No. 15-113098-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

NAVID YEASIN,
Petitioner-Appellee,
v.

UNIVERSITY OF KANSAS,
Respondent-Appellant.

Appeal from the District Court of Douglas County
Honorable Robert W. Fairchild, Judge
District Court Case No. 14CV102

BRIEF FOR AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF KANSAS IN SUPPORT OF PETITIONER-APPELLEE

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INTEREST OF AMICI CURIAE

Founded by a group of civil libertarians in Wichita more than fifty years ago, the American Civil Liberties Union Foundation of Kansas (hereafter "ACLU") is an affiliate of the national organization and has approximately 3,000 members in Kansas. Since its founding, the ACLU has participated in numerous cases in Kansas's state and federal courts both as direct counsel and as amicus curiae and has consistently argued for an expansive interpretation of constitutional rights, particularly in First Amendment cases. Thus, the proper resolution of this case is a matter of substantial interest to the ACLU and its members.

ARGUMENT

I. The First Amendment's Speech Clause protects online speech, and Twitter is among the many burgeoning venues for online speech.

For at least half a century, electronic media have dominated communications in America. Marvin Ammori, "Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine," 70 Mo. L. Rev. 59, 86–91 (2005) (describing changes in Americans' news sources). As communications technology has changed, moreover, the Supreme Court has faced a series of questions about the relevance of the First Amendment to new media. *See, e.g., Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 399-400 (1969) (upholding FCC's "fairness doctrine"); *FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1978) (upholding FCC's restrictions on non-obscene "indecent" expression in broadcasting); *Sable Communications of Cal., Inc.* v. *FCC,* 492 U.S. 115, 131 (1989) (striking down ban on adult access to indecent telephone messages); *Turner Broadcasting System, Inc.* v. *FCC,*

520 U.S. 180, 209 (1997) (upholding FCC rule requiring cable operators to carry broadcast station programming).

The Court first considered the First Amendment's applicability to the Internet in *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997). At that time, the Court observed that

> This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, realtime dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.

521 U.S. at 870. In *Reno*, the Supreme Court distinguished the Internet from traditional broadcast media and made it absolutely clear that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to" the Internet. *Id.* Thus, the Court's First Amendment jurisprudence applies with full force to online speech.

Between 1997 – the year the Court decided *Reno* – and 2012, home Internet access grew from 18.0 percent to 74.8 percent of all United States households. U.S. Census Bureau, *Computer and Internet Trends in America*, http://www.census.gov/hhes/computer/files/2012/Computer_Use_Infographic_FINAL.pdf (last checked May 19, 2015). In 2012, moreover, 45.3 percent of individuals aged twenty-five and older were using smartphones. *Id.* Today, as a result of these technological changes, digital platforms have largely displaced traditional

paper media such as pamphlets and handbills as the means by which individuals communicate messages to groups of like-minded people or to the public at large.

> The speech on Google, YouTube, WordPress.com, Facebook, Tumblr, Twitter, Dropbox, Wikipedia, Pinterest, Yelp, and many other sites comes almost exclusively from users, not employees. Billions post photos, status updates, blog posts, news articles, and files. Billions also like/upvote/favorite those posts (which is itself protected speech). While it is true that people often use these digital speech platforms to share stories from traditional newspapers and magazines, the billions of users also express themselves far more widely. They comment, they debate, they critique, they invent, they create, they share.

Marvin Ammori, "The New *New York Times*: Free Speech Lawyering in the Age of Google and Twitter," 127 Harv. L. Rev. 2259, 2268 (2014).

In particular, this case involves Twitter posts. "Twitter is an online social networking service that enables users to send and read short 140-character messages called 'tweets.' Registered users can read and post tweets, but unregistered users can only read them." "Twitter," http://en.wikipedia.org/wiki/Twitter (last checked May 19, 2015). Registered users create a unique profile and publish messages onto their Twitter page or "feed."[1] One Twitter user can "follow" (or subscribe to) another user's feed. When a Twitter user follows another Twitter user, the "follower" receives and can read the followed person's tweets. By default, tweets are visible to the public, meaning anyone – even someone without a Twitter account – can view a user's tweets. But individual users can also "protect" their tweets, which makes them visible only to followers the user approves. Users can also send each other private

[1] Unless otherwise noted, the facts set out in the following summary of Twitter use and technology are drawn from the Wikipedia entry.

tweets known as "direct messages," which, like physical letters or email, are directed to and can be viewed by only the intended recipient.

Since its launch in 2007, Twitter's popularity has exploded. "As of May 2015, Twitter has more than 500 million users, out of which more than 302 million are active users." *Id.* Numerous politicians, celebrities, and athletes use Twitter to directly communicate with the public. For instance, the New York Times recently reported that President Barack Obama now tweets from his own personal Twitter account. Michael D. Shear, "Six Years in, Obama Joins Twitter Universe (but He's Not Following You)," *New York Times*, May 18, 2015, http://www.nytimes.com/2015/05/19/us/obama-joins-twitter-universe-but-hes-not-following-you.html (last visited May 20, 2015).

II. Appellee's Tweets Were Protected Speech within the Meaning of the First Amendment.

The First Amendment protects offensive speech. "The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826 (2000). "Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975). "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S.

576, 592 (1969) (citations omitted). "[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973).

The Supreme Court has consistently rejected listener offense as a justification for restricting speech directed to the public, including speech that causes a private person to suffer severe emotional distress. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (applying First Amendment to tort claims based on funeral picketing conducted in traditional public forums). "[E]ven when a speaker or writer is motivated by hatred or ill will his expression [is] protected by the First Amendment." *Hustler v. Falwell*, 485 U.S. 46, 53 (1988).

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Cohen v. California, 403 U.S. 15, 21 (1971).

Where speech in public offends some listeners (or viewers), "the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" *Erznoznik*, 422 U.S. at 210-11, quoting *Cohen*, 403 U.S. at 21. *See also Spence v. Washington,* 418 U.S. 405, 412 (1974).

Citing *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513 (1969)[2] and *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984), the University argues that "[i]t is well-settled that no one can use constitutional rights to invade the rights of others." Responsive Brief of Appellant at 16. The University further argues that "content-based restrictions [of speech] are not always improper and have been allowed [with regard to] certain categories of speech that directly harm society while contributing little or nothing to the exposition of ideas." Responsive Brief of Appellant at 18. The quoted language seems to suggest that the First Amendment only protects important or high-value speech and that Mr. Yeasin's offensive tweets were unprotected because they had a low social value. But the University's crabbed interpretation of the First Amendment is at odds with the Supreme Court's jurisprudence.

"The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government." *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1966). *See also Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 223 (1967) ("the First Amendment does not protect

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[2] Petitioner's First Amendment claim should not be assessed under the *Tinker* "substantial disruption" standard because *Tinker* does not apply to university students. *See, e.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301, 315 (3rd Cir. 2008); *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 242 (3rd Cir. 2010). Unlike elementary and high school students, university students have the same First Amendment free speech rights as do other adults. *Compare* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)(high school could suspend student for "offensively lewd and indecent speech") *with* Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 671 (1973)(expulsion of university student for distributing on campus a newspaper containing forms of indecent speech violated First Amendment). In *Healy v. James*, furthermore, the Supreme Court stated that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." 408 U.S. 169, 180 (1972).

speech and assembly only to the extent it can be characterized as political"). In fact, in recent years, the Supreme Court has made it crystal clear that the First Amendment protects a wide range of speech that has little or no relationship to or value in the realm of public affairs. *See, e.g., United States v. Stevens*, 130 S. Ct. 1577 (2010) (First Amendment protects "depictions of animal cruelty"); *Brown v. Entertainment Merch. Ass'n*, 131 S. Ct. 2799 (2011) (First Amendment protects "violent video games"); and *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (First Amendment protection extends to false statements of fact). "*Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation." *Stevens*, 130 S. Ct. at 1591 (emphasis in original). The Supreme Court has explicitly rejected "a free-floating test for First Amendment coverage." *Stevens*, 130 S. Ct. at 1585.

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

Id.

In its opening brief, the University set out fourteen tweets that Mr. Yeasin posted between July 10 and October 23, 2013. Appellant's Opening Brief at 11-13.[3]

[3] None of the tweets Mr. Yeasin posted about Ms. W specifically mentioned her by name. In addition, none of the tweets posted after the University's issuance of the August 14, 2013 no contact order was sent directly to Ms. W. Instead, Ms. W apparently either actively sought out the tweets or was shown them by one or more of Mr. Yeasin's Twitter followers.

Many of these tweets referred to Ms. W in sophomoric and unflattering ways, and many were tasteless, offensive, and hateful. But they still fell well within the broad protections of the First Amendment's Speech Clause.

III. The University's Order Prohibiting Appellant from Posting Anything on Twitter *about* Ms. W Was a Content-based Restriction on Speech in Violation of the First Amendment.

On August 14, 2013, the University of Kansas issued a no contact order prohibiting Mr. Yeasin from, in pertinent part, contacting or attempting to contact Ms. W and "her family, her friends or her associates" personally or through third parties. R. 2:312. Mr. Yeasin "posted . . . [a message] about Ms. W. on Twitter after the date he received the 'No Contact' directive." Appellant's Opening Brief at 13. As a result of Mr. Yeasin's tweet about Ms. W, Jennifer Brooks, an investigator with the University's Office of Institutional Opportunity and Access, sent Mr. Yeasin an e-mail dated September 6, 2013, in which she "clarified" the previous no contact order. R. 2:317. Specifically, Ms. Brooks advised Mr. Yeasin that "any reference made on social media *regarding* Ms. [W], even if the communication is not sent to her or state [*sic*] her name specifically, … is a violation of the No Contact Order." R. 2:317, Email from Jennifer Brooks, Investigator, Office of Inst. Opportunity and Access, to Navid Yeasin (Sept. 6, 2013, 17:22 CST) (emphasis added). During a meeting held on September 17, 2013, the University "again reiterated to Mr. Yeasin that indirect communications *about* Ms. W. on Twitter were a violation of the 'No Contact' directive." Appellant's Opening Brief at 14, citing R. 2:319 (emphasis added). In all of these communications, the University made it clear that it was barring Yeasin from

speaking *about* Ms. W regardless of how or to whom he did it. The University's summary of the student conduct hearing and the Vice Provost's decision makes it clear that Mr. Yeasin's tweets *about* Ms. W played a crucial role in the decision to expel Mr. Yeasin from the University of Kansas. *See* Appellant's Opening Brief at 16-25.

The University's clarification of the no contact order prohibited Appellee from referring to Ms. W in his social media posts even if those posts were not directed to Ms. W. Because it limited the permissible subject matter of Mr. Yeasin's Twitter posts, the University's directive was a content-based restriction of Appellee's speech. "[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'" *Alvarez*, 132 S. Ct. at 2544 (citation omitted) (listing obscenity, defamation, fighting words, child pornography, true threats, and a few other categories).

"[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft* v. *Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). "Content-based prohibitions … have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid and that the Government bear the burden of showing their constitutionality." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 670 (2004)

(citations omitted). The general rule requires courts to apply strict scrutiny to governmental regulations that restrict the speech of private citizens. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). Strict scrutiny requires the State to demonstrate that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Boos v. Barry,* 485 U.S. 312, 321 (1988).

Because the University's prohibitory directives were based on the content of Mr. Yeasin's tweets, the First Amendment requires that those directives be presumed invalid, and the University must shoulder a heavy burden to prove the constitutionality of its prohibitions. The University cannot meet that heavy burden because Ms. Brooks' directive prohibiting Mr. Yeasin from speaking *about* Ms. W was not narrowly tailored to achieve the University's legitimate ends.

Although the government has a legitimate interest in "protecting individuals from the fear of violence" and "from the disruption that fear engenders" as well as "the possibility that the threatened violence will occur," *RAV*, 505 U.S. at 388, the First Amendment constrains the government's ability to advance that interest through means that punish or chill protected expression. In this case, the University prohibited Mr. Yeasin from posting comments *about* Ms. W in order to protect her from harassment and abuse. But, as then Judge Samuel Alito wrote when he sat on the Third Circuit, "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v. State College Area School District*, 240 F. 3d 200, 204 (3rd Cir. 2001).

In *Rowan v. Post Office Dept.*, the Supreme Court upheld against a constitutional challenge a federal statute that allowed householders to ban future mailings deemed by the householder to be "erotically arousing." 397 U.S. 728 (1970). But, in later cases, the Court has clarified that the First Amendment limits the government's ability to prohibit harassment. The fact that the mailings at issue in *Rowan* were targeted at a particular individual in the privacy of the target's home is the key distinction between constitutional and unconstitutional restrictions in the context of harassing speech. *See Cohen*, 403 U.S. at 21. *See generally* Eugene Volokh, "One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and 'Cyber-Stalking,'" 107 Nw. U. L. Rev. 731, 748-50 (2013) (arguing that, under First Amendment, government may only prohibit intrusive one-to-one speech).

Thus, to the extent that the University's original no contact order prohibited Mr. Yeasin from talking to Ms. W or from having contact with her either directly or indirectly through other people, it was legitimate because it was narrowly tailored to prohibit Mr. Yeasin from targeting abuse at Ms. W. But the subsequent "clarification" prohibiting Mr. Yeasin from speaking *about* Ms. W on social media sites violated Mr. Yeasin's First Amendment right to free speech because it was not narrowly tailored to achieve the University's goal of avoiding harassment and abuse of Ms. W.

IV. Appellee's Tweets Were Not True Threats.

In *Watts v. United States*, the Supreme Court added "true threats" to the short list of constitutionally proscribable speech. 394 U.S. 705, 707-08 (1969) (per curiam).

In doing so, however, the Court was careful to note that – in order to ensure that public discussion remains "uninhibited, robust, and wide-open" – the First Amendment still protects speech that is "vituperative, abusive, and inexact." 394 U.S. at 708 (internal quotation marks omitted).

In *Virginia v. Black*, 538 U.S. 343 (2003), the Court made it clear that the true threats exclusion is a narrow exception to the First Amendment. "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.*, at 359 (internal quotation marks omitted). "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where the speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360. Statements that do not meet the definition of a true threat continue to enjoy the full protection of the First Amendment.

The University takes a very broad view of the true threat exception, positing that "[i]t . . . logically follows that a cyber-stalker's message threatens violence regardless of how seemingly innocuous the message might appear." Appellant's Response Brief at 18. The problem is that "seemingly innocuous" messages cannot meet the Supreme Court's exacting definition of true threats, which requires that "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.*, 538 U.S. at 359 (internal quotation marks omitted). If the University (or any other governmental

entity) could view innocuous messages with such a jaundiced eye, the true threat exception would quickly swallow the rule that offensive speech remains protected by the First Amendment.

In addition, the specific facts of this case show that Mr. Yeasin's tweets fell far short of the Supreme Court's narrow definition of true threats. In its opening brief, the University recounted the tweets that it argues were beyond the pale of First Amendment protection. Opening Brief of Appellant at 11-13. In its response brief, furthermore, the University equated Yeasin's tweets with "stalking" and "cyberstalking" and argued that "Yeasin cyberstalked his victim Ms. W., using his Twitter posts to continue to exercise control and dominance over her and [to] intimidate her." Appellant's Response Brief at 19.

None of the tweets catalogued in the University's opening brief threatened violence or even mentioned Ms. W by name. Moreover, none of those tweets was directed at Ms. W or "to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Virginia v. Black*, 538 U.S. at 360. Thus, because Mr. Yeasin's tweets did not "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," *id.* at 359, and because the tweets were not directed at Ms. W or anyone else with the intent to cause fear of bodily harm or death, Yeasin's tweets did not constitute true threats and were fully protected by the Speech Clause of the First Amendment.

Finally, the University argues that "it is not the subjective intent of the abuser that determines the nature of the communication. . . . The nature of the communication is determined by whether a reasonable person with the benefit of the context of the relationship would understand the communication to be a threat." Appellant's Response Brief at 19.[4] The University urges the Court of Appeals to apply the objective standard from the University's point of view rather than from the point of view of a reasonable victim. Such a standard essentially amounts to a "know it when I see it" test that would allow the University to punish any speech that it interprets as harassing. Such unbridled power would not be circumscribed by the clear definitions that have saved criminal harassment and civil stalking statutes from being held unconstitutional under the First Amendment. Thus, the University's position – if accepted by this Court – would pose a significant risk of violating the First Amendment rights of students.

Moreover, even assuming *arguendo* that an objective standard applies, the application of such a standard would not sanction the punishment meted out in this

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[4] Last year, the United States Supreme Court granted certiorari to decide "Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten." *Elonis v. United States*, 134 S. Ct. 2819 (2014). The Court heard argument in *Elonis* on December 1, 2014. *See* http://www.scotusblog.com/case-files/cases/elonis-v-united-states/. The decision in *Elonis* may cast light on the legal issue posed by the University. The ACLU, et al., argued in an amicus brief filed in *Elonis* that the determination of whether words constitute a true threat depends on the subjective intent of the speaker and that proof of such subjective intent is required to prove the violation of criminal statutes prohibiting threats or harassment. http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-983_pet_amcu_aclu-etal.authcheckdam.pdf.

case. The record in this case demonstrates that, although they may have been offensive, Mr. Yeasin's tweets were not directed at Ms. W or any other particular person and that his tweets contained no threats of violence or intimidation, either overt or implied. On these facts, no reasonable person could view Mr. Yeasin's tweets as true threats.

CONCLUSION

For these reasons, Mr. Yeasin's tweets were fully protected by the Speech Clause of the First Amendment, and the University violated Mr. Yeasin's First Amendment rights by ordering him not to post messages about Ms. W and by considering his tweets in deciding to expel him. The ACLU urges the Court of Appeals to affirm District Court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2015, I caused two true and correct copies of the foregoing Brief for Amici Curiae American Civil Liberties Union Foundation of Kansas in Support of Appellee to be served by United States Mail, postage prepaid, on:

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