

A.C. 39881

AUSTIN HAUGHWOUT	:	APPELLATE COURT
	:	
v.	:	STATE OF CONNECTICUT
	:	
LAURA TORDENTI ET AL.	:	FEBRUARY 15, 2018

MOTION TO STRIKE PORTION OF REPLY BRIEF

Pursuant to Practice Book § 60-2(3), the defendants Laura Tordenti et al. respectfully move the Court to strike section VI (pages 8-14) of plaintiff's reply brief in which, for the first time, plaintiff asserts a state constitutional argument that the "true threats" doctrine in Connecticut does or should contain an intent or scienter requirement, based on an analysis of the factors enumerated by the Court in *State v. Geisler*, 222 Conn. 672, 684-86 (1992).

I. Brief History of the Case

Plaintiff Austin Haughwout was a student at Central Connecticut State University ("CCSU"), from which he was expelled for certain verbal and nonverbal conduct found violative of the CCSU Student Code of Conduct. After exhausting the University appeal process, Mr. Haughwout brought an action in New Britain Superior Court seeking, *inter alia*, declaratory and injunctive relief, including his reinstatement as a student. After a full evidentiary hearing the Court (Shortall, J.) denied all of plaintiff's claims. Plaintiff appealed to this Court, but limited his claims to whether his free speech rights had been violated by the defendants. The briefing before this Court is now complete, with plaintiff's reply brief having been filed on or about February 1, 2018.

II. Specific Factual Grounds on Which Movant Relies

After the second sentence in the "Argument" section of his original brief to this Court, with respect to the free speech issue and the "true threats" doctrine, plaintiff inserted a footnote (No. 7) (pages 8-9) which, in its entirety, reads as follows:

Because undersigned counsel believes in good faith that the established federal standard is clearly dispositive on this factual record, undersigned counsel believes this case does not provide occasion to define any daylight between the state and federal constitutions on the issue of true threats. See *State v. Baccala*, 326 Conn. 232, 237 n.5 (2017) (setting forth factors concerning appropriateness to address state constitutional claim); *State v. Geisler*, 222 Conn. 872, 610 A.2d 1225 (1992) (seminal case for defining contours of state constitution); see also *State v. Linares*, 232 Conn 345, 377–87, 655 A.2d 737 (1995) (state constitution provides elevated protections in free speech context concerning vagueness challenges). Counsel is prepared to brief relevant *Geisler* factors, yet counsel does not wish to unnecessarily burden the court or his adversary with surplusage. Accordingly, inasmuch as process permits, arguments under the state constitution are not waived, yet analysis proceeds respecting the standards under the first amendment to the United States constitution. The question of various scienter requirements in this context has not been settled on constitutional grounds. See *Elonis v. United States*, 135 S.Ct. 2001 (2015) (declining to reach constitutional scienter requirement in this context, resting opinion on statutory grounds instead).

Much of the balance of plaintiff's original brief is devoted to arguing, as won the day in *State v. Krijger*, 313 Conn. 434 (2014), that plaintiff's words and action should have been interpreted by hearers, observers and the trial court as benign, and focuses extensively on plaintiff's and plaintiff's counsel's *post hoc* explanations of plaintiff's intent or meaning. The defendants, in their brief (Section II.H.) noted, as had the trial court, that the true threats standard is predicted on an objectively reasonable standard as to hearers or observers, and thus the plaintiff's intent is irrelevant. In his reply brief at Section VI (pages 8-14) plaintiff then engages in an extensive discussion and argument in favor of adoption of an intent or scienter requirement to the true threats doctrine in

Connecticut, claiming that the matter is not settled under federal law. In so doing, plaintiff's reply brief, in contravention of the representations in plaintiff's original brief, undertakes a full *Geisler* analysis.

III. Legal Grounds on Which the Movant Relies

Practice Book § 60-2(3) authorizes this Court to strike "improper matter from a brief or appendix."

It is "well established ... that [c]laims ... are unreviewable when raised for the first time in a reply brief. ... Our practice requires an appellant to raise claims of error in his original brief, so that the issue as framed by him can be fully responded to by the appellee in its brief, and so that we can have the full benefit of that written argument." *Medeiros v. Medeiros*, 175 Conn. App. 174, 189 n.12 (2017); see also, *State v. Wilson*, 242 Conn. 605, 607 n. 5 (1997) ("we agree with the state that the defendant failed to provide an adequate state constitutional analysis in his original brief. Although the defendant did revisit the issue in his reply brief, '[i]t is a well established principle that arguments cannot be raised for the first time in a reply brief.' (Internal quotation marks omitted.) *Williams Ford, Inc. v. Hartford Courant Co.*, 232 Conn. 559, 593 n. 26 ... (1995). Accordingly, we decline to consider the defendant's state constitutional claim.")

The scenario here also occurred in *State v. Gonzalez*, 278 Conn. 341 n.9 (2006), wherein the Court held as follows:

Although the defendant purports to invoke the more protective provisions of the Connecticut constitution, he does not, in his opening brief, provide any specific, independent support for his state constitutional arguments. We reiterate that "we will not entertain a state constitutional claim unless the defendant has provided an independent analysis under the particular provisions of the state constitution at issue.... Without a separately briefed and analyzed state constitutional claim, we deem abandoned the defendant's claim" (Internal quotation marks omitted.) *State v. Sinvil*,

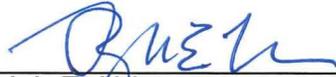
270 Conn. 516, 518 n. 1, 853 A.2d 105 (2004). Although, in his reply brief, the defendant ultimately does provide analysis of his state constitutional argument under the factors set forth in *State v. Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), “[i]t is a well established principle that arguments cannot be raised for the first time in a reply brief.” (Internal quotation marks omitted.) *State v. Peeler*, 271 Conn. 338, 373 n. 36, 857 A.2d 808 (2004), cert. denied, 541 U.S. 1029, 126 S.Ct. 94, 163 L.Ed.2d 110 (2005). Accordingly, we granted the state's motion to strike portions of the defendant's reply brief discussing his state constitutional claims. See *State v. Sinvil*, supra, at 518 n. 1, 853 A.2d 105. We, therefore, confine our analysis to the defendant's federal constitutional claims. See *State v. Eady*, 249 Conn. 431, 435 n. 6, 733 A.2d 112, cert. denied, 528 U.S. 1030, 120 S.Ct. 551, 145 L.Ed.2d 428 (1999).

IV. Conclusion

The defendants respectfully urge the Court to grant this motion to strike Section VI of plaintiff's reply brief.

GEORGE JEPSEN
ATTORNEY GENERAL

BY:



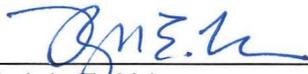
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CERTIFICATION

In accordance with Practice Book §§ 10-13 and 62-7, a copy of this motion has been served on each other counsel of record by first class postage prepaid U.S. mail this 15th day of February 2018 to:

Mario Cerame
c/o Woolf Law Firm LLC
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East Hartford, CT 06108

In addition, this motion complies with Practice Book § 66-3.



Ralph E. Urban
Assistant Attorney General