Uniform Law Commission
Drafting Committee
on
Redaction of Personal Information from Public Records

April 29, 2024

SUBJECT: First Amendment Issues for Consideration by Drafting Committee

TO: Members and Observers of the Drafting Committee

FROM: Vincent C. DeLiberato, Jr.
Chair

QUESTIONS PRESENTED

I. Whether the Drafting Committee's project is sufficiently limited in scope to address potential First Amendment issues?

II. Whether a state's limitation of access to information in its possession restricts freedom of expression?

III. If a state's limitation of access to information in its possession restricts freedom of expression, does the restriction withstand strict scrutiny?

BRIEF ANSWERS

I. Yes. The project, as refined in April 2024, deals only with judicial officers' personal information in publicly available government-maintained electronic public records.

II. No. The First Amendment does not prohibit a state from limiting access to information in its possession.

III. Yes. Limiting access to judicial officers' personal information in a publicly available government-maintained electronic public record is narrowly tailored to promote the compelling government interest of reducing threats to judicial officers. The limitation is the least restrictive means available to accomplish the result without a total ban on access and freedom of expression.

STATEMENT OF FACTS

In Fall 2021, a Uniform Law Commission project was undertaken to study, and possibly draft, uniform or model legislation on redaction of public officers' personal information from public records. As a result of two years of study by commissioners, with input from press and media organizations, custodians of public records, commercial users of potentially

affected public records, and judges, the project was narrowed to protect only personal information of judicial officers within publicly available government-maintained electronic public records. During the study, no First Amendment issues were raised.

When the Executive Committee of the Commission approved the project for drafting, Question II was raised. At preliminary virtual meetings and at the initial, hybrid drafting meeting, Question III was raised. The project came into question because of the two questions and a possible division among the United States Circuit Courts of Appeals on the questions and because the project, as modified, would only retard, and not eliminate, threats to judicial officers.

The Drafting Committee directed Co-Reporter Bintliff to prepare a draft for submission to the Commission's Style Committee. That draft, dated April 24, 2024 {hereinafter referred to as the Proposed Act}, has been submitted to the Style Committee for consideration in May 2024.

The Drafting Committee directed Co-Reporter Sanders to prepare a memorandum on Questions II and III, citing circuit court decisions. That memorandum is in progress.

Members and observers of the Drafting Committee were also invited to submit memoranda on Questions II and III.

DISCUSSION

I. Whether the Drafting Committee's project is sufficiently limited in scope to address potential First Amendment issues?

The legislation at issue has four material definitions. A "judicial officer" is defined as an individual appointed or elected to hear and decide legal matters in a state court. Section 2(3) of the Proposed Act (April 24, 2024). "Personal information" is defined as name plus home address, unlisted telephone number, personal cell phone number, driver license number, or license plate number. Section 2(5), *id.* "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. Section 2(1), *id.* The definition of "public record" is left to applicable legislation in each enacting state. Section 2(6), *id.*

Utilizing the material definitions, the operative provision of the Proposed Act deals with redaction of "personal information" of "judicial officers" from a publicly available government-maintained "electronic" "public record." Section 3 of the Proposed Act (April 24, 2024). The Drafting Committee and

the Style Committee will be clarifying the text of the Proposed Act to cover only databases to which the public has access, referred to as public-facing access.

There is no impact on state legislation relating to freedom of information or open records. Section 3 of the Proposed Act (April 24, 2024). Custodians of public records are required to maintain an unredacted version of every public record. Section 7, *id.* There is no restriction on any other access to public records. *See id.*

Since the Proposed Act deals only with public-facing access to government-maintained electronic public records, its only purpose is to increase time necessary for a potentially violent individual to access information which would allow that individual to inflict personal injury or property damage at the residence of a judicial officer.

II. Whether a state's limitation of access to information in its possession restricts freedom of expression?

A state's limitation of access to information in the possession of the state does not restrict freedom of expression. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011); *Los Angeles Police Department v. United Reporting Publishing Corporation*, 528 U.S. 32, 40-41 (1999); *The Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989); R. Rotunda, *Treatise on Constitutional Law*, § 20.31(i)(2013).

In *Sorrell*, the State statute at bar proscribed sale, disclosure, and use of pharmacy records detailing prescribing practices. This proscription was held to violate the First Amendment as a content-based and speaker-based burden on the free speech of prescribers. *Sorrell*, 564 U.S. at 569-70. The Proposed Act does not burden the expression of any member of the public. The Proposed Act does nothing more than partially restrict access to information in the possession of each enacting state.

In *Los Angeles Police Department*, a California statute conditioned access to public arrest records upon a declaration of legitimate and noncommercial use of public arrest records. The Court validated the State's right to control its own data: "[W]hat we have before us is nothing more than a governmental denial of access to information *in its possession*." *Los Angeles Police Department*, 528 U.S. at 40 (emphasis added). The Proposed Act does not even deny access to information possessed by a state; it merely slows down access to that information.

In *Florida Star*, in invalidating a State criminal conviction for violation of a Florida statutory prohibition of identifying victims of sexual abuse, the Court recognized the State's ability to protect sensitive information under its control: "Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." *Florida Star*, 491 U.S. at 534.

III. If a state’s limitation of access to information in its possession restricts freedom of expression, does the restriction withstand strict scrutiny?

A. Standard.

To satisfy strict scrutiny, a content-based restriction must be narrowly tailored to promote a compelling government interest; and it must use the least restrictive means to promote that interest. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997); *Sable Communications of California, Inc., v. Federal Communications Commission*, 492 U.S. 115, 126 (1989); 16A *Am. Jur. 2d*, Constitutional Law, § 480 (2009).

B. Narrow tailoring to promote compelling state interest.

Maintaining public confidence in an impartial judiciary constitutes a compelling State interest, and a ban on personal campaign solicitation by judicial candidates is narrowly tailored to accomplish that goal with a minimal abridgment of free speech. *Williams-Yullee v. Florida Bar*, 575 U.S. 433, 444 (2015). The case involved a judicial candidate who was disciplined for violating a Florida Bar Rule prohibiting judicial candidates from personally soliciting campaign funds. The candidate challenged

the Rule as denying freedom of expression. The Court upheld the Rule as protecting the integrity of the judiciary and maintaining public confidence in an independent judiciary. *Id.* at 445. The Proposed Act does not abridge speech at all.

Achieving safety and security of judicial officers protects the integrity of the judiciary and maintains public confidence in an independent judiciary. Permitting a state to delay electronic access to information under its control is a narrowly tailored means to accomplish the compelling state interest of achieving safety and security of judicial officers by increasing the time necessary for potentially violent individuals to access personal information which would allow the infliction of personal injury or property damage at residences of judicial officers, thus protecting judicial officers from harm which might be avoided by quelling the passion of potentially violent individuals.

The standard of narrow tailoring to promote a compelling state interest is not limited to prohibiting expression which causes an immediate danger. The Court has recognized this principle:

> [T]he government retains ample means of safeguarding significant interests upon which publication may impinge.... To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition.... *To the extent* sensitive *information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release*.

Florida Star, 491 U.S. at 534 (emphasis added). The Proposed Act utilizes a state’s power over public-facing access to electronic public records in its custody to forestall harm to judicial officers.

Efficiency in the workplace is a compelling State interest to allow free speech restrictions imposed by the State as an employer. *Waters v. Churchill*, 511 U.S. 661, 675 (1994). The case involved a State employee who was fired for an improper conversation about cross-training. While identifying the compelling state interest, the Court remanded for an evidentiary hearing on the reasonableness of the basis of the employment sanction. *Id.* at 677-79, 682.

C. Least restrictive means.

Analysis begins with the goal served by the least restrictive means standard:

> The purpose of the test is to ensure that ... legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.

Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 666 (2004).

A state's statutory prevention of gender discrimination in civic organization membership is the least restrictive means to dispel sexual stereotypical notions unrelated to actual ability and to provide access to the promotion of leadership skills, business, contacts, and employment opportunities. *Roberts v. United States Jaycees*, 468 U.S. 609, 625-26 (1984). The case involved a civic organization's freedom of association challenge to a Minnesota law prohibiting discrimination on the basis of sex. In applying the least restrictive means standard, the Court held that: "The Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no

restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Id.* at 627. The Proposed Act targets a small portion of public records in possession of a state and imposes no other restrictions on those public records.

In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), Former President Nixon challenged, on privacy grounds, Federal legislation authorizing the Administrator of General Services to: take custody of the former President's papers and recordings, promulgate regulations on access to the materials, and have Federal archivists screen the materials and return private materials to the former President. In denying the challenge, the Court affirmed the Federal District Court's holding that archival screening of presidential materials to separate public and private matter is the least restrictive means to maintain presidential records. *Id.* at 456-57. The Proposed Act does not require any discretionary action on redaction or on access to unredacted public records. *See* section 7 of the Proposed Act.

The Proposed Act regulates only public-facing access to government-maintained electronic public records; it does not

regulate any other access to public records. This is the least restrictive means to achieve the compelling state interests to directly protect judicial officers from harm which might be avoided by quelling the passion of potentially violent individuals and to indirectly maintain public confidence in the judiciary.

D. Underinclusiveness.

Underinclusiveness can reveal that a law does not actually address a compelling interest. *Williams-Yullee*, 575 U.S. at 449. The question of underinclusiveness centers on how far a state must go to carry out its compelling interest.

The compelling state interest of protecting anonymity of juvenile offenders is not served by restricting newspaper publication but no other form of publication. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104-05 (1979). The case involved enforcement of a West Virginia penal statute restricting newspaper publication of the names of juvenile offenders. In defending the enforcement action, the Respondent newspapers raised a First Amendment challenge to the statute. The Court held State interest of protecting anonymity of juvenile offenders

insufficiently compelling to impose a criminal penalty. *Id.* at 104. The Court went even farther:

> The statute does not restrict the electronic media or any form of publication, except "newspapers," from printing the names of youths charged in a juvenile proceeding. In this very case, three radio stations announced the alleged assailant's name before the Daily Mail decided to publish it. Thus, even assuming the statute served a state interest of the highest order, it does not accomplish its stated purpose.

Id. at 104-05.

Legislative interdiction of speech which insults or provokes violence solely on the basis of the target of the speech is content-based interdiction. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393 (1992). The case arose out of a juvenile criminal action for violation of a municipal ordinance that banned speech which insults or provokes violence based on race, color, creed, religion, or gender. The ordinance was held to violate the First Amendment. *Id.* at 391. The Court concluded that, while the First Amendment permits banning all "fighting words," it does not permit selectively banning only "fighting words" which communicate messages of racial, gender, or religious intolerance. *Id.* at 393-94.

The concept of underinclusiveness, however, is not an

absolute bar to justification of restriction on freedom of expression. *Williams-Yullee*, 575 U.S. at 449; *R.A.V.*, 505 U.S. at 387. The First Amendment does not require that, in a prohibitive context, a state must proscribe all speech or no expression at all. *Cf. id.* at 419 (concurring opinion). The concept allows for a piecemeal approach.

A statute's failure to regulate all speech does not render the statute fatally underinclusive. *Burson v. Freeman*, 504 U.S. 191, 207 (1992). The case involved a political party worker's action seeking to enjoin enforcement of Tennessee legislation prohibiting solicitation of votes and display of campaign materials within 100 feet of entrance to polling place on election day.

The Court recognized that the legislation on polling places regulated only partisan, political solicitation but found no need for the legislation to regulate charitable and commercial solicitation or exit polling: "[T]here is... ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud. In contrast, there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses." *Id.* As to the Proposed Act, evidence of the possibility of a cooling period to avert potential violence supports the need to only regulate public-facing access to government-maintained electronic public records and not the need to regulate all other access to public records.

A state is not required to address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. *Williams-Yullee*, 575 U.S. at 449. The Court addressed and dismissed the argument that the challenged personal fund-solicitation ban applied only to judicial candidates and not to campaign committees: "The solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges

and judicial candidates." *Id.* The Proposed Act aims squarely at a cooling period achieving safety and security of judicial officers to protect the integrity of, and maintain public confidence in, the judiciary.

CONCLUSION

The Proposed Act deals with redaction of personal information of judicial officers from publicly available government-maintained electronic public records, with no impact on state legislation relating to freedom of information or open records. An unredacted version of every public record is required to be maintained. The only purpose of the Proposed Act is to increase time necessary for potentially violent individuals to access information which would allow the infliction of personal injury or property damage at residences of judicial officers.

A state's limitation of access to information in the possession of the state does not restrict freedom of expression. The Proposed Act does nothing more than partially restrict access to information in the possession of each enacting state. There is no denial of access to information possessed by a state. There is only a slowing of access to that information.

To satisfy strict scrutiny, a content-based restriction must be narrowly tailored to promote a compelling government interest; and it must use the least restrictive means to promote that interest.

Maintaining public confidence in an impartial judiciary constitutes a compelling State interest. Achieving safety and security of judicial officers protects the integrity of the judiciary and maintains public confidence in an independent judiciary. Permitting a state to delay electronic access to information under its control is narrowly tailored to directly increase time necessary for, and possibly quell the passion of, potentially violent individuals to access personal information useful in inflicting harm upon judicial officers.

The goal of the least restrictive means standard is to ensure that legitimate speech is not chilled or punished. The standard is tested by whether a challenged regulation is the least restrictive means among available, effective alternatives.

A state can legislate to prevent gender discrimination in organizational membership as the least restrictive means to dispel sexual stereotyping and to provide access to the organizational benefits. Congress can require archival screening

of presidential materials to separate public and private matter as the least restrictive means to maintain presidential records. The Proposed Act can restrict public-facing access to government-maintained electronic public records as the least restrictive means to achieve safety and security of judicial officers, thus protecting integrity of the judiciary and maintaining public confidence in an independent judiciary.

Underinclusiveness can reveal that a law does not actually address a compelling interest. It is impermissible to target a specific type of dissemination of information or to target a species of hate speech.

Underinclusiveness does not absolutely deny a compelling interest justification for a restriction on freedom of expression but does allow for a piecemeal approach. It is permissible for legislation to distinguish between partisan, political solicitation and commercial or charitable solicitation. Policymakers in a state may focus on their most pressing concerns. It is permissible for the Proposed Act to single out public-facing access to government-maintained electronic public records and to focus on slowing down only that access.

VDL/alg&mla