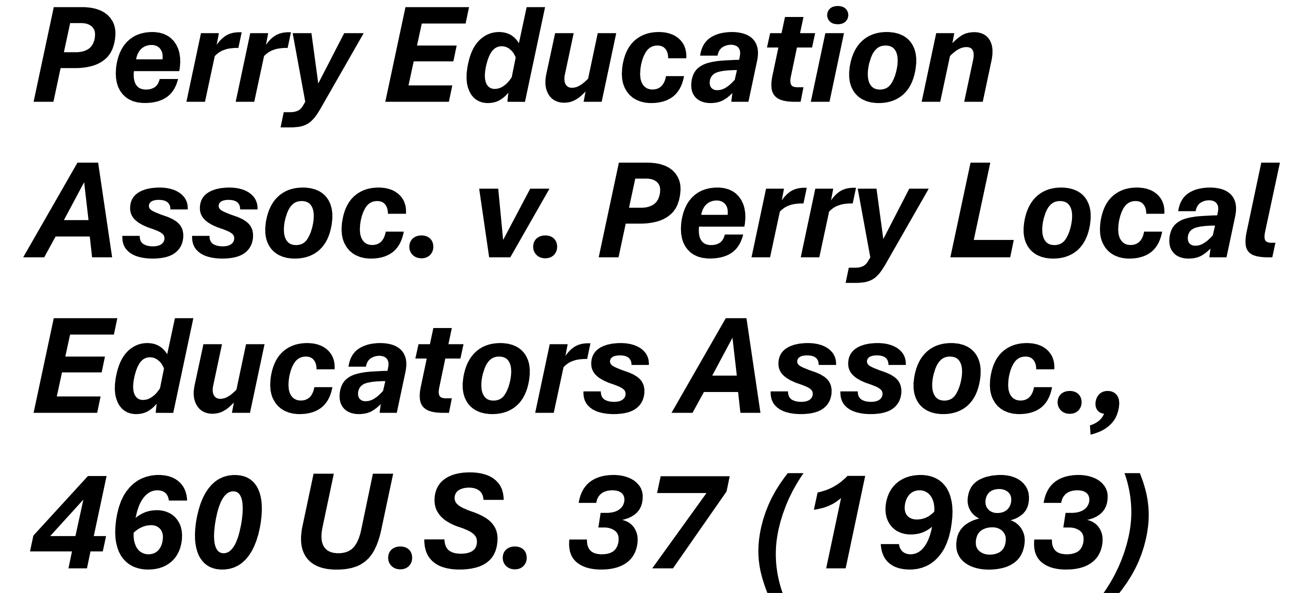
First Choice Women's Res. Ctrs, Inc. v. Davenport
608 U.S. __, U.S. LEXIS 1949 (April 29, 2026)

- New Jersey Attorney General service subpoena on non-profit organization demanding identities of financial supporters.
- This is not permitted; it is a violation of the First Amendment, and the subpoenas were quashed.
- This was a unanimous Court opinion.

Public Forum

Adderley v. Florida, 385 U.S. 39 (1966)

- Buildings and grounds of jail facilities are non-public forum.
- Therefore, policy forbidding protests on the grounds of the jail is constitutional.



Perry Education Assoc. v. Perry Local Educators Assoc., 460 U.S. 37 (1983)

The mail system of a public school district is a non-public forum.

Cornelius v. NAACP Legal Defense and Ed. Fund, 473 U.S. 788 (1985)

The Combined Federal Campaign and US Government office spaces are non-public forum.

To restrict access in a non-public forum, the government need only show that the restriction is reasonable in light of the purpose of the forum.

And the totality of the circumstances.

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)

Student's speech in a school-sponsored student newspaper can be censored by school officials without violating the First Amendment.

It is a non-public forum.

Riots & Protests

Riots and Protests by Pro-Hamas Supporters

Whether riots and protests, consisting of mere words, against Jewish people, Jewish interests and institutions, or even on public highways and airports, are protected by the First Amendment clearly depends upon the nature of the action; who it interferes with and how; intent of the protesters; their subjective purpose; and the impact on others.

Many acts and statements by pro-Hamas interests have been specifically to intimidate, frighten, prevent the speech of others, and could be prosecuted criminally or the subject of civil suits without infringing upon First Amendment protections.

Robert Gartenberg, et al v. The Cooper Union 765 F.Supp. 3d 245 (S.D. NY 2025)

- October 23, 2023, pro-Palestinian students defaced the school's Colonnade windows which houses the school's administrative offices, classrooms, and the school's only library.
- The signs describe Jews as "settlers" and justified Hamas's massacre as a "counterattack."
- Posters hung up by Jewish students with the names of those abducted were vandalized and torn down.
- On October 25, 2023, approximately 100 students staged a walk out chanting: "Resistance is justified when people are occupied," "It is right to rebel, Israel go to Hell," "There is only one solution: Intifada revolution," and "From the river to the sea, Palestine will be free."
- After the October 25th walk out, demonstrators stormed into the Foundation Building shoving past security guards.
- They attempted to locate Cooper Union's President but descended upon the building's library.

Robert Gartenberg, et al v. The Cooper Union 765 F.Supp. 3d 245 (S.D. NY 2025)

- Demonstrators surrounded the library where Jewish students went for protection and proceeded to bang on the library's doors and shouting demands to be let in, directing anti-Israel slogans and waving of Palestinian flag at Jewish students inside the library.
- Cooper Union administrators did nothing to disburse the protestors and directed law enforcement to stand down. However, the college president had escaped the building through a back exit. None of the protestors were subsequently disciplined.
- The Plaintiffs filed a civil rights action.
- Gartenberg alleged sufficient facts to establish an actionable hostile educational environment based on instances of harassment that are not constitutionally protected
- Gartenberg alleged a plausible claim for breach of contract to the extent that Cooper Union failed to enforce its disciplinary policies in good faith.

Robert Gartenberg, et al v. The Cooper Union 765 F.Supp. 3d 245 (S.D. NY 2025)

- Court agreed with Cooper Union that Gartenberg's contract claim failed insofar as it is based on the school's Building Access Policy and on general statements of policy containing Cooper Union's regulations.
- Gartenberg has not alleged sufficient facts and stated claims for violation for state tort law.
- Punitive damages and some injunctive relief may still be available under Gartenberg's surviving claims for hostile educational environment.

Robert Gartenberg, et al v. The Cooper Union 765 F.Supp. 3d 245 (S.D. NY 2025)

- Title VI makes it unlawful for institutions that receive federal funding to discriminate against participants in their programs on account of race, color, or national origin.
- Title VI requires the following proof: 1) a student was subject to severe or pervasive harassment; 2) the harassment was motivated, at least in part, by race, color, or national origin; 3) the institution had both actual knowledge of the harassment and the ability to exercise substantial control over the harassers; 4) the institution was deliberately indifferent to the harassment; and 5) the harassment deprived the student of educational benefits or opportunities that she was otherwise entitled to.
- Court said the First Amendment limits Title VI.
- Gartenberg contended that Cooper Union is a private institution and does not enjoy First Amendment protections

Robert Gartenberg, et al v. The Cooper Union 765 F.Supp. 3d 245 (S.D. NY 2025)

- Court held that a statute that burdens protected speech must comport with the First Amendment regardless of whether it does so directly such as prohibiting certain speech outright, or indirectly, such as by requiring a court adjudicating a civil lawsuit between private parties to apply rule of law that has the effect of imposing invalid restrictions on the defendant’s constitutional freedom of speech.
- Even private schools cannot censor or punish political speech to avoid liability for a hostile environment.
- Whether a private institution is free to regulate its students’ speech without regard for the First Amendment is irrelevant to the question as to whether Congress may compel it to do so via the threat of civil liability under Title VI.
- Few courts have had occasion to address what limits, if any, the First Amendment places on federal anti-discrimination law.

Robert Gartenberg, et al v. The Cooper Union 765 F.Supp. 3d 245 (S.D. NY 2025)

- The First Amendment cannot restrict speech because it is upsetting or arouses contempt.
- The fact that an institution could escape Title VI's requirements by declining federal funds does not, by itself, obviate the First Amendment implications of construing Title VI to require censorship of political speech.
- "The Court concludes that because interpreting Title VI to impose liability for a hostile environment created in part by pure speech on matters of public concern would cast significant doubt on the statute's constitutionality, the Court must adopt a permissible construction of Title VI that avoids placing its application in First Amendment jeopardy."

Robert Gartenberg, et al v. The Cooper Union 765 F.Supp. 3d 245 (S.D. NY 2025)

Court's principles:

1. Speech on matters of public concern directed to the college community will generally fail to constitute unlawful harassment. The Court does not construe Title VI as allowing for liability based on speech that is reasonably designed or contended to contribute to debate on matters of public concern, and that is expressed through generally accepted methods of communication.

Robert Gartenberg, et al v. The Cooper Union 765 F.Supp. 3d 245 (S.D. NY 2025)

Court's principles:

2. The need to avoid a collision between Title VI and the First Amendment counsels in favor of an even more limited application of the already strict deliberate indifference standard. It will be difficult if not impossible to show that a college university acted in a clearly unreasonable manner under Title VI where it's acts of alleged deliberate indifference consist of its refusal to punish political speech directed at the college community through reasonable means.

Robert Gartenberg, et al v. The Cooper Union
765 F.Supp. 3d 245 (S.D. NY 2025)

Court's principles:

3. To make out a hostile environment claim, Plaintiff must plead and prove not only that they suffered objectively severe or pervasive harassment, but that the harassment was motivated, at least in part, by a protected characteristic.

Robert Gartenberg, et al v. The Cooper Union 765 F.Supp. 3d 245 (S.D. NY 2025)

- Court agreed that the Plaintiff has set forth some plausible claim of harassment based upon antisemitic stereotypes of Jews and Israel.
- Gartenberg plausibly alleged a hostile educational environment based on incidents not protected under the First Amendment.
- While some of the speech directed towards the Jewish students may properly be considered for purposes of Title VI's discriminatory-intent element, it cannot itself support a claim for an objectively hostile educational environment.
- The protest went beyond words when the mob of protestors forced their way past campus security guards and into the Foundation Building.
- This incident was physically threatening or humiliating to Jewish students huddled in the library.

Robert Gartenberg, et al v. The Cooper Union 765 F.Supp. 3d 245 (S.D. NY 2025)

- School suggested, in its opposition, that the students should do a better job of hiding or leaving the building. President Sparks herself was sufficiently frightened to have locked her door and escaped the building.
- Cooper Union faulted the Jewish students for gathering in a prominent location in the library.
- "The Court is dismayed by Cooper Union's suggestion that the Jewish students should have hidden upstairs or left the building, or that locking the library doors was enough to discharge its obligations under Title VI. These events took place in 2023, not 1943, and Title VI places responsibility on colleges and universities to protect their Jewish students from harassment, not on those students to hide themselves away in a proverbial attic or attempt to escape a place they have a right to be. In sum, the physically threatening or humiliating conduct that the Complaint alleged Jewish students in the library experienced 'is entirely outside the ambit of the free speech clause.'"
- Vandalism and physical acts of harassment are not protected by the First Amendment.

Robert Gartenberg, et al v. The Cooper Union
765 F.Supp. 3d 245 (S.D. NY 2025)

- Gartenberg plausibly alleged that Cooper Union was deliberately indifferent to the antisemitic harassment on its campus.
- Gartenberg alleged numerous examples of deliberate indifference that did not involve Cooper Union's refusal to suppress political speech. The actions that will go to trial had to do with the school not preventing the group from trespassing and occupying the building where they disrupted school activities and intimidated Jewish students, some of whom attempted to call the police for help. Cooper Union failed to check the ID of those individuals. Cooper Union did nothing to disperse the protestors.
- Gartenberg plausibly alleged the loss of educational benefits or opportunities.

Standing

Murthy v. Missouri
603 U.S. 43 (2024)

- Plaintiffs have no standing where they claim that the Federal Government suppressed their speech through pressure on social media platforms.
- During the 2020 election season of the COVID-19 pandemic, social media platforms frequently removed or demoted or “fact-checked” allegedly false or misleading information.
- Federal officials communicated extensively with the platforms about their content-moderation efforts
- Plaintiffs, two states and five social media users sued dozens of executive branch officials and agencies alleging that thy pressured the platforms to suppress protected speech in violation of the 1st amendment.

The First Amendment and Religious Freedoms

The First Amendment and Religious Freedoms

We have all heard the debate as to whether the First Amendment protects citizens from religion or rather supports the free exercise of religion.

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014)

- Whether the Religious Freedom Restoration Act of 1993 (RFRA) permits the United States Department of Health and Human Services to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious belief of the companies' owners.
- "We hold that the regulations that impose the obligation violate the RFRA, which prohibit the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest."
- RFRA protection is not jettison when the businesses incorporate.

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014)

- If the owners comply with the HHS mandate, they believe they will be facilitating abortions.

- Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest.

- In order for HHS mandate to be sustained, it must also constitute the least restrictive means of serving an interest and the mandate plainly fails that test.

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014)

- HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objection to providing such coverage.

- The employees of religious nonprofit corporations have access to insurance coverage without cost sharing for all FDA-approved contraceptives.

- Although HHS has made the system available to religious nonprofits, HHS has provided no reason why the system could not be made available for the owners of non-profit corporations that have similar religious objections.

The First Amendment and Religious Freedoms

The answer to this question is BOTH.

A cakemaker may refuse to make a cake for a gay couple, based upon religious scruples. But a gay couple cannot be excluded from a public accommodation either.

303 Creative , LLC v. Elenis
143 S. Ct. 2298 (2023)

The First Amendment and Religious Freedoms

The question has been raised as to whether bigotry can amount to defamation, or rather whether it enjoys First Amendment protection.

ungender

Bigotry

Intolerance towards those who hold different opinions from oneself.

#GENDERDICTIONARY

Sweeney v. United Feature Syn., Inc. 129 F. 2d 904 (2nd Cir. 1942)

Facts: Non-Jewish Congressman and chief spokesman for Fr. Coughlin opposed the appointment of a judge of Jewish heritage who was not born in the USA. The judge left the decision about whether defamation occurred to the jury.

Holding: Federal cases in New York for defamation must allege, "special damages" under New York law in order to have a claim of defamation go forward to trial. The case never went to trial because the dismissal on a motion for summary judgment was upheld.

New York Times v. Sullivan 376 U.S. 254 (1964)

- Rule of law applied by Alabama Courts was constitutionally deficient for failure to provide Petitioner the safeguards the freedom of speech and press.
- Petitioner's constitutional guarantees required a rule that prohibited a public official from recovering damages for defamatory falsehood relating to the public official's conduct unless the official proved that the statement was made with actual malice.
- Actual malice: that the statement was false or made with reckless disregard of whether it was false or not.

Weiner v. Time & Life, Inc. 133 N.E. Misc.2d 622 (N.Y. Sup. Ct. 1986)

Facts:

Plaintiff, an Orthodox Jewish rabbi and business owner, alleged that he was libeled by a publication with nationwide reach because they quoted him as saying that he does not wear a yarmulke when driving in public and looked around more carefully due to the incidents of antisemitism that occurred in the Washington Heights neighborhood near Yeshiva University.

Weiner v. Time & Life, Inc.
133 N.E. Misc.2d 622 (N.Y. Sup. Ct. 1986)

Expression of Facts vs. Opinion about another:

Plaintiff alleged that the magazine portrayed him in a false light by claiming he would violate Jewish law by not wearing his yarmulke.

Weiner v. Time & Life, Inc.
133 N.E. Misc.2d 622 (N.Y. Sup. Ct. 1986)

Holding:

Plaintiff has to allege or prove special damages under New York law to have a triable case of defamation. Defendant's motion to dismiss was granted.

Hustler Magazine v. Falwell
485 U.S. 46 (1987)

- Action for libel, slander, and intentional infliction of emotional distress due to publication of caricature in ad parody.
- Damages inconsistent with First Amendment.
- Public figure required to show that statements published in the advertisement parody were made with actual malice or reckless disregard of the truth.
- Award of damages inconsistent with First Amendment.

Milkovich v. Lorain Journal
497 U.S. 1 (1990)

Question Presented:

Does the First Amendment require a separate "opinion privilege" limiting the reach of state defamation laws?

Expression of Facts vs. Opinion About Another:

The newspaper believed the wrestling coach had caused the brawl by publicly challenging the decisions of the referees.

Milkovich v. Lorain Journal
497 U.S. 1 (1990)

Holding:

"The First Amendment does not require a separate "opinion" privilege limiting the application of state defamation laws. While the Amendment does limit such application, *New York Times Co. v. Sullivan*, 376 U. S. 254, the breathing space that freedoms of expression require to survive is adequately secured by existing constitutional doctrine. 497 U.S. at 2." The case was dismissed.

Gibson Bros., Inc. v. Oberlin College 187 N.E. 3d 629 (2002)

Expression of Facts vs. Opinion About Another:

Oberlin College students and the Oberlin College Student Senate disseminated statements accusing a local bakery of having a history of racial profiling and discriminatory treatment of students and residents.

Gibson Bros., Inc. v. Oberlin College 187 N.E. 3d 629 (2002)

Statements Accusing Another of Bigotry:

The Oberlin College Student Senate passed a resolution that was disseminated for consumption by persons on campus and Oberlin College students and a college administrator disseminated a flyer accusing a local business of having a history of racial profiling and discriminatory treatment of college - students and residents.

Gibson Bros., Inc. v. Oberlin College 187 N.E. 3d 629 (2002)

Holding:

Jury verdict and state law cap on damages upheld. Liability is also incurred under Ohio law when someone aids and abets the publication of defamatory material.

Comic Strip Promo., Inc. v. ENVIVO, LLC
2023 NY Slip Op 31112(U) (Sup Ct NY County 2023)

Facts:

Comedy club made postings on a social media platform likening the COVID vaccine mandate imposed by the City of New York to the treatment of Jews during the Holocaust. Thereafter, a member of the NYC Council reposted the comedy club's posting and wrote a letter condoning antisemitism and asking for a public apology from the plaintiff.

Comic Strip Promo., Inc. v. ENVIVO, LLC

2023 NY Slip Op 31112(U) (Sup Ct NY County 2023)

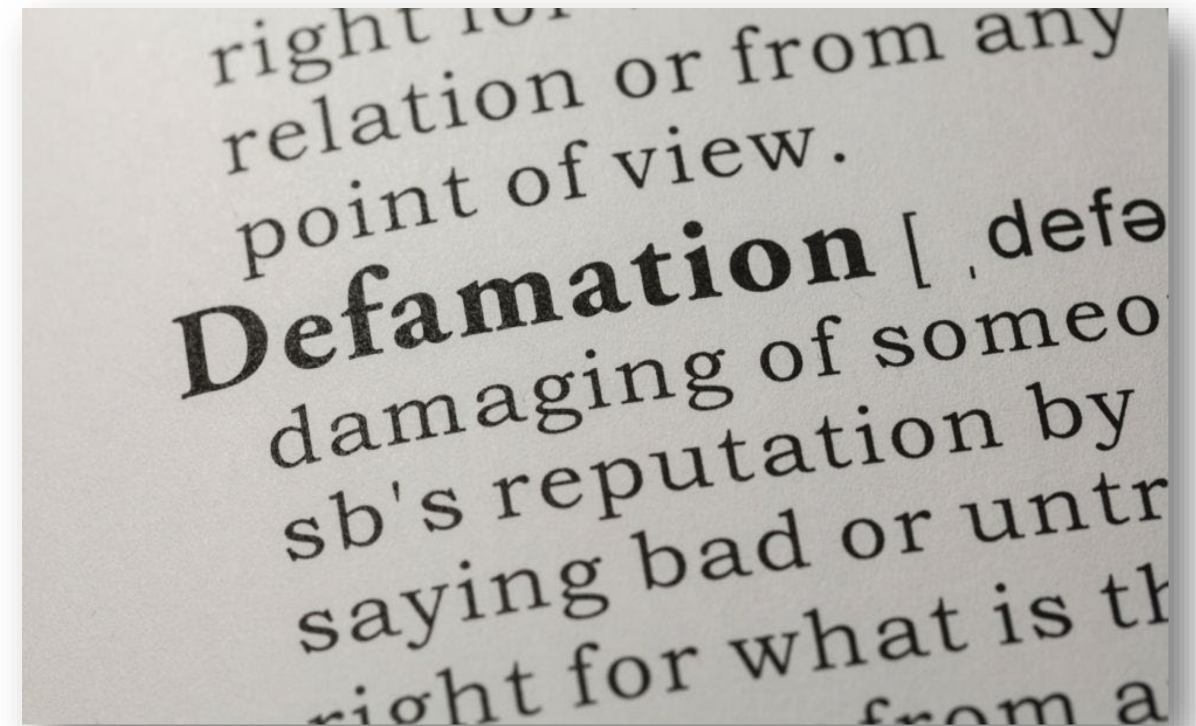
Holding:

Facts are the only phenomenon that are capable of being proven false and therefore are the only phenomenon that is actionable in a defamation case. In order to prevail in a defamation case, a plaintiff must prove special damages unless the claim meets one of the exceptions under New York law. Claims against NYC Council Member Julie Menin dismissed but the claims against the other defendants were allowed to move forward per the Court's order.

State Criminal Laws Against Defamation

State Criminal Laws Against Defamation

There are state criminal laws against defamation, which are usually in the nature of business torts, are criminalized, such as Florida statute imposing punishment for making derogatory statements concerning banks and building and loan associations.



Restatement Third of Defamation

Restatement Third Defamation

§ 8. Materially False Statement of Fact

To establish a defamation claim, a plaintiff must prove that:

(a) a reasonable person would understand a defendant's communication to assert or imply a statement of fact; and

(b) the statement of fact is false; and

(c) the falsity of the statement of fact is material to the defamatory meaning of the communication.

Defamation by Implication

§ 9. Defamation by Implication

A defendant's communication that does not explicitly assert a statement of fact may nevertheless imply a statement of fact if a recipient of the communication would reasonably conclude, based on the language and context of the defendant's communication, that the defendant intended to assert the implied statement of fact.

Defamation “of and Concerning” Members of a Group or Class

§ 11. Defamation "Of and Concerning" Members of a Group or Class

A defamatory communication that refers to a group of persons is, "of and concerning" an individual member of the group if a recipient of the communication would reasonably interpret the communication as referring specifically to that individual member of the group.

Factors Affecting Defamatory Communication About a Group

Factors affecting whether a defamatory communication about a group is of and concerning an individual within the group. Whether a defamatory communication about a group is, "of and concerning" an individual member of the group depends on factors such as group size, the inclusivity or exclusivity of the language used by the defendant, and the surrounding context of the defamatory statement.

Large Group Size

Large group size. Group size is an important factor in determining whether a statement about a group is "of and concerning" any specific member of the group. As a general rule, a defamatory communication about a large group is not "of and concerning" any specific individual within that group, particularly when the communication is couched in general terms. When a defamatory communication is about a large group, reputational harm caused by the communication are likely to be diffuse and diluted.

Large Group Size

Allowing individuals to bring suit in such cases would likely produce a multiplicity of actions, with the potential for damages disproportionate to individual harms. Although there are some groups whose members are too numerous to be defamed, that number is not firmly fixed. Nevertheless, the assertion that "all dentists cheat on their taxes" does not suffice to satisfy the "of and concerning" element as to any individual dentist, nor does the assertion that "all of the lawyers in the 350-member firm of Jarndyce and Jarndyce are liars" satisfy the "of and concerning" element with regard to any particular lawyer in the firm.

History of Employment Discrimination Against Jewish Americans

History

The history of discrimination against Jewish communities in the United States dates back to the arrival of Portuguese jews to New Amsterdam in 1654.

Following the Dutch West India Company's approval of Jewish immigration to New Amsterdam, Peter Stuyvesant adopted several different approaches to discourage Jews from permanent settlement.

Historical Perspective

History

In 1654 or 1655, the date is unclear from the literature, Stuyvesant, “importuned the colonial council to bar Jews from serving in the volunteer home guards.” While this ban was eventually overturned after a two-year legal battle between Asser levy, Joseph Barsimon and the colonial court, it represented one of the first instances of state-sanctioned discrimination against Jews serving in official positions.

History

Following the Dutch capture of Swedish territory along the Delaware River, “Stuyvesant refused to issue trade permits to Jewish settlers in the new territory.” After protests by Jewish settlers against these harmful restrictions, Stuyvesant was disciplined by the Dutch West India Company. “From then on, Jews in the colony were allowed to trade and own real estate, but not hold public office, open a retails hop, or establish a synagogue.”

History - Professor Sarna

Professor Jonathan Sarna provided a written statement in the district court with respect to the *Podell* matter and offered his Commentary on Anti-Semitism, an American History.

Podell Amicus - American Heroes

Even American heroes were not exempt from engaging in anti-Semitic rhetoric, as Thomas Jefferson, "in spite of having several Jewish acquaintances, continued to think Jews morally depraved, and lamented that 'among them ethics are so little understood;" – Footnote Omitted

The Jewish Sabbath

As early as 1817, a Jewish lawyer name Zalegman Phillips sought to persuade a Philadelphia judge that, “those who profess the Jewish religion and others who keep the seventh day” should be exempted from blue laws on freedom of religion grounds. Although Phillips lost his case, leading nineteenth-century proponents of Sunday legislation advocated exemptions for all who conscientiously observed the sabbath on Saturday. In time, several states (twenty-four by 1908) enacted such exemptions into law.

Immigration Perspectives

The immigration of over 2 million East European Jews to the United States between 1881 and 1924 transformed the issue of the Jewish Sabbath in the United States. A great many available jobs in the clothing trade, the cigar trade, and even on farms in in peddling made working ion Saturday a condition of employment. With the six-day work week commonplace and Sunday closing laws strictly enforced, unsympathetic employers decreed that "if you don't come in on Saturday, don't bother coming in on Monday." – Footnote Omitted

Leading Up To World War II

In the decades leading up to World War II, Sarna contended that, “by all accounts, anti-Semitism crested in America during the half-century preceding World War II. During the era of nativism and then isolationism, Jews faced physical attacks, many forms of discrimination, and intense vilification in print, on the airwaves, in movies, and on stage.” – Footnote Omitted

The Basics of a Discrimination Claim

Podell vs. White, U.S., Department of Defense

Facially Neutral Employment Practices

Some facially neutral employment practices **may** violate Title VII even in the absence of discriminatory intent, when they have disparate impact on otherwise qualified individuals. Citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988).

Absence of Discriminatory Intent

It is possible for a Title VII violation to be present not only when there is an absence of discriminatory intent, but even when the neutral employment practice has a disparate impact on those who hold minority religious views. The employment policy to host the hiring even only on Saturday (the day of Sabbath Observance), at first glance may appear to be a neutral day to hire individuals allowing more time to assess applicants.

Numerical Disparity

The government argued that employer must isolate and identify specific employment practices allegedly responsible for the discrimination. The plaintiff must allege either the existence of numerical or statistical evidence demonstrating disparate impact or sufficient factual detail of a series of discrete episodes of the contested employment practice in order to raise a plausible inference that the employment practice has a discriminatory impact on the protected group.

Exhaustion of Administrative Remedies

There must be an exhaustion of administrative remedies which is often the most significant obstacle in these cases.

The Court in *Podell*

The court in *Podell* was not impressed with the exhaustion argument, given that the plaintiff contacted, emailed and attempted to develop communication with everyone that he could with respect to requesting and achieving a reasonable accommodation, all of which were denied without explanation.

Retaliation/Hostile Working Environment

Could there be a claim with respect to reasonable accommodation cases, of retaliation and hostile work environment?

Time Limitations

In *Podell*, defendants claimed that Mr. Podell failed to timely contact the EEO within forty-five days of the challenged discriminatory action under 29 C.F.R. 1614.105(a)(1) (pre-complaint processing) but failed to mention the listed exceptions that follow in subsection (a)(2).

29 C.F.R. 1614.105(a)(1)

Under 29 C.F.R. 1614.105(a)(2):

The agency or the Commission shall extend the time limit in paragraph (a)(1) of this section when [1] the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, [2] that her or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, [3] that despite due diligence he or she was prevented by circumstances beyond his or control from contacting the counselor within the time limits, [4] or for other reason considered sufficient by the agency or the Commission.

Constitutional Claims

The Government argued in *Podell*, but not in other cases, that the constitutional protections are preempted by legislation.

Brown v. General Services Administration

Defendants chiefly rely upon *Brown v. General Services Administration*, 425 U.S. 820 (1976). The argument is that §717 of the Civil Rights Act of 1964, codified at 42 U.S.C. §2000e-16, provides the, "exclusive judicial remedy for claims of discrimination in federal employment." A careful reading of *Brown*, however, does not extend it to preempting federal employment *religious* discrimination.

Brown as Specific to Claims of Racial Discrimination

At least one more recent United States Supreme Court case has characterized *Brown's* holding a specific to claims of racial discrimination in federal employment. In *Jett*, the Supreme Court noted that in *Brown*, "[the] Court…[held] that §717 of Title VII constituted the exclusive remedy for allegations of racial discrimination in federal employment." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 734 (1989).

RFRA

Brown's rationale does not apply to the RFRA. Brown applied the principle that a, "precisely drawn, detailed statute pre-empts more general remedies." *Brown*, 491 U.S. at 735 (quotation omitted). The RFRA is a more specific remedy than Title VII. While Title VII is specific to federal employment, the RFRA only protects against government-imposed burdens on the free exercise of religion, rather than the other forms of discrimination that Title VII protects against, 42 U.S.C. §2000e-16(a); 42 U.S.C. §200066-1. *Brown* compared §717 to 42 U.S.C. §1983, finding that former is more "precisely drawn" because of Title VII's "careful and thorough remedial scheme" that "provides for a careful blend of administrative and judicial enforcement powers." *Brown*, 425 U.S. at 833.

Does Title VII Preempt RFRA?

Depends upon the circuit in which the government is arguing. In the Third Circuit, they do argue such preemption, and in the Fourth Circuit they did not. However, an internal memorandum from the Department of Justice is that even though the Third Circuit case authority supports preemption, the government will ignore that and simply let the court decide.

Importance of Religious Freedom Restoration Act

The importance of the Religious Freedom Restoration Act, including the necessity for a damage remedy thereunder, is well demonstrated by *Tanzin vs. Tanvir*, 141 S. Ct. 486, 209 L. Ed. 2d 295,220 U.S. LEXIS 5987 (2020), distinguished by *Allen vs. Becerra*, 2022 U.S. Dist. LEXIS 2 989, 2022 WL 374409 (2022).

The Scope of Title VII

The Supreme Court, "recognized generally that Title VII does not preclude a public employee from seeking other remedies." Id. at 640 (citing *Alexander vs. Gardner-Denver Co*., 415 U.S. 36 (1974)). '•Title VII was designed to supplement rather than supplant existing laws and institutions relating to employment discrimination." Id. (quoting Alexander, 415 U.S. at 4 7-49). "The Court observed that ' [d]espite Title VII' s range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." Id. (quoting *Johnson vs. Railway Express Agency*, 451 U.S. 454, 459 (1975)).

Henley v. Brown
686 F. 3d 634 8th Cir. 2012

After analyzing guidance provided by the Supreme Court's jurisprudence, the Circuit Court in Henley stated as follows:

First Title VII provides the exclusive remedy for violations of its own terms and an employment discrimination plaintiff asserting the deprivation of rights created by Title VII must comply with the Acts procedural requirements before seeking judicial review. Second, a plaintiff may not invoke a purely remedial statute such as section 1985(3), to redress a violation of a right conferred only by Title VII. However, when the employer's conduct violates not only rights created by Title VII but also rights conferred by an independent source, Title VII supplements, rather than supplants, existing remedies for employment discrimination.

Official-Capacity Claims Against Defendants Other Than Secretary Austin

The position of the United States is that the claims against Defendants in their official capacities are "duplicative" of claims against the agency itself and therefore subject to dismissal. Counsel for Plaintiff agrees that an official-capacity suit is to be treated as a suit against the entity. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). However, that does not mean that individuals cannot be sued for their own misconduct. The fact that an individual has taken action or failed to act in a liability creating manner, does not automatically eliminate that individual in terms of claims made.