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# Ninth Circuit Holds Senator Warren's Letter to Amazon Was Protected as Persuasive Speech

## *Affirms Denial of RFK, Jr.'s Motion for A Preliminary Injunction*

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Robert F. Kennedy, Jr. and others sought an injunction against Senator Elizabeth Warren after she wrote an open letter to Amazon claiming that a book they had written and published “perpetuates dangerous conspiracies about COVID-19.” The United States Court of Appeals for the Ninth Circuit affirmed the denial of the requested injunction, holding that the plaintiffs’ underlying lawsuit was not likely to succeed on the merits because Sen. Warren’s letter was not an unlawful attempt to coerce Amazon to stifle their speech. *Kennedy v. Warren*, 66 F.4th 1199 (9th Cir. May 4, 2023).

### Background

Kennedy, Joseph Mercola, and Ronald Cummins wrote a book titled *The Truth About COVID-19: Exposing the Great Reset, Lockdowns, Vaccine Passports, and the New Normal*, which was published by Chelsea Green Publishing, Inc. In September 2021, Sen. Warren wrote a letter to Amazon asking that it modify its algorithm to stop directing consumers to the book, complaining that the book espouses misinformation regarding the COVID-19 pandemic. In the opening paragraph of her letter, Sen. Warren referenced another letter that she had written to Amazon about its sale of unauthorized KN95 masks and said that “[t]his pattern and practice of misbehavior suggests that Amazon is either unwilling or unable to modify its business practices to prevent the spread of falsehoods or the sale of inappropriate products – an unethical, unacceptable, and potentially unlawful course of action from one of the nation’s largest retailers.”

Sen. Warren asked Amazon to “perform an immediate review of [its] algorithms and, within 14 days, provide both a public report on the extent to which Amazon’s algorithms are directing consumers to books and other products containing COVID-19 misinformation and a plan to modify these algorithms so that they no longer do so.” Sen. Warren subsequently issued a press release on her website and attached a copy of the letter.

Kennedy, his co-authors, and the book’s publisher then sued Sen. Warren in her official and personal capacity in the United States District Court for the Western District of Washington claiming that her letter violated their First Amendment rights by seeking to intimidate Amazon and suppress their book. Plaintiffs sought a preliminary injunction to require Sen. Warren to remove the letter from her website, issue a public retraction, and refrain from publishing similar letters in the future.

The district court denied the plaintiffs’ motion for a preliminary injunction, ruling that they were unlikely to succeed on the merits, “failed to establish that, in the absence of preliminary injunction, they will suffer irreparable harm, and the balance of equities disfavors a remedy that would

irreparably harm Defendant Warren.” *Kennedy v. Warren*, No. 2:21-cv-01508-BJR, 2022 U.S. Dist. LEXIS 83683, at \*14-\*15 (W.D. Wash. May 9, 2022).

## Ninth Circuit Decision

On May 4, 2023, the Ninth Circuit, in an opinion authored by Judge Paul J. Watford, affirmed and held that plaintiffs did not “raise a serious question on the merits of their First Amendment claim.”

Plaintiffs alleged that Sen. Warren’s letter reflected a coercive action designed to stifle protected speech and thus ran afoul of the prohibitions articulated by the Supreme Court in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). In *Bantam Books*, a government commission had sent letters to obscene magazines threatening them with prosecution if they did not comply with the commission’s request to cease publication. The Supreme Court held that these letters constituted informal government censorship that violated the First Amendment by intimidating distributors into pulling unfavored publications. As the Ninth Circuit explained, following *Bantam Books*, courts have distinguished “between government officials’ ‘attempts to convince and attempts to coerce’ intermediaries not to distribute third party’s speech,” recognizing that attempts to persuade are constitutional, while attempts to coerce are not.

The Ninth Circuit noted that this distinction can be difficult to discern and, to determine whether Sen. Warren’s speech was a permissible attempt to persuade or an unlawful coercion constituting censorship, the Court looked to the four-factor framework that the Second Circuit adopted in *National Rifle Association v. Vullo*, 49 F.4th 700, 715 (2d Cir. 2022). That framework considers: “(1) the government official’s word choice and tone; (2) whether the official has regulatory authority over the conduct at issue; (3) whether the recipient perceived the message as a threat; and (4) whether the communication refers to any adverse consequences if the recipient refuses to comply.”

The Ninth Circuit ruled that all four factors supported the conclusion that Sen. Warren’s letter was permissible persuasive speech. First, although Sen. Warren used “strong words,” her word choice and tone were a persuasive “call to action” consistent with elected officials’ right to “forcefully criticize” other speakers. The Court explained that “[g]enerating public pressure to motivate others to change their behavior is a core part of public discourse,” and nothing in Sen. Warren’s letter intimated that “compliance was the only realistic option to avoid government sanction.” The plaintiffs argued that her letter’s reference to “potentially unlawful” conduct showed that the Senator’s actions were coercive, but the Ninth Circuit disagreed, stating that the phrase needed to be considered in context. The letter did not explain what, if any, law Amazon might be breaking by selling the book, and the phrase seemed to refer to the sale of the masks discussed earlier in the same paragraph. According to the Court, merely “referencing potential legal liability does not morph an effort to persuade into an attempt to coerce.” As the Ninth Circuit made clear, “[a] First Amendment problem arises only if the official intimates that she will use her authority to turn the government’s coercive power against the target if it does not change its ways.”

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On the second factor, the Court pointed out that “a single Senator, has no unilateral power to penalize Amazon,” and Sen. Warren’s “absence of authority” to take legal action shows her letter was persuasive, not coercive.

Third, the Court stated the perception of the recipient was a less important factor, but, regardless, there was “no evidence that Amazon changed its algorithms in response to Senator Warren’s letter, let alone that it felt compelled to do so.” Plaintiffs stressed that Amazon notified the publisher that it

would not advertise the book several weeks after receiving the letter, but the Ninth Circuit described this fact as “unilluminating” since there was no evidence Amazon advertised the book prior to receiving the letter.

Finally, the Court held that the “most important” factor, adverse consequences for non-compliance, weighed in favor of Sen. Warren because the letter did not level any explicit or implicit threat. The Ninth Circuit underscored that “an official does not need to say ‘or else’ if a threat is clear from the context,” but, in this case, “it is hard to fathom what the unspoken ‘or else’ would be.”

Under this analysis, the Court concluded that the plaintiffs had “not raised a serious question” about whether Sen. Warren’s letter was an unconstitutional coercive attempt to restrict speech and thus affirmed the denial of the request for a preliminary injunction.

Judge Mark J. Bennett wrote a separate concurrence. He agreed with the case’s outcome, but disagreed that there was not a “serious question” about the coercive nature of the letter. Judge Bennett’s concurrence expressed the view that “plaintiffs have raised at least some questions as to the potentially coercive nature of Senator Warren’s letter,” but nevertheless agreed that the district court had not abused its discretion in determining that the plaintiffs had failed to demonstrate a likelihood of success on the merits.

*Plaintiffs-Appellants are represented by Jeb Rubinfeld and Arnold & Jacobowitz PLLC. Defendant-Appellee Senator Elizabeth Warren is represented by the United States Department of Justice and Elias Law Group LLP.*

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