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## Close Enough for Jazz? Characterizing the Disposition of Criminal Cases in News Reports

BY ROBB HARVEY AND KEVIN ELKINS

**T**he pressure of the 24/7 news cycle leaves media professionals with competing demands of getting the news out quickly and ensuring that the published/broadcast story is right. The “substantial truth” doctrine provides some comfort but is no guarantee against a lawsuit. This is especially the case in reporting about the disposition of criminal charges, where reporters are expected to appreciate the distinctions between various devices created by state legislatures that few lawyers can define. These include divining the niceties of, among others, convictions, guilty pleas, *nolo contendere* (no contest) pleas, “best interest” pleas, “Alford” pleas, “Kennedy” pleas (in West Virginia), “deferred convictions,” “judicial diversions,” and “deferred sentences.”

Criminal defendants frequently take offense to reporting—even accurate reporting—about their offenses. It is a short hop from criminal defendant to libel plaintiff. This article addresses some recent lawsuits in which a plaintiff asserted libel and other claims based upon a news outlet’s reporting of a “judicial diversion” or “deferred conviction” as a conviction based upon a determination of guilt.

Although the name and particulars differ from jurisdiction to jurisdiction, “deferred sentences,” “deferred convictions,” and “judicial diversions” are synonymous descriptions for

the discretionary method by which a judge may choose to defer proceedings against a qualified defendant and place the individual on probation. Whether a criminal defendant qualifies for deferral depends upon applicable state statutes. In Tennessee, for example, individuals qualify for deferrals if they have been found guilty or plead guilty or *nolo contendere* to certain classes of felonies and misdemeanors.<sup>1</sup> Upon the completion of a successful probationary period, the court dismisses the deferred charges, and the individual can petition the court for an order expunging all recordation relating to the person’s arrest, indictment or information, trial, finding of guilty, and dismissal and discharge.<sup>2</sup> As such, judicial deferrals act as a “second-chance” opportunity for certain offenders.

In *Molthan v. Meredith Corp. and Raycom Media, Inc.*,<sup>3</sup> the magistrate-judge recommended, and the district judge recently agreed, that the libel/false light plaintiff’s claims should be dismissed. In an earlier criminal case, the libel plaintiff had been accused of

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*Robb Harvey has been defending content providers for more than 30 years. Kevin Elkin’s media practice focuses on representing newspapers and television stations in First Amendment and Open Records Act cases. Note: The authors represent the defendants in the Molthan case.*

# Shaping the Forum for the Hashtag Era

BY DAVID M. GILES

Today's polarized political environment headlines very startling times: "Senate Declares 'Press Not the Enemy of the People.'" In mid-August, following more than 18 months of acerbic presidential rhetoric, threats, and assaults against journalists and ubiquitous accusations of "fake news" ringing out from The White House, to Congress and to city halls, it took the combined voices of more than 300 U.S. newspapers to get/inspire/urge our political leaders to reinforce that a free press is elemental to American democracy.

In a recent poll released shortly before the Senate's acknowledgment of the "vital and indispensable role" of the media, *Ipsos* released a survey finding that, at their core, Americans support the concept that an unfettered press serves a critical role in our democratic society. Specifically, it found significant support for the idea that a free press "is essential for American democracy" and that journalists should be sheltered from government pressure.

Despite the Senate's unanimous affirmation, the *Ipsos* poll also revealed some fraying at the edges of public support for the importance of a free press to democracy:

- Nearly one-third of Americans agree that news organizations are the "enemy of the people";



David M. Giles

- About a quarter believe "the president should have the authority to close news outlets engaged in bad behavior"; and
- More than two thirds think it "should be easier to sue reporters who knowingly publish false information."

Any poll is fraught with contradictions and generalizations, but it is evident that trust in the media is, at least for now, on the decline. Whether this is attributable to polarized politics, a 24-hour news cycle, or technological advances that allow us all to be commentators is anyone's guess.

Many see impending doom for a free press and professional journalism. President Trump's incessant attack on the media in an effort to discredit the messenger is not a recent phenomenon. Criticism of the press is as old as the First Amendment itself. From George Washington and Thomas Jefferson (whose once-famous quote "Nothing can now be believed which is seen in a newspaper" is akin to today's hackneyed use of the phrase "Fake News") to Trump and his predecessors Barack Obama and George W. Bush, every American president at some point has complained about the media and attempted to influence news coverage.

One thing is clear: Angry rhetoric and physical confrontation are cause for concern. Whether it's a Florida mob shouting down a reporter during a live shot, a Tweet threatening harm to an anchor, or a testosterone-charged city park employee grabbing the tripod from a cameraman and hurling it into a lake, covering the news has become perilous.

The challenges I've outlined above

serve as a reminder to those of us who provide legal advice to journalists and news organizations that we also are charged with helping them navigate this new frontier. In this rapidly changing time in the media business, the Forum must continue to evolve to attract new lawyers and foster conversations about the best and most innovative ways to represent journalists and media organizations to ensure they can independently continue their role as the Fourth Estate.

### The Work Ahead

As the Forum on Communications Law makes its biennial transition from one chair to another, we must not lose our momentum. I have the good fortune of following Carolyn Forrest as chair. Carolyn is a tireless worker, a creative thinker, and an endless and enthusiastic advocate for the Forum. Building on the efforts of Carolyn and her predecessors, the Forum is in good shape. Forum membership has started to increase, due in large part to the efforts of our Membership Committee.

To continue that momentum, our

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*Dave Giles (dave.giles@scripps.com), Chair of the Forum on Communications Law, is vice president, deputy general counsel, and chief ethics officer at The E.W. Scripps Company in Cincinnati, Ohio.*

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focus this year is on getting more people involved, providing more people with speaking roles at various Forum conferences, and providing more opportunities for outside counsel to network with in-house counsel. To accomplish these goals, we've added new committees and leadership roles.

Several of the changes will be noticeable. First, the Forum now has an Executive Committee, comprised of the chair, immediate past chair, and chair-elect, as well as two new positions: executive director and finance director. Laura Prather and Gregg Leslie will serve those two positions respectively for the next three years.

### **New Faces, New Initiatives, and More Content**

We've added two new subject matter committees: Intellectual Property Committee and Insurance Committee. We've also expanded the leadership roles on other committees, creating co-chairs where only one chair may have led a committee in the past. To buffet the pipeline of new leaders, we have created succession plans for many committees so that a co-chair-elect can spend a year or two learning how to run a committee and step in seamlessly when a co-chair's term expires or he or she can go on to other leadership positions. Several of the committees now publish newsletters.

Now, the *Communications Lawyer* is not the only avenue for members to get published. The Young Lawyers and Women in Communications Law Committees are producing quarterly newsletters, providing additional publishing opportunities for members. In addition, Christine Walz and the Webinar Committee recently produced a webinar entitled "What News Organizations Need to Know About Protecting Journalists from Harassment" that provided a wealth of information for media lawyers and journalists in today's increasingly antagonistic times.

The Forum also is doing a better job of interfacing with other ABA sections, forums, and divisions. One great example is the recent ABA Annual Meeting, where two Forum members—Steve Mandell and Drew

Shenkman—participated in the Annual Meeting Showcase: "Hurdles and Hope—The Quest for Transparent Government in the U.S. and Abroad."

All of our efforts are geared toward increasing opportunities to participate and learn from one another. Elsewhere in this edition we've listed the names and email addresses for the chairs of all of the Forum's committees so that you know who to contact to get involved. Share your ideas and initiatives to ensure the Forum meets your needs.

As you know, each year the Forum has three headliner conferences: The Data Privacy Symposium, Representing Your Local Broadcaster during the National Association of Broadcasters conference, and the Annual Conference. We welcome your ideas on how to improve them.

### **The 24th Annual Conference**

The 24th Annual Conference is set for January 31–February 2, 2019, at Nobu Eden Roc in Miami. We've got a terrific lineup of plenaries and workshops exploring leading-edge legal issues facing media and communications lawyers. The conference includes an impressive roster of dynamic and diverse speakers and facilitators.

Before the conference begins, on January 30, experienced members of our Bar will give back by (i) training young lawyers during the 22nd Annual Media Advocacy Workshop and (ii) judging the semifinal rounds of our 11th Annual First Amendment and Media Law Diversity Moot Court Competition for law students.

Then, we formally will kick things off on January 31 with an opening-night reception at Estefan Kitchen, in the trendy Miami Design District. From the tasty and *plentiful* Cuban fare to the stocked Mojito Bar to lively salsa music, it promises to be a great location for reconnecting with colleagues, making new acquaintances, and getting a taste of what Miami has to offer.

The four plenary sessions will feature a wide range of topics:

- The continuing impact of hate speech on new platforms that were not even in their infancy 50 years ago when the U.S. Supreme

Court decided *Brandenburg v. Ohio*;

- New legislation that intersects the debate on privacy vs. free speech;
- Whether the ongoing challenges to the legitimacy of a free press are eroding constitutional rights; and
- A "breaking news" panel on the controversial "catch and kill" practice employed by some media organizations, which is stifling free speech for political gain.

Based on feedback from conference attendees, we dropped one plenary session in favor of an extra round of workshops, so folks can spend more time with colleagues talking about new developments in the various practice areas that incorporate communications law.

We've also added a feature on Friday afternoon that we're calling "Cocktails, Conversations, and Connections." In years past, Friday afternoon was reserved for meetings of small groups gathered to discuss matters impacting in-house lawyers, women lawyers, and young lawyers. "Cocktails, Conversations, and Connections" is intended to throw the doors wide open. Beer and wine will be served, and we hope you will join your colleagues for panel discussions and conversations led by the Digital Communications Committee, In-house Lawyers Committee, Insurance Committee, Intellectual Property Committee, Teach Media Law Committee, Women in Communications Law Committee, and the Young Lawyers Committee.

An organization can only be as great as its members make it. Help us make the Forum better. We invite you to get involved and to share your ideas.

## EXECUTIVE COMMITTEE

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*dave.giles@scripps.com*

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Jenn Dukarski  
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Dana Green  
*greendana@ballardspahr.com*

# Courts Weigh Validity of Injunctions Against Speech as Summer Brings Wave of Prior Restraints

BY MICHAEL LAMBERT

Say your client, a broadcasting company, receives a temporary restraining order prohibiting it from airing a political ad criticizing a local judge running for reelection with the state supreme court. The ad claims that the candidate judge accepted hundreds of thousands of dollars in donations and perks from law firms with matters before her court. The judge issuing the TRO determined, in response to the candidate's emergency ex parte motion, that there was a substantial likelihood of success of proving that the statements in the ad were defamatory. In fear of contempt, you tell your client to remove the ad until you can fight the TRO. Two days later, the judge issuing the TRO recuses himself from the case after it was revealed that he received money, through his wife, from the law firm of the candidate's husband. The replacement judge then denies a request to extend the TRO and allows the ads to resume airing. Just as you breathe a sigh of relief, a judge in a different circuit court issues a similar TRO against your client, barring the ad in another part of the state. This injunction ultimately stands until the election is held a few days later.

This vexing series of events occurred in Arkansas this past May when Arkansas Circuit Court Judge Doug Martin issued a TRO<sup>1</sup> barring Tribune, Cox, and Nexstar from airing the Judicial Crisis Network's ad about Arkansas State Supreme Court Justice Courtney Goodson.<sup>2</sup>

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*Michael Lambert is a media and First Amendment associate with Prince Lobel Tye LLP in Boston, Massachusetts.*

The Arkansas case represents one of a handful of injunctions entered against speech this summer.

On June 26, the District Court of Harris County, Texas, issued an expunction order on behalf of Damon Barone against KTRK, Houston's ABC-13 television station, demanding the deletion of all references to Barone's arrest records and files and prohibiting the dissemination of records relating to his arrest.<sup>3</sup> In 2016, KTRK reported that authorities charged Barone, a local teacher, with assault–family violence. KTRK updated the article in 2017 when authorities dropped the charges.<sup>4</sup> As of the date of this publication, the article no longer appears on KTRK's website.<sup>5</sup>

On July 14, Judge John F. Walter of the U.S. District Court for the Central District of California ordered the *Los Angeles Times* to remove information from an article detailing a plea agreement between prosecutors and a former police detective accused of working with the Mexican Mafia.<sup>6</sup> The *Times* found the plea agreement on PACER, an online public court record database, and included segments of the agreement in an article published the morning of July 14. The government mistakenly filed the plea agreement publicly instead of filing it under seal. That afternoon, the judge issued a temporary restraining order: "To the extent any article is published prior to issuance of this order, it shall be deleted and removed forthwith."<sup>7</sup> The *Times* edited the article, removing any information contained in the plea agreement, and on the following day, it filed an emergency petition asking the Ninth Circuit to vacate the order.

The Reporters Committee for Freedom of the Press and 59 news media organizations quickly filed an amicus letter in support of the *Times*.<sup>8</sup> Three days after issuing the order, Judge Walter vacated his original order, stating that he subsequently developed an understanding of the facts and realized that the document was posted publicly due to a clerical error.<sup>9</sup>

These circumstances serve as reminders that injunctions against speech, considered "the most serious and least tolerable infringement on First Amendment rights,"<sup>10</sup> are sometimes tolerated by courts, at least temporarily. In the meantime, a speaker subjected to an injunction faces a no-win situation: Shut up and comply or face criminal or civil contempt sanctions. These daunting choices do not disappear after receiving an injunction. They will remain unless a court strikes it down upon appeal.

## Case Law

Injunctions that forbid future speech, known as prior restraints,<sup>11</sup> have a storied history in American jurisprudence. The U.S. Supreme Court has repeatedly made clear, starting with *Near v. Minnesota*<sup>12</sup> in 1931, that "it is the chief purpose of the guaranty [of the First Amendment] to prevent previous restraints upon publication."<sup>13</sup> A prior restraint, considered "the essence of censorship,"<sup>14</sup> is presumptively unconstitutional, "bearing a heavy presumption against its constitutional validity."<sup>15</sup>

In *New York Times Co. v. United States*,<sup>16</sup> the Supreme Court rejected an injunction against the publication of the Pentagon Papers, a report about the Vietnam War leaked

to the *New York Times*. Dismissing the government's claims that an injunction was necessary to protect military secrets from a previous war, the Court explained that there was only an "extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden."<sup>17</sup> This included national security situations, such as "when the Nation is at war,"<sup>18</sup> or the "publication of sailing dates of transports or the number and location of troops."<sup>19</sup> The governing principle under *New York Times* and subsequent jurisprudence is that injunctions prohibiting speech prior to a determination that the speech is unprotected are unconstitutional absent exceptional circumstances.<sup>20</sup>

Courts have routinely rejected injunctions issued before there has been an adjudication on the merits that speech is unprotected. TROs and preliminary injunctions in libel cases, for example, have been found unconstitutional because they are entered based on only a showing of likelihood of success on the merits before extensive discovery.<sup>21</sup> The same rule applies to obscenity.<sup>22</sup>

But injunctions against speech determined to be unprotected after an adjudication on the merits, at least in the obscenity and commercial speech contexts, have been permitted. For example, the U.S. Supreme Court, in *Kingsley Books, Inc. v. Brown*,<sup>23</sup> upheld an injunction on distributing materials found to be obscene, and in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,<sup>24</sup> it upheld an administrative order prohibiting a newspaper from printing gender-specific advertisements in violation of antidiscrimination laws. The Supreme Court has not resolved whether injunctions imposed as a remedy to prevent the repetition of defamatory statements are constitutional. The High Court nearly answered the question 13 years ago when it granted certiorari in *Tory v. Cochran*,<sup>25</sup> but the Court summarily vacated the injunction after the plaintiff died before the Court reached its decision.

Many courts still follow the traditional rule that "equity does not enjoin a libel or slander and that

the only remedy for defamation is an action for damages."<sup>26</sup> But some courts have determined that narrowly tailored permanent injunctions as a remedy against specific statements found to be false and defamatory at trial are consistent with the First Amendment.<sup>27</sup>

In *Balboa Island Village Inn, Inc. v. Lemen*,<sup>28</sup> the California Supreme Court found that injunctions prohibiting statements found to be defamatory are constitutional. The case arose after Anne Lemen protested noise and activities occurring at the Balboa Island Village Inn, a bar near her home. The Village Inn sued her for nuisance, defamation, and interference with business and sought an injunction against her. The trial court issued a permanent injunction, prohibiting her from contacting the business's employees, filming within 25 feet of the Village Inn, and repeating certain statements deemed defamatory, such as comments that the bar "acts as a whorehouse," "is involved in child pornography," and "distributes illegal drugs."<sup>29</sup> The injunction applied to Ms. Lemen, "her agents," and "all persons acting on her behalf."<sup>30</sup> The California Supreme Court reversed the injunction—not on the grounds that it was an impermissible prior restraint—but because it was overbroad, determining that any new injunction must be limited to the defendant and must not prevent complaints to government officials.<sup>31</sup> In fact, the court acknowledged that "a properly limited injunction prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory would not violate defendant's right to free speech."<sup>32</sup>

Similarly, the Kentucky Supreme Court, in *Hill v. Petrotech Resources Corp.*,<sup>33</sup> held that defamatory speech may be enjoined only after a court's final determination that the speech is false and the injunction is narrowly tailored to limit the prohibited speech.<sup>34</sup>

The Texas Supreme Court created its own rule, determining that permanent injunctions as a remedy in a defamation case prohibiting future speech are unconstitutional, while injunctions requiring the removal

of speech that has been adjudicated defamatory are valid. In *Kinney v. Barnes*,<sup>35</sup> Robert Kinney, a legal recruiter, left BCG Attorney Search in 2004 to begin his own competing search firm. In a number of online posts, BCG's president Andrew Barnes accused Kinney of taking part in a kickback scheme and other improprieties while at BCG. Kinney sued Barnes for defamation and sought a permanent injunction to require Barnes to remove the online statements, demand that third-party publishers delete the content, post a copy of the court order on his website, publicly retract the statements, and write an apology on his website. Kinney also requested that Barnes be barred from making similar statements about him in any future forum.

The Texas Supreme Court held that an order requiring Barnes to remove statements published online that have been adjudicated as defamatory is permissible because it does not enjoin future speech and thus is not a prior restraint.<sup>36</sup> But the court found that the prohibition on repeating those statements in the future was unconstitutional because it is a prior restraint that risks chilling constitutionally protected speech. The court emphasized the challenges in crafting a narrowly tailored injunction given the inherently contextual nature of defamatory speech, writing that "the same statement made at a different time and in a different context may no longer be actionable. Untrue statements may later become true; unprivileged statements may later become privileged."<sup>37</sup>

This summer, two courts from opposite coasts struck down injunctions against speech—one on statutory grounds and the other under the First Amendment.

#### ***Hassell v. Bird***

In *Hassell v. Bird*,<sup>38</sup> the California Supreme Court held in a 3-1-3 plurality opinion that Yelp could not be ordered to take down defamatory reviews of third parties under section 230 of the Communications Decency Act. The court concluded that section 230 shields online intermediaries from injunctions that treat them as the publisher or speaker of

information provided by another information content provider. The case, which attracted the attention of the media, tech, and civil liberty communities,<sup>39</sup> presented a unique question about injunctions—whether an online intermediary that hosted the alleged defamatory content and was not a party to the original defamation suit could be required to remove speech subject to a default judgment. The California Court of Appeal upheld the injunction. Yelp argued to the California Supreme Court that the injunction violated the First Amendment, due process, and section 230.

Writing for the plurality, Chief Justice Cantil-Sakauye reasoned that allowing plaintiff's "litigation strategy" of not including Yelp in her original suit and then later seeking an injunction would "end-run around section 230 immunity."<sup>40</sup> The injunction, according to the plurality, violated section 230 by seeking to overrule Yelp's decision as an interactive computer service to publish the reviews and to not remove them after a finding that they were libelous. The plurality considered the potential downstream consequences of allowing future plaintiffs to mimic Hassell's strategy of weaponizing a default judgment to demand the removal of online speech from a third-party intermediary: "[T]he extension of injunctions to these otherwise immunized nonparties would be particularly conducive to stifling, skewing, or otherwise manipulating online discourse—and in ways that go far beyond the deletion of libelous material from the Internet."<sup>41</sup>

In her concurrence, Justice Kruger determined that the court did not have the authority to bind Yelp, a nonparty, to litigation in which it had no meaningful opportunity to participate.<sup>42</sup> And despite believing that "it is unnecessary to reach the section 230 questions,"<sup>43</sup> Justice Kruger opined that "section 230 does not bar a cause of action solely because the result might be a court order requiring the provider, as the publisher of the posting in question, to take steps to remove it."<sup>44</sup>

Dissenting Justices Stewart, Cuellar, and Liu raised the potential consequences of the plurality's

decision, such as tort victims continuing to face danger and suffer reputational harm online. The dissenting judges also took aim at the Internet and section 230. Justice Cuellar wrote that the Internet "has the potential not only to enlighten but to spread lies, amplifying defamatory communications to an extent unmatched in our history"<sup>45</sup> and that the CDA "was not meant to be—and it is not—a reckless declaration of the independence of cyberspace."<sup>46</sup>

The court decided the case on section 230 grounds, leaving the burning First Amendment and due process questions for another day.

### ***Sindi v. El-Moslimany***

The U.S. Court of Appeals for the First Circuit held in *Sindi v. El-Moslimany*<sup>47</sup> that a permanent injunction barring the defendants from disseminating six statements violated the First Amendment because it did not account for contextual variation. After the jury returned a general verdict finding defendants liable for defamation, the trial court determined that six specific statements were false, defamatory, and made with actual malice and issued an order enjoining the defendants from repeating the statements in any medium or for any purpose.<sup>48</sup>

In the six statements the defendants accused Dr. Hayat Sindi, a public figure, of fraudulently obtaining her doctorate, lying about her age, and inflating her resume to be defamatory. Concerned with its "failure to account for contextual variation," the court determined that the injunction failed to survive strict scrutiny required for a prior restraint.<sup>49</sup> The First Circuit struck down the injunction based on two flaws: (1) It was not narrowly tailored because it punished future speech that may be constitutionally protected and (2) it did not leave open alternative channels of communication because it forbid defendants from republishing particular statements regardless of the forum or purpose of the speech.<sup>50</sup> The court offered three examples out of a "virtually endless" number of situations in which the context of the statements may change in the future so that repeating one of the six statements would be

protected. One example, according to the court, would be if defendants repeated one of the statements found to be defamatory—that Dr. Sindi "is an academic and scientific fraud"—after Dr. Sindi actually commits fraud. Under the injunction, defendants would be subject to contempt for truthful speech.<sup>51</sup> The court thus concluded that the injunction is "so wide-ranging and devoid of safeguards that it plainly contravenes the First Amendment's limitation of liability for speech about public figures to false assertions of fact made with actual malice."<sup>52</sup>

The court did not resolve questions of whether the First Amendment could ever allow an injunction as a remedy for defamation or whether a court could order a statement be removed from a website after an adjudication that the statement was unprotected.<sup>53</sup>

### **Conclusion**

The *Hassell* and *Sindi* courts added some clarity to the muddled waters of the validity of injunctions. But as both courts acknowledged, many open questions linger. Deciding whether to allow injunctions against defamatory speech will be the province of lower courts unless the U.S. Supreme Court reviews the issue. Until then, injunctions will remain an expected yet unpredictable reality of being a media lawyer.

### **Endnotes**

1. T.R.O., Courtney Goodson v. Tribune Broad. Fort Smith, LLC, No. 71CV-18-1326-1 (Cir. Ct. Wash. Cty. Ark. Div. 1, May 14, 2018), available at <https://reason.com/assets/db/15263959073945.pdf>; see also Eugene Volokh, *Arkansas Judge Issues Temporary Restraining Order Against Allegedly Libelous Political Ad*, THE VOLOKH CONSPIRACY (May 14, 2018), <https://reason.com/volokh/2018/05/14/arkansas-judge-issues-temporary-restrain>.

2. See John Moritz, *Judge Who Blocked Ads Against Arkansas Supreme Court Justice Reported Receiving Income from Her Husband's Law Firm*, ARK. DEMOCRAT-GAZETTE (May 15, 2018), available at <http://www.arkansasonline.com/news/2018/may/15/judge-who-blocked-ads-against-arkansas-high-court-/>; Staff Reports, *Judge*

*Rules Some Stations Can Air Ads Attacking Arkansas Supreme Court Justice After Another Judge Blocks Other Broadcasters*, ARK. DEMOCRAT-GAZETTE (May 18, 2018), available at <http://m.arkansasonline.com/news/2018/may/18/pulaski-county-judge-rules-ads-criticizing-state-s/>; Eugene Volokh, *Arkansas Prior Restraint Saga—One Court Says Yes, One Says No*, THE VOLOKH CONSPIRACY (May 18, 2018), <https://reason.com/volokh/2018/05/18/arkansas-prior-restraint-saga-one-court>.

3. Notice of Expunction Final, *Damon Anthony Barone v. Harris Cty. Sheriff's Office*, No. 201833093 (Dist. Ct. Harris Cty. Tex. Dist. 113, June 26, 2018), available at <https://reason.com/assets/db/15316958828800.pdf>.

4. See Eugene Volokh, *TV Station Ordered to Expunge Archived Story About Teacher's Dismissed Domestic Violence Charges*, THE VOLOKH CONSPIRACY (July 16, 2018), [https://reason.com/volokh/2018/07/16/tv-station-ordered-to-expunge-archived-s?utm\\_source=dldr.it&utm\\_medium=twitter](https://reason.com/volokh/2018/07/16/tv-station-ordered-to-expunge-archived-s?utm_source=dldr.it&utm_medium=twitter).

5. Although expungement orders typically only apply to internal court records and law enforcement, some states, such as Texas, have laws requiring private online criminal record databases to remove information under expungement orders. TEX. BUS. & COM. CODE § 109 *et seq.* The statute expressly exempts news publications, radio and television stations, online intermediaries, and telecommunications providers. *Id.* § 109.002(b)(2)–(5).

6. Order Granting *Ex Parte* Application and Order to Show Cause Why a Preliminary Injunction Should Not Issue, *United States v. John Balian*, No. CR 18-345-JFW (C.D. Cal. July 14, 2018), available at <https://www.documentcloud.org/documents/4600189-Temporary-Restraining-Order-on-Los-Angeles-Times.html>; see also Cindy Chang, *Judge Orders L.A. Times to Alter Story About Glendale Cop, Sparking Protest from Newspaper*, L.A. TIMES (July 16, 2018), available at <http://www.latimes.com/local/lanow/la-me-ln-legal-dispute-20180714-story.html>.

7. Order Granting *Ex Parte* Application, *supra* note 6.

8. Amicus letter, *L.A. Times Commc'ns v. USDC-CALA*, No. 18-71991 (9th Cir. July 16, 2018) available at <https://www.rcfp.org/sites/default/files/2018-07-16-LA-Times-v-USDC.pdf>.

9. See Victoria Kim, *Judge Lifts Controversial Order Requiring the L.A. Times to Alter Article About an Ex-Glendale Cop*, L.A. TIMES (July 17, 2018), available at <http://www.latimes.com/local/lanow/la-me-ln-balian-order-lifted-20180717-story.html>.

10. *Neb. Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976).

11. See *Alexander v. United States*, 509 U.S. 544, 550 (1993) (“Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints.”).

12. 283 U.S. 697 (1931).

13. *Id.* at 713.

14. *Id.*

15. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1960).

16. 403 U.S. 713 (1971).

17. *Id.* at 726.

18. *Id.* (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

19. *Id.* (citing *Near*, 283 U.S. at 716).

20. See *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (finding that “the gagging of publication has been considered acceptable only in ‘exceptional cases’”) (quoting *Near*, 283 U.S. at 716); *CBS, Inc. v. U.S. Dist. Court*, 729 F.2d 1174, 1183 (9th Cir. 1984) (writing that “prior restraints, if permissible at all, are permissible only in the most extraordinary of circumstances”).

21. See, e.g., *Hill v. Petrotech Res.*, 325 S.W.3d 302 (Ky. 2010); *Advanced Training Sys. v. Caswell Equip. Co., Inc.*, 352 N.W.2d 1 (Minn. 1984); *Sid Dillon Chevrolet v. Sullivan*, 559 N.W.2d 740 (Neb. 1997); *Metro. Opera Ass'n, Inc. v. Local 100*, 239 F.3d 172 (2d Cir. 2001).

22. See *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980).

23. 354 U.S. 436 (1957).

24. 413 U.S. 376 (1973).

25. 554 U.S. 734 (2005).

26. See, e.g., *e360 Insight v. The Spamhaus Project*, 500 F.3d 594 (7th Cir. 2007); *Comm. for Creative Non-Violence v. Pierce*, 814 F.2d 663 (D.C. Cir. 1987); *Kramer v. Thompson*, 947 F.2d 666 (3d Cir. 1991); see also Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 167 (2007) (“The traditional rule of Anglo-American law is that equity has no jurisdiction to enjoin defamation.”).

27. See, e.g., *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1208–09 (6th Cir. 1990) (Wellford, J. & Hull, J., concurring

in part and dissenting in part); *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 351 (Cal. 2007); *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 313 (Ky. 2010); *Advanced Training Sys. v. Caswell Equip. Co., Inc.*, 352 N.W.2d 1, 11 (Minn. 1984); *O'Brien v. Univ. Cmty. Tenants Union, Inc.*, 327 N.E.2d 753, 755 (Ohio 1975); *Retail Credit Co. v. Russell*, 218 S.E.2d 54, 62–63 (Ga. 1975); *In re Conservatorship of Turner*, No. M2013-01665-COA-R3-CV, 2014 WL 1901115, at \*20 (Tenn. Ct. App. 2014); *Nolan v. Campbell*, 690 N.W.2d 638, 652 (Neb. Ct. App. 2004).

28. 156 P.3d 339.

29. *Id.* at 342.

30. *Id.*

31. *Id.* at 353.

32. *Id.*

33. 325 S.W.3d 302 (Ky. 2010).

34. *Id.* at 309.

35. 443 S.W.3d 87 (Tex. 2014).

36. *Id.* at 93.

37. *Id.* at 98.

38. 420 P.3d 776 (Cal. 2018).

39. See Eric Goldman, *Dozen Amicus Briefs Oppose the Worst Section 230 Ruling of 2016 (and One Supports It)*—*Hassell v. Bird*, TECH. & MKTG. L. BLOG (Apr. 20, 2017), <https://blog.ericgoldman.org/archives/2017/04/dozen-amicus-briefs-oppose-the-worst-section-230-ruling-of-2016-and-one-supports-it-hassell-v-bird.htm>.

40. *Hassell*, 420 P.3d at 790.

41. *Id.* at 793.

42. *Id.* at 794 (Kruger, J., concurring).

43. *Id.* at 800.

44. *Id.* at 801.

45. *Id.* at 815 (Liu & Cuellar, JJ., dissenting).

46. *Id.* at 824.

47. 896 F.3d 1 (1st Cir. 2018).

48. *Id.* at 12.

49. *Id.* at 30.

50. *Id.* at 22.

51. *Id.* at 21.

52. *Id.*

53. *Id.* at 22.

# Weighing Public Safety and Caller Privacy: Why the FCC Decided to Amend Its Caller ID Rules

BY JOSHUA PILA AND ARIEL PINSKY

Caller ID-blocking technology, which protects the privacy of consumers who wish to conceal their identities, also can be manipulated by bad actors for unlawful purposes. For example, bad actors may make threatening (e.g., “swatting”) calls while hiding under a veil of anonymity, which may hinder law enforcement efforts to investigate and thwart those threats in a timely fashion.<sup>1</sup>

Caller ID-blocking technology is based on the FCC’s rules regarding Calling Party Numbers (CPNs). A CPN is the “subscriber line number or the directory number . . . associated with an interstate call on a Signaling System 7 (‘SS7’) network.”<sup>2</sup> CPNs contain a privacy indicator that specifies “whether the calling party authorizes presentation of the calling party number to the called party.”<sup>3</sup> In general, FCC rules prohibit carriers using SS7 to pass (and thus reveal) a calling party’s number if the party has dialed \*67, explicitly stating that “[n]o common carrier subscribing to or offering any service that delivers CPN may override the privacy indicator associated with an interstate call.”<sup>4</sup> Though the purpose of this provision is to protect the privacy of consumers, it has the unintended effect of hindering third parties such as law enforcement and nonpublic emergency services from quickly identifying and locating callers in a crisis situation.<sup>5</sup> While exceptions to this provision had already existed in “certain limited circumstances . . . [such as] a public agency’s emergency line, a poison control line, or in conjunction

with 911 emergency services,”<sup>6</sup> institutions like JCCs, school districts, hospitals, and even NASA were traditionally required to petition the FCC in order to obtain access to Caller ID information whenever they received threatening calls—a process that could take weeks, if not months, to complete.<sup>7</sup>

Indeed, in response to several waves of threatening calls made to Jewish Community Centers (JCCs) around the nation,<sup>8</sup> the FCC’s Consumer and Governmental Affairs Bureau (CGB) issued an Emergency Waiver on March 3, 2017, to provide law enforcement and security personnel access to restricted Caller ID information when facing serious threats.<sup>9</sup> That October, rather than continuing to issue temporary waivers in similar situations, the FCC voted to amend the Caller ID rule<sup>10</sup> itself—a move the FCC said was “intended to provide a more streamlined approach to investigating threatening calls from a blocked number.”<sup>11</sup> The immediate impact of this change, which became effective on January 2, 2018,<sup>12</sup> is that institutions like JCCs “no longer need to apply and wait for case-by-case waivers in order for their phone companies to share information”<sup>13</sup> due to an exemption now built into the Commission’s rules.

## Threatening Calls to JCCs: A Nationwide Crisis

The alarming rise in the number of threats directed toward JCCs throughout the country during the first two months of 2017<sup>14</sup> served as the precipitating event that led to an eventual change in the FCC’s Caller ID rules. There were “roughly 100 threats to 81 JCCs across the U.S.”<sup>15</sup> Threats were called into multiple schools and JCCs in several states, including New York, where “JCCs in Long Island, Staten Island, and Westchester were evacuated following the anonymous threats . . . none

of which led to a substantive claim.”<sup>16</sup> The threats were both severe and pervasive, eliciting condemnation from President Trump and triggering a prompt meeting between FBI Director James Comey and Jewish community leaders from across the country.<sup>17</sup> In recorded audio of one of the threats, “a disguised voice warns that a C-4 bomb has been placed in the JCC and that ‘a large number of Jews are going to be slaughtered.’”<sup>18</sup>

This series of threats directed at schools<sup>19</sup> and JCCs culminated in a general fear felt by local Jewish communities. Since the threats were never carried out, the injury suffered in these communities was primarily one of emotional trauma and apprehension. Indeed, JCCs are particularly sensitive targets due to the various functions they perform for the larger community—many JCCs operate nurseries, early childhood programs, senior programs, teen sports, and various other after-school programs. In response to the rising levels of threats made via phones and the traumatic impact of those threats on Jewish communities across the nation, the FCC, according to FCC spokesman Neil Grace, began “actively exploring” any measures it could take that might aid law enforcement to discover callers’ identities more rapidly than under the Commission’s existing Caller ID rules.

## Senator Schumer’s Letter to the FCC

The FCC did not have to explore its options for very long—on February 28, 2017, Senator Charles “Chuck” Schumer of New York wrote a public letter addressed to FCC Chairman Ajit Pai requesting any action that would allow JCCs experiencing serious threats to circumvent section 1601(b) of the Commission’s rules governing Caller ID.<sup>20</sup> The senator’s letter specifically referenced the wave of bomb threats that had been made

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*Joshua Pila has held several in house roles and is currently the general counsel of Meredith Corporation’s local media group. Ariel Pinsky is a second-year law student at the University of Georgia interested in commercial litigation with a background in journalism and political science.*

the previous day to eleven JCCs, many of them occurring either within or in close proximity to his home state.<sup>21</sup> Schumer also discussed the impact of the threats on the larger Jewish community: “The damage from these threats is far-reaching, often disrupting our classrooms and requiring the deployment of bomb squads and other SWAT equipment. As you can imagine, these attacks have traumatized the Jewish community and struck fear in homes across the country.”<sup>22</sup>

Regarding potential solutions, the senator pointed to the case of Middletown School District of Middletown, NY, that had been “similarly plagued by phone calls with terror threats” in 2016 and that, similar to the situation at JCCs, had been “unable to track the perpetrators, who hid behind blocked numbers.”<sup>23</sup> In response to the Middletown threats in his constituency, Schumer sent a letter to then-FCC Chair Thomas Wheeler, suggesting the grant of a waiver to the school district could “significantly enhance” investigation efforts and thus thwart future attacks.<sup>24</sup> The FCC responded by granting a waiver to the school district that allowed law enforcement to bypass section 1601(b) for the specific purpose of gaining access to the CPNs of threatening callers.<sup>25</sup> When writing nearly a year later to Chairman Pai about the JCC crisis, Schumer cited the success of the Middletown waiver insofar that it “enabled critical school personnel and law enforcement officials to coordinate with one another in their attempts to quickly respond to swatting calls made to the School District.”<sup>26</sup> Schumer ended the letter with a three-part question to Chairman Pai, asking what action the Commission has taken in response to the JCC threats thus far, whether the Commission would consider granting a similar waiver to JCCs as it had granted to Middletown, and, finally, what resources the FCC could provide to local law enforcement “to ensure they are equipped to thwart these attacks.”<sup>27</sup>

### The Emergency Waiver

The FCC’s response to Schumer’s letter came within a few days on March 3, 2017, in the form of a “Temporary

Waiver Order” issued by the CGB that allowed nonpublic emergency services as well as law enforcement (and security personnel) acting on behalf of JCCs to access prohibited CPN information during crisis situations.<sup>28</sup> The CGB concluded that “there is good cause to grant such a waiver [of Section 1601(b)] on an emergency basis due to a large number of recent bomb-threat calls targeting these [JCC] facilities and substantial disruption and fear caused as a result.”<sup>29</sup> Generally, in determining whether to grant a waiver of its policies to a particular entity, the FCC relies on the standard that allows it to waive any of its rules “for good cause shown,” meaning that (1) the waiver would better serve the public interest than would application of the rule and (2) special circumstances warrant a deviation from the general rule.<sup>30</sup> The inquiry into whether the issuance of a waiver is justified includes “considerations of hardship, equity, or more effective implementation of overall policy.”<sup>31</sup> In the case of JCCs, the CGB found that the phone threats described in Schumer’s letter and in the press over the preceding two months “pose a new, grave, and immediate danger to the ‘safety of life and property’ of a specific category of call recipients” and that the general public would be best served by a “tailored waiver that both will help JCCs and local law enforcement address the threats in real time while also continuing to protect the privacy of lawful callers.”<sup>32</sup> Thus, in weighing the competing policy interests of callers’ privacy that section 1601(b) is designed to protect and the safety of local Jewish communities, the CGB resolved the issue in favor of the latter on the assumption that doing so would not fundamentally undermine the larger policy objectives of the FCC’s Caller ID rules.

It is worth noting that the CGB extended the waiver to telecommunications carriers that serve JCCs because JCCs “may not have their own switches that would allow them to capture the restricted CPN.”<sup>33</sup> Some of these carriers and their trade associations, such as AT&T and CTIA, had expressed concerns regarding their own potential legal liability in complying (or,

alternatively, not complying) with section 1601(b) during crisis situations.<sup>34</sup> Another issue was how the Commission should define “JCC” for purposes of the emergency waiver, and the CGB stated that “the current record is insufficient for us to adopt a specific definition of a ‘Jewish Community Center’ on a permanent basis.” The CGB decided that “[f]or purposes of this order, we will consider eligible for this emergency waiver any entity that operates as a Jewish Community Center or its close equivalent, including any entity that is a member of the JCC Association of North America located in the United States.”<sup>35</sup> Finally, the CGB laid out several conditions<sup>36</sup> designed to prevent or at least minimize any potential infringement on callers’ privacy who utilize Caller ID-blocking features lawfully. Included in these conditions were guidelines on how to determine whether a threat exists,<sup>37</sup> who may access caller data information, how to document and later destroy the private CPNs that are obtained, and how to transmit CPN data securely.

The CGB modeled its Temporary Waiver Order on similar waivers issued in the past to other entities requesting relief from section 1601(b).<sup>38</sup> For example, in 2012, NASA received a waiver from the CGB after experiencing delays in attempting to identify the individuals who had posed potentially serious threats to its facility—in one frightening incident, a threatening caller was apprehended only after attempting to gain entrance to NASA’s Kennedy Space Center with a concealed handgun.<sup>39</sup> Not long afterward, the Liberty Public School (LPS) District in Liberty, Missouri, received between six and ten serious threats (including bomb threats and threats toward personnel) made over the phone by callers who used CPN privacy indicators to conceal their identities.<sup>40</sup> To prevent more harassing calls, the CGB issued LPS a waiver because the district “demonstrated a specific threat-based need to respond rapidly to threatening or abusive calls, and commits to access the information only for that limited purpose.”<sup>41</sup> As discussed above, the Middletown School District experienced similar

threats in 2015—specifically, “twelve active shooter and bomb threats from callers using restricted CPN, triggering lockdown procedures at its school”<sup>42</sup>—and was issued a waiver mirroring that given to LPS the following year in 2016. Further, certain nonpublic (for example, private or volunteer) emergency services had petitioned the FCC for waivers of section 1601(b), citing obstacles in attempting to identify callers automatically during emergencies, which “creates several problems that can delay or even prevent the timely provision of emergency care.”<sup>43</sup>

The Temporary Waiver Order also sought comment separately on whether to extend this waiver by amending the FCC’s Caller ID rules.<sup>44</sup> The Commission’s June 2017 meeting culminated in the adoption of a Notice of Proposed Rulemaking (NPRM) that discussed a potential change to section 1601(b) in the form of an exemption for all institutions receiving threatening calls and for nonpublic emergency services.<sup>45</sup> The FCC reiterated that the ultimate goal of any rule change was maintaining the privacy of consumers who lawfully use Caller ID—blocking technology while also allowing quicker access to critical CPN information when a threatening call (e.g., a bomb threat) is made.<sup>46</sup> Additionally, the NPRM sought comment on what “safeguards” should be put into place to avoid abuse or unlawful manipulation of the exemption itself.<sup>47</sup> For example, the Commission asked for guidance on “how to define and authenticate threatening calls, and whether disclosure of such information should be limited to law enforcement authorities or certain entities.”<sup>48</sup> Finally, the NPRM extended the Temporary Waiver Order pending the Commission’s decision on whether to amend its Caller ID rules.<sup>49</sup>

### **The Commission Implements an Exemption**

After the period for Comments and Reply Comments to the NPRM closed, the Commission met again on October 24, 2017, and released a Report and Order the following day creating an exemption to section 1601(b).<sup>50</sup> Though at least one

commenter, CTIA, opposed altering the rule and instead suggested the FCC continue using its ad hoc waiver system,<sup>51</sup> the FCC found that streamlining the process through an exemption is the most efficient method of removing the barrier to law enforcement investigations in emergency situations. Further, the FCC found that this approach better protects the safety of institutions like JCCs “without the regulatory delay inherent in applying for and being granted a waiver of the rules.”<sup>52</sup> In other words, Senator Schumer will no longer have to write letters and school districts will no longer have to petition the FCC for waivers because law enforcement and security personnel charged with protecting an institution will have access to otherwise-restricted CPN information when threatening calls are made.

The conditions of the exemption are nearly identical to those in the Temporary Waiver Order with a few notable exceptions.<sup>53</sup> The first is the inclusion of the phrase “as directed by law enforcement” with respect to limiting access to blocked CPN data; unlike the NPRM, the Report and Order places the burden on law enforcement to determine who qualifies as security personnel.<sup>54</sup> The Commission defined security personnel as “those individuals directly responsible for maintaining the safety of the threatened entity consistent with the nature of the threat.”<sup>55</sup> In both narrowly defining what constitutes security personnel and leaving the determination of who meets that definition to law enforcement, the Commission sought to “prevent exploitations of the amended rule, such as an abuser tracking down a victim.”<sup>56</sup> Additionally, the Commission altered its definition of “threatening call” from that proposed in the NPRM—which had included any “threat of serious and imminent unlawful action posing a substantial risk to property, life, safety, or health”<sup>57</sup>—to one more consistent with the Electronic Privacy Communications Act (EPCA).<sup>58</sup> This definition of “threatening call” covers “any call that conveys an emergency involving a danger of death or serious physical injury to any person requiring disclosure without delay

of information relating to the emergency.”<sup>59</sup> The definition adopted in the Report and Order is both narrower and broader in scope than its NPRM predecessor. It is narrower because it applies to threats directed at one’s person only and not to those directed at property, but it is broader because it omits language such as “substantial risk” and “imminent” and instead uses the term “emergency,” which is more subjective and open to interpretation on a factual basis. Finally, the FCC stated that law enforcement alone will be responsible for determining the credibility of threats,<sup>60</sup> or, in other words, law enforcement decides whether the particular situation at hand constitutes an emergency warranting an exemption from the rule.

Because common carriers are now required, rather than simply permitted, to reveal or “pass” CPN information to law enforcement, the FCC acknowledges that the “mandatory nature of the disclosure” to law enforcement necessarily precludes any potential legal liability for common carriers with respect to revealing CPN data.<sup>61</sup>

Additionally, the carriers are protected because law enforcement will determine whether a threat falls within the exemption, which will “help ensure compliance with the ECPA disclosure requirements, and . . . prevent overbroad disclosures of blocked caller ID information that may harm the privacy of non-threatening callers.”<sup>62</sup> During the comment period, carriers like AT&T had expressed concern with the potential for “significant costs and burdens” associated with having to make those determinations.<sup>63</sup>

### **Balancing Privacy and Consumer Safety**

Inherent in the FCC’s newly amended Caller ID rules is some level of conflict between the privacy of law-abiding consumers and the safety of the public. Due to the significant policy implications on either side, the Commission, with the help of common carriers and other commenters, chose its language carefully so as to construct an exemption that is neither over – nor under-broad.<sup>64</sup> Whether sophisticated threatening callers

and other bad actors will continue to evade detection despite the new exemption by manipulating blocking features might warrant the FCC's attention. For example, questions remain over whether the Commission should "undertake further efforts to thwart 'spoofing' . . . [which] occurs when a caller deliberately falsifies the information transmitted to the called party's Caller ID."<sup>65</sup> For the time being, simply making threatening calls more difficult to transmit anonymously at least will have a deterrent effect<sup>66</sup> in addition to the barrier it lifts on law enforcement's investigative efforts.

The FCC considers the effects on public safety whenever determining whether its policies will best serve the public interest—but how much weight should be afforded to public safety over other policy considerations? In the present case, it is indisputable that JCCs across the nation were experiencing frightening threats, "disrupting the routine and the feeling of security in the affected centers, with adults, children and infants forced to evacuate at a moment's notice."<sup>67</sup> The fear was such that parents even began pulling their children out of JCC-run schools.<sup>68</sup> The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) also reports a "substantial increase in bomb threats to schools and residences" in recent years, indicating a need for a broader solution than just the temporary waiver issued specifically to JCCs.<sup>69</sup> However, even if a public safety concern can be established, the FCC rule or exemption should still be well-suited to address and remedy (or at least minimize) that concern. The exemption attempts to do so by replacing the Commission's time-consuming and often-onerous case-by-case waiver process, a process that could result in 100s of days between a request being made and the FCC's granting of the waiver.<sup>70</sup>

On the other hand, the FCC has an obligation to ensure that CPN transmission is properly restricted and regulated in order to protect the privacy of law-abiding consumers.<sup>71</sup> In the case of nonpublic emergency services, privacy concerns are minimal because "a caller seeking emergency services has an interest in the number

becoming known to the emergency provider to speed the provision of emergency services."<sup>72</sup> However, when threatening phone calls are involved, the anonymous caller has the exact opposite interest—he or she wishes to remain unknown in order to avoid police detection and continue making threats. More fundamentally, there is a privacy interest in the consumer who uses Caller ID-blocking features lawfully and who might be concerned with the scope of disclosure permitted by an exemption to section 1601(b). For example, lawful purposes of blocking Caller ID include anonymous police tips, victims attempting to report or escape domestic abusers, calls made to rape crisis centers, private medical phone calls, legal adult services, and calls to various help hotlines such as suicide prevention hotlines.

The Commission, in proposing the exemption, did not ignore the implicit privacy concerns inherent in the disclosure of CPN data. In issuing the Temporary Waiver Order, the FCC stated that through the use of clearly defined conditions attached to the waiver, the "likelihood that CPN information will be disclosed to unauthorized personnel is minimized and, hence, any legitimate expectation of privacy by the caller is adequately addressed."<sup>73</sup> To continue to protect these interests in the newly amended rule, the FCC included several conditions (discussed above), which were adopted and modified from earlier waivers like the Temporary Waiver Order. For example, the FCC limited the type of personnel given access to restricted CPN data, the definition of "threatening calls," and various security and storage measures that must be complied with to claim the exemption. When creating the exemption, the FCC concluded that these conditions are sufficiently protective, stating that, "We have no indication that these conditions did not properly protect privacy interests in the cases underlying the waivers, and the record does not reveal any reason to doubt their efficacy more generally."<sup>74</sup>

#### **The Guarantees (and Limits) of the First Amendment**

Beyond the conflicting policy considerations regarding consumer privacy

and public safety, constitutional questions remain following the FCC's new exemption. The first involves freedom of speech and whether one who makes so-called threatening calls can claim any constitutional protection. Traditional justifications for protecting speech, no matter how objectionable, includes fostering the "marketplace of ideas," where ideas compete for acceptance by the public; encouraging participation in representative democracy; and safeguarding individual autonomy.<sup>75</sup> However, the First Amendment's right to freedom of speech is not unqualified. For example, "[k]nowingly false statements of fact are often constitutionally unprotected [such as] libel, fraud, perjury, and false light invasion of privacy. That would presumably apply to knowing falsehoods that cause a panic."<sup>76</sup> Of these panic-inducing "knowing falsehoods," an oft-cited example is the person falsely shouting "FIRE!" in a crowded theater, which can lead to a dangerous and chaotic scene of terrified theatergoers scrambling for an exit. This language stems from the late Justice Oliver Wendell Holmes, who famously stated in *Schenck v. United States* that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."<sup>77</sup> Calling in a (false) bomb threat to a school or JCC is arguably comparable to shouting fire in a theater because it has the same potential to cause an immediate panic and, in several cases, requires a full evacuation of the premises.

In its NPRM, the FCC had defined "threatening call" as one that includes "a threat of serious and imminent unlawful action posing a substantial risk to property, life, safety, or health."<sup>78</sup> The FCC might have initially chosen this language to mirror the standard articulated in *Brandenburg*, emphasizing the immediate illegal activity that must be present in a threatening call for the exemption to apply and the speech to be unprotected.<sup>79</sup> The content of the message found in a threatening call is likely unprotected by the First Amendment because "such knowing falsehoods [like shouting fire in a theater] . . . are likely to cause tangible

and immediate harm” and thus tend to be punishable at law.<sup>80</sup>

In addition to the category of traditionally unprotected speech of “incitement to imminent lawless action,” a threatening call also might fall within the doctrine of true threats.<sup>81</sup> “Similar to advocacy or incitement of unlawful action, threats are not views as promoting the values underlying the First Amendment.”<sup>82</sup> In determining whether a threat is a “true threat” rather than mere advocacy, hyperbole, or some other form of protected speech, courts must look at the statement in context and take into account its intended effect, the nature of the language used, and the reaction of listeners.<sup>83</sup> A true threat does not necessarily need to be one that the threatening party intends to carry out—in fact, the “true threats doctrine was designed not only to protect potential victims from actual violence, but from the reasonable apprehension of fear as well.”<sup>84</sup> Thus, depending on the jurisdiction, a caller’s threat directed at a school or JCC might be considered unprotected (not to mention criminal) based on a “reasonable speaker” or “reasonable listener” standard regardless of the speaker’s specific intent.<sup>85</sup> Because these threats tend to be taken seriously and are perceived as potentially real, the chance that threatening callers would be able to shield themselves with the First Amendment is slight at best.

Not unrelated to the doctrines of incitement and true threats is the doctrine of compelled speech. Unlike the threatening callers who tend to act upon their own will, carriers under the newly amended Caller ID rules are now compelled to disclose CPN data to law enforcement. During the comment period following the NPRM, CTIA had argued that a mandate is unnecessary due to the “industry’s long and successful track record of cooperation with law enforcement” and the fact that the EPCA already contains a voluntary disclosure provision.<sup>86</sup> “Just as the government can violate the Free Speech Clause when it silences someone who wishes to speak, the government can violate the Free Speech Clause when it forces someone to speak who would rather remain

silent.”<sup>87</sup> The case of the Jehovah’s Witnesses who refused to salute the flag in *West Virginia State Board of Education v. Barnette*<sup>88</sup> is a “paradigmatic example” of compelled speech that violates the First Amendment.<sup>89</sup> Compelled disclosure, arguably a form of compelled speech, can interfere with individual autonomy and actually might serve to chill expression.<sup>90</sup> Furthermore, “[t]here may be paternalistic overtones to government-mandated disclosures.”<sup>91</sup> One common example of a government-compelled disclosure of potentially private information includes policies that require institutions to report any incident of sexual assault to university officials (or law enforcement), even when the victim does not consent to the disclosure.<sup>92</sup> However, the Supreme Court does distinguish between the compelled expressions of belief present in *Barnette* and compelled statements of fact far more comparable to disclosure of CPN data.<sup>93</sup> Thus, it would be difficult for a carrier to legitimately raise the issue of compelled speech in response to the new exemption.

The countervailing interest to that of the carrier in a situation involving compelled disclosure of private user data is the caller’s potential right to anonymity. “Anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.”<sup>94</sup> Traditionally, the Supreme Court has held that compelled disclosure of group affiliation and restrictions on the ability to publish and distribute anonymous literature can violate the First Amendment as an unconstitutional restriction on free expression.<sup>95</sup> It is unlikely, however, that a court would consider CPN data to be a form of anonymous speech or expression subject to First Amendment protection, particularly in the context of a user engaging in threatening (and perhaps criminal) activity. Another way to view a user’s right to remain anonymous is through the lens of the Fourth Amendment’s right to privacy against unreasonable searches and seizures. To claim this protection, a user would have to assert that he or she had a legitimate or reasonable expectation of privacy by dialing \*67

while making the call at issue.<sup>96</sup> However, this too is an unlikely claim in the context of the exemption because “callers who [unlawfully] make threats should have no legitimate expectation of privacy that their caller ID information will remain secret.”<sup>97</sup>

## Conclusion

As Commissioner Mignon L. Clyburn explained in her statement following the NPRM, “At the foundation of our Constitution, are rights to free speech and protection against unreasonable search and seizures, and in the age of Caller ID, this means making sure that legitimate privacy interests are protected.”<sup>98</sup> Thus, although the disclosure of restricted CPN data necessarily raises several policy issues and constitutional questions, the inclusion of several conditions along with limits on the scope of the exemption itself should alleviate these concerns. Whether this exemption will curb or even end the trend of threatening calls to vulnerable institutions—or if sophisticated actors will circumvent even the new rules—remains to be seen. In any case, JCCs, schools, and other institutions receiving threatening calls no longer will have to wait and apply for a case-by-case waiver of section 1601(b), and law enforcement (as well as nonpublic emergency services) will at least have quicker access to crucial Caller ID information during a crisis.

## Endnotes

1. See Rules and Policies Regarding Calling Number Identification Service—Caller ID; Waiver of Federal Communications Commission Regulations at 47 C.F.R. § 64.1601(b) on Behalf of Jewish Community Centers, CC Docket No. 91-281, Report and Order, 32 FCC Rcd. 8003 (9), 8006, para. 7 (2017) [hereinafter *Caller ID Report and Order*].

2. *Id.* at 8004, para. 3, n.4 (citing 47 C.F.R. § 64.1600(e)).

3. *Id.* (citing 47 C.F.R. § 64.1600(j)).

4. *Id.* at 8004, para. 4, n.11 (alteration in original) (footnote omitted) (citing 47 C.F.R. § 64.1601(b)) (“[A] carrier may not reveal that caller’s number or name, nor may the carrier use the number or name to allow the called party to contact the calling party.”).

5. See Rules and Policies Regarding Calling Number Identification Service—Caller ID, CC Docket No. 91-281, Notice of Proposed Rule-making, 2017 WL 2714970 (2017) (statement of Chairman Ajit Pai) [hereinafter *Caller ID NPRM*].

6. *Caller ID Report and Order*, 32 FCC Rcd. 8003 (9), 8005, para. 5.

7. Rules and Policies Regarding Calling Number Identification Service—Caller ID, Waiver of Federal Communications Commission Regulations at 47 CFR 64.1601(b) on Behalf of Jewish Community Centers, CC Docket No. 91-281, Temporary Waiver Order (DA 17-223) (rel. Mar. 3, 2017) [hereinafter *JCC Temporary Waiver Order*]; see also Rules and Policies Regarding Calling Number Identification Service—Caller ID; Petition of National Aeronautics and Space Administration for Waiver of Federal Communications Commission Regulations at 47 CFR § 64.1601(b), CC Docket No. 91-281, Order, 27 FCC Rcd. 5704 (CGB 2012) [hereinafter *NASA Order*]; Rules and Policies Regarding Calling Number Identification Service—Caller ID; Petition of Chevrah Hatzalah Volunteer Ambulance Corps Inc. for Waiver of Section 1601(b) of the Commission’s Rules—Blocked Telephone Numbers, CC Docket No. 91-281, Order, 28 FCC Rcd. 1253 (CGB 2013) [hereinafter *Hatzalah Order*]; Petition of Liberty Public School District for Waiver of Federal Communications Commission Regulations at 47 CFR § 64.1601(b), CC Docket No. 91-281, Memorandum Opinion and Order, 28 FCC Rcd. 6412 (CGB 2013) [hereinafter *Liberty School Waiver Order*]; Rules and Policies Regarding Calling Number Identification Service—Caller ID, Petition of Enlarged City School District of Middletown for Waiver of Federal Communications Commission Regulations at 47 CFR § 64.1601(b), CC Docket No. 91-281, Order, 31 FCC Rcd. 3565 (CGB 2016) [hereinafter *Middletown Waiver*].

8. See Eric Levenson & AnneClaire Stapleton, *Jewish Center Bomb Threats Top 100: Kids Pulled from Schools*, CNN (Mar. 13, 2017), <http://www.cnn.com/2017/02/28/us/bomb-threats-jewish-centers-jcc/>; see also

Aaron Katersky, Josh Margolin, Mike Levine & Emily Shapiro, *Man Accused of Making Threats Against Jewish Community Centers Arrested in St. Louis*, ABC NEWS (Mar. 3, 2017), <https://abcnews.go.com/US/man-accused-making-threats-jewish-community-centers-arrested/story?id=45884069> (“Since Feb. 20, Jewish cemeteries have been desecrated in University City, Missouri; Philadelphia and Rochester, New York. Authorities are investigating all three cases.”).

9. See *JCC Temporary Waiver Order*, Temporary Waiver Order (DA 17-223).

10. Calling Number Identification Service—Caller ID, 82 Fed. Reg. 56,909 (Dec. 1, 2017) (to be codified at 47 C.F.R. § 64.1601(b)).

11. Small Entity Compliance Guide: Rules and Policies Regarding Calling Number Identification Service—Caller ID, CC Docket No. 91-281 (DA 18-317) (Mar. 29, 2018).

12. Calling Number Identification Service, 82 Fed. Reg. 56,909 (to be codified at 47 C.F.R. § 64.1601(b)).

13. Kate Cox, *FCC Votes to Let Phone Companies, Cops Identify Anonymous Callers Behind Bomb Threats*, CONSUMERIST (Oct. 24, 2017), <https://consumerist.com/2017/10/24/fcc-votes-to-let-phone-companies-cops-identify-anonymous-callers-behind-bomb-threats/index.html>.

14. See Levenson & Stapleton, *supra* note 8; see also *Caller ID Report and Order*, 32 FCC Rcd. 8003 (9), 8006–07, paras. 8–9; Katersky, Margolin, Levine, & Shapiro, *supra* note 8.

15. Ali Breland, *Schumer Asks FCC for Waiver to Trace Jewish Bomb Threats*, THE HILL (Mar. 3, 2017), <http://thehill.com/policy/technology/321805-sen-schumer-wants-the-fcc-to-grant-waiver-to-trace-jewish-center-bomb>.

16. Letter from Senator Charles E. Schumer to Ajit Pai, FCC Chairman (Feb. 28, 2017) [hereinafter *Schumer Letter*].

17. Cristiano Lima, *Comey Meets with Jewish Community Leaders to Discuss Threats*, POLITICO (Mar. 3, 2017), <https://www.politico.com/story/2017/03/james-comey-fbi-jewish-community-leaders-threats-23566>.

18. Levenson & Stapleton, *supra*

note 8.

19. It is worth noting that threats made against schools have increased generally, not just at JCCs or Jewish schools: “One recent study found that the incidents of bomb threats made to schools from 2011–16 increased by 1,461 percent, and that more than half of such threats were made by phone.” *Caller ID Report and Order*, 32 FCC Rcd. 8003 (9), 8006, para. 8 (citing Dr. Amy Klinger & Amanda Klinger, *Bomb Incidents in Schools: An Analysis of 2015–16 School Year*, EDUCATOR’S SCH. SAFETY NETWORK, <http://eschoolsafety.org/bir-2016/> (last visited Sept. 27, 2017)).

20. See *Schumer Letter*, *supra* note 16; see also 47 C.F.R. § 64.1601(b).

21. Breland, *supra* note 15 (citing *Schumer Letter*).

22. *Schumer Letter*, *supra* note 16.

23. *Id.*; see also *Middletown Waiver*, 31 FCC Rcd. 3565 (CGB 2016).

24. Letter from Senator Charles E. Schumer to Thomas Wheeler, FCC Chairman (Mar. 1, 2016); see *Middletown Waiver*, 31 FCC Rcd. 3565.

25. See *Middletown Waiver*, 31 FCC Rcd. 3565.

26. *Schumer Letter*, *supra* note 16.

27. *Id.*

28. *JCC Temporary Waiver Order*, Temporary Waiver Order 1, para. 1 (DA 17-223) (rel. Mar. 3, 2017).

29. *Id.*

30. *Id.* at 4, para. 6.

31. *Id.* (“Generally, the Commission may grant a waiver of its own rules if the relief requested would not undermine the policy objectives of the rule in question, and would otherwise serve the public interest.”).

32. *Id.* at para. 7.

33. *Id.*

34. See AT&T Services, Comment Letter on Proposed Caller ID Exemption (Aug. 21, 2017); CTIA, Comment Letter on Proposed Caller ID Exemption (Aug. 21, 2017); see also NTCA, Reply Comment on Proposed Caller ID Exemption (Sept. 19, 2017).

35. *JCC Temporary Waiver Order*, Temporary Waiver Order 1, para. 1, n.1.

36. *Id.* at 5, para. 10. These conditions include “(1) the CPN on incoming restricted calls to JCCs may not be passed on to the line called[;] (2) any system used to record CPN

obtained as a result of this waiver shall be operated in a secure way, limiting access to designated telecommunications and security personnel[;] (3) telecommunications and security personnel [including JCC personnel] may access restricted CPN data only when investigating phone calls of a threatening and serious nature . . . and shall document that access as part of the investigative report[;] (4) transmission of restricted CPN information from JCC to law enforcement agencies must occur only through secure communications[;] (5) CPN information must be destroyed in a secure manner after a reasonable retention period[;] and (6) any violation of these conditions must be reported promptly to the Commission.” *Id.* (footnote omitted).

37. *Id.* The Commission adopted the same definition it later proposed on its Notice of Proposed Rulemaking for “phone calls of a serious and threatening nature,” i.e., when a “calling party makes a bomb threat or a similarly serious and imminent threat to property, life, or health.” *Id.*

38. *NASA Order*, 27 FCC Rcd. 5704 (CGB 2012).

39. *Id.* at 5708, para. 11.

40. *Liberty School Waiver Order*, 28 FCC Rcd. 6412, at 3, para. 5 (CGB 2013).

41. *Id.* at 10, para. 5.

42. *Middletown Waiver*, 31 FCC Rcd. 3565, at 3, para. 5. (footnote omitted).

43. *Hatzalah Order*, 28 FCC Rcd. 1253, at 11, paras. 26–27 (CGB 2013); see Petition of Chevrah Hatzalah Volunteer Ambulance Corps Inc., for Waiver of § 64.1601(b) Regarding the Transmission of Calling Party Number, CC Docket No. 91-281 (filed on Sept. 30, 2011); *JCC Temporary Waiver Order*, Temporary Waiver Order (DA 17-223) (rel. Mar. 3, 2017); see also *INSIGHT Order*, 17 FCC Rcd. 223 (CCB 2002).

44. *JCC Temporary Waiver Order*, Temporary Waiver Order 1, para. 1 (citing Consumer and Governmental Affairs Bureau Seeks Comment on Waiver Regarding Access to Calling Party Numbers Associated with Threatening Phone Calls Made to Jewish Community Centers, CC Docket No. 91-281, Public Notice (DA 17-222) (rel. Mar. 3, 2017)).

45. See *Caller ID NPRM*, 2017 WL 2714970 (2017).

46. *Id.* at 2 paras. 2–3.

47. *Id.* at 22 (statement of Chairman Ajit Pai).

48. *Id.*

49. *Id.* at 2, para. 4.

50. See *Caller ID Report and Order*, 32 FCC Rcd. 8003 (9), 8015, para. 34 (amending 47 C.F.R §§ 64.1600, 64.1601).

51. See *Id.* at 8007, para. 10 (citing CTIA, Comment Letter on Proposed Caller ID Exemption (Aug. 21, 2017)).

52. *Id.* at 8007, para. 9.

53. *Id.* at 8011, para. 19.

54. *Id.* at 8010–11, para. 18.

55. *Id.*

56. *Id.*

57. *Caller ID NPRM*, 2017 WL 2714970, at 12, para. 5 (2017).

58. *Caller ID Report and Order*, 32 FCC Rcd. 8003 (9), 8007, para. 9.

59. *Id.* at 8008–09, para. 13. The Commission explained that “referring to ‘emergency’ rather than to ‘threat’ encompasses more situations where immediate disclosure is necessary to address an emergency.” *Id.* at n.45.

60. *Id.* at 8008. Common carriers had advanced the position in their comments that “law enforcement involvement . . . is essential to avoid having carriers make a determination on what constitutes a threatening call.” *Id.* at 8010, para. 17.

61. *Id.* at 8008, para. 12.

62. *Id.* at 8010, para. 17 (footnote omitted). Carriers like AT&T had argued that placing the responsibility in law enforcement would serve the additional function of deterring bad actors from manipulating the unblocking process. *Id.* (citing AT&T Services, Comment Letter on Proposed Caller ID Exemption (Aug. 21, 2017)).

63. *Id.* at n.56.

64. “We expect that these boundaries on how the disclosed Caller ID information must be treated will advance public safety efforts while protecting valid privacy interests.” *Id.* at 8011, para. 19.

65. *Id.* at 8005, para. 6, n.20.

66. In fact, once the Middletown School District received the waiver from the FCC (and that fact was made public), the calls reportedly stopped. Lisa Irizarry & Chau Lam,

*Schumer to FCC: Allow Calls to Be Traced*, NEWSDAY (Feb. 28, 2017), <https://www.newsday.com/long-island/nassau/sen-chuck-schumer-fcc-should-allow-jcc-phone-calls-to-be-traced-1.13190730>.

67. Levenson & Stapleton, *supra* note 8.

68. *Id.*

69. *Caller ID Report and Order*, 32 FCC Rcd. 8003 (9), 8006, para. 8.

70. *Id.* at 8007, para. 10, n.33; see E-Rate, Comment Letter on Proposed Caller ID Exemption (Aug. 21, 2017) (“A late waiver may ultimately lead to the [perpetrator] of the threatening calls, but only after the immediate threat has abated—or, worse yet, has been carried out.”).

71. *Caller ID Report and Order*, 32 FCC Rcd. 8003 (9), 8004, para. 4.

72. *Id.* at 8013, para. 27.

73. *JCC Temporary Waiver Order*, Temporary Waiver Order 5, para. 11 (DA 17-223) (rel. Mar. 3, 2017).

74. *Id.* at 9, para. 19.

75. Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1291 (2014).

76. Eugene Volokh, *The Volokh Conspiracy: Shouting Fire in a Crowded Theater*, WASH. POST (May 11, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/11/shouting-fire-in-a-crowded-theater/?noredirect=on&utm\\_term=.950323cb08c3](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/11/shouting-fire-in-a-crowded-theater/?noredirect=on&utm_term=.950323cb08c3).

77. 249 U.S. 47, 52 (1919).

78. *Caller ID NPRM*, 2017 WL 2714970 (2017). The Temporary Waiver Order issued to JCCs had similarly defined “threatening call” as any call of a “threatening and serious nature (i.e., in which the calling party makes a bomb threat or a similarly serious and imminent threat to property, life, or health).” *JCC Temporary Waiver Order*, Temporary Waiver Order 5, para. 10.

79. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that speech is unprotected by the First Amendment when it is directed at “inciting or producing imminent lawless action” and is likely to produce such action); see also *Dennis v. United States*, 341 U.S. 494, 579 (1951) (Black, J., dissenting). However, as discussed above, the FCC later settled on a definition modeled

on the EPCA at the advice of commenters and common carriers.

80. Volokh, *supra* note 76.

81. Lori Weiss, *Is the True Threats Doctrine Threatening the First Amendment?* Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists *Signals the Need to Remedy an Inadequate Doctrine*, 72 *FORDHAM L. REV.* 1283 (2004).

82. *Id.* at 1311–12 (“Another category of speech comprising a separate, yet related category to incitement, is true threats.”); *see also* *RAV v. City of St. Paul*, 505 U.S. 377 (1992); *Watts v. United States*, 394 U.S. 705 (1969) (per curiam) (finding the speech at issue to be political hyperbole and not a true threat).

83. Weiss, *supra* note 81, at 1314. Weiss notes that the Supreme Court has given little guidance on the doctrine of true threats and thus “true threat jurisprudence” varies throughout the country. *Id.*

84. *Id.* at 1313.

85. *See id.* at 1314.

86. *See Caller ID Report and Order*,

32 *FCC Rcd.* 8003 (9), 8007–08, para. 11 (citing CTIA, Comment Letter, *supra* note 51).

87. Corbin, *supra* note 75, at 1282.

88. 319 U.S. 624 (1943).

89. Corbin, *supra* note 75, at 1282.

90. *Id.* at 1293.

91. *Id.* at 1301. (“The challenge is drawing the line between acceptable protection and unacceptable paternalism.”). *See* Rules and Policies Regarding Calling Number Identification Service—Caller ID, CC Docket No. 91-281, Report and Order and Further Notice of Proposed Rulemaking, 9 *FCC Rcd.* 1764, 1768, para. 26 (1994). When the original SSA rules were being considered, some companies contended that “there exists a non-frivolous claim that the First Amendment right to free speech includes a right of the calling party not to be compelled to disclose his or her telephone number.” *Id.* The Commonwealth Court of Pennsylvania had even held that Caller ID was “*per se* unconstitutional under the PA state constitution because of the *theoretical risk* that

a caller wanting to remain anonymous would accidentally forget to use the available blocking feature.” *Id.* (emphasis added).

92. Kathryn J. Holland, Lilia M. Cortina & Jennifer J. Freyd, *Compelled Disclosure of Sexual Assault*, 73 *AM. PSYCHOLOGIST* 256 (2018).

93. Corbin, *supra* note 75, at 1283.

94. Jason M. Shepard & Genelle Belmas, *Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright, and Election Speech*, 15 *YALE J.L. & TECH.* 94, 103 (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–42 (1995)).

95. *See id.* at 102; *see also* *McIntyre*, 514 U.S. 334; *Talley v. California*, 362 U.S. 60 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

96. *See* *Katz v. United States*, 389 U.S. 347 (1967).

97. *Caller ID Report and Order*, 32 *FCC Rcd.* 8003 (9) (2017) (statement of Chairman Ajit Pai).

98. *Caller ID NPRM*, 2017 WL 2714970 (2017) (statement of Commissioner Mignon L. Clyburn).

# FOIA Wars: The Government Strikes Back

BY JOSEPH E. RICHOTTE AND DOAA K. AL-HOWAISHY

When first enacted, laws protecting the public's right of access to information about their government were lauded as a new hope for transparency. Anyone could ask for records about the people's business, and the government was required to give them access, subject to certain limitations that balanced competing interests in certain circumstances (e.g., national security, law-enforcement investigations, legally privileged information, trade secrets, etc.). If the requestor disagreed with the government's reason for withholding information, then the requestor could sue the government and ask a judge to order disclosure. Many jurisdictions even allowed requestors to recover their attorney fees and costs for the trouble of vindicating their right of access.<sup>1</sup>

Government agencies and officials have long complained about the time and expense devoted to answering FOIA requests. From time to time, they have tried tinkering around the edges with reform legislation. Having limited success on that front, some are now quietly trying a new tactic that, if successful, will threaten to dissuade people from even making requests in the first place: They are suing the requestors.

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*Joseph E. Richotte is a shareholder with Butzel Long, P.C., in Bloomfield Hills, Michigan. He is a member of the firm's media-law practice and serves as deputy general counsel to the Michigan Press Association. Mr. Richotte also co-chairs the firm's appellate practice and maintains an active white-collar criminal defense practice. Doaa K. Al-Howaishy is an associate with Butzel Long, P.C., in Ann Arbor, Michigan. She is a member of the firm's media-law practice and also practices in the areas of commercial litigation and intellectual property.*

## The Battle of Hoth

As our friends in the Upper Peninsula can attest, some parts of Michigan can easily pass for Hoth during the wintertime. So, it is fitting that we battled against this latest tactic in the FOIA wars in our home state. This time the rebels won.

In *Montcalm County v. Greenville Daily News*, a journalist submitted a FOIA request for the personnel files of the undersheriff and a sheriff's deputy who were candidates in an open race for sheriff. What better way for voters to evaluate the candidates for the job as "top cop" in the county than by studying how well they'd performed their jobs in law enforcement? The undersheriff had no objection to the release of his file. The deputy did.

He threatened to sue the county if it released his file, citing Michigan's Employee Right to Know Act (ERKA). ERKA gives employees a right to examine their own personnel records. The term "personnel record" is generally defined, but certain materials and information are excluded from the definition; those items are not available to the employee.<sup>2</sup> ERKA also requires an employer to review a personnel record and, before releasing information to a third party, delete disciplinary records that are more than four years old, unless ordered otherwise in connection with a lawsuit or arbitration.<sup>3</sup>

In our case, the county claimed there was a conflict between its duty to release records under FOIA and ERKA's requirement to delete disciplinary records that were more than four years old, even though (1) ERKA expressly provides that it does not diminish the right of access to records under FOIA<sup>4</sup> and (2) an unpublished (nonprecedential) appellate decision from the Michigan Court of Appeals found no conflict between FOIA and ERKA. It filed a declaratory action for instructions on how it should proceed.

The county also obtained an *ex parte* TRO that not only stayed the county's duty to respond to the request under FOIA, but also enjoined the newspaper from pursuing administrative appeals or suing the county under FOIA to compel production. The trial court also ordered the *newspaper* to show cause why the records should be disclosed, even though Michigan law assigns the burden of proof to the party invoking the exemption—i.e., the *government*.<sup>5</sup>

Somewhere, a Wookiee roared. And we all know it's not wise to upset a Wookiee.

The newspaper broke out the snow speeders and rushed into battle. We reminded the court that there are only two kinds of FOIA lawsuits: (1) a lawsuit brought *by a requestor* under MCL 15.240(1)(b) after a public body has denied access to a public record and (2) a reverse-FOIA lawsuit *by an affected third party* who claims a common-law or statutory right, independent of FOIA, to preclude the release of records about him – or herself.<sup>6</sup> In Michigan, a declaratory action cannot be brought unless a court would otherwise have jurisdiction over the substance of a dispute.<sup>7</sup>

There is no mechanism for the government to sue a requestor under Michigan's FOIA, which only confers jurisdiction over *claims by a requestor to compel disclosure* within six months of a *denial*.<sup>8</sup> A denial is a mandatory jurisdictional predicate; a claim is not ripe until after a denial has been issued.<sup>9</sup> Thus, a public body has no right under FOIA to ask a court to ratify its decision to grant a request or to instruct it how to proceed.<sup>10</sup>

There's a reason why FOIA gives the *requestor* the choice to seek court review if a request is denied. It lets the requestor decide whether to assume the burdens of litigation—paying filing fees, hiring lawyers, missing work for court dates, etc.

Nothing in FOIA says that a public body can foist those burdens upon unsuspecting requestors.

The ghost of Admiral Ozzel warns of the obvious danger. He felt the power of the dark side when he irritated Lord Vader. Very few people are looking to get squeezed by a lawsuit for making a request. After all, any public body could proceed in the same manner in response to any FOIA request where an exemption may apply. Unsure whether the request seeks information of a clearly unwarranted invasion of privacy? Sue the requestor. Unsure whether releasing the information would interfere with law-enforcement proceedings? Sue the requestor. Unsure whether the public interest in disclosure outweighs the public interest in nondisclosure of law enforcement personnel records? Sue the requestor. The examples are as numerous as the exemptions listed in any given FOIA statute.

#### **The Clone Wars**

This phenomenon of suing FOIA requestors is not new. Nor is it unique to Michigan.<sup>11</sup> At least six states beat Michigan to the punch, and the trend continues. We are now deep in our own version of the Clone Wars.

**The Battle of Texas**—*City of Garland v. Dallas Morning News*.<sup>12</sup> In 1993, *The Dallas Morning News* requested a copy of records concerning the resignation of the finance director for Garland, Texas. Included within the responsive records was a draft memorandum prepared by the city manager, which listed reasons why the city should fire its finance editor. After the city council reviewed the memorandum, the finance director resigned. The city first claimed the memorandum wasn't a public record but then sued the newspaper for a declaration that its position was correct. Under Texas's version of FOIA, however, public bodies were supposed to ask the attorney general for a decision if they were unsure of a record's status. After a seven-year battle in the lower courts, the Texas Supreme Court ruled in 2000 that the State's 1993 version of FOIA did not preclude public bodies from suing

requestors.<sup>13</sup> Fortunately, the victory was pyrrhic. In 1995, the Texas Legislature amended the statute to expressly preclude such lawsuits.

The Texas Legislature is to be applauded for this commonsense reform. To its credit, the Michigan House *unanimously* passed a bill last year that would expressly prohibit such lawsuits in Michigan—no small feat in our politically charged times.<sup>14</sup> But Senate Majority Leader Arlen Meekhof refuses to give the bill a hearing before the Senate Government Operations Committee he chairs. His indifference—which has been too common on matters affecting the press<sup>15</sup>—calls to mind Grand Moff Tarkin's legendary quip, "we will deal with your rebel friends soon enough."

**The Battle of California at Los Angeles**—*Filarsky v. Superior Court of Los Angeles County*.<sup>16</sup> In 1999, a requestor submitted a FOIA request to the City of Manhattan Beach, California, for public records. The city denied the request, and the requestor expressed an intent to sue. The city raced to the courthouse to file a declaratory action. The trial court and intermediate appellate court ruled that the city was within its rights to do so. In 2002, the California Supreme Court reversed, holding that these kinds of declaratory actions would "eliminate statutory protections and incentives for members of the public in seeking disclosure of public records, require them to defend civil actions they otherwise might not have commenced, and discourage them from requesting records pursuant to [California's version of FOIA], thus frustrating the Legislature's purpose of furthering the fundamental right of every person in [California] to have prompt access to information in the possession of public agencies.

**The Battle of North Carolina**—*City of Burlington v. Boney Publishers, Inc.*<sup>17</sup> and *McCormick v. Hanson Aggregates Southeast, Inc.*<sup>18</sup> In 2002, *The Alamance News* challenged a decision by the city council for Burlington, North Carolina, to meet in closed session for a conversation covered by attorney-client privilege when it learned a third party attended the meeting.

It requested meeting minutes from the closed session. The city withheld the minutes and filed a declaratory action. The trial court ruled in favor of the city.

In the same year, Hanson Aggregates requested records from the city attorney for Raleigh, North Carolina, related to a quarry the company owned. The city attorney filed a declaratory action for a ruling that the records were not subject to North Carolina's version of FOIA. The trial court ruled in favor of the city attorney.

Both defendants appealed. The North Carolina Court of Appeals held in both cases that FOIA gives *requestors* the right to sue, but not the government. The North Carolina Supreme Court initially granted leave in the *Burlington* case but rescinded that order as improvidently granted, leaving the intermediate decision intact.<sup>19</sup>

**The Battle of Vermont**—*Addison Rutland Supervisory Union v. Cyr*.<sup>20</sup> In 2012, a Vermont school board issued a no-trespass order to a parent of an active student. He wrote to the board asking why the order had been issued. When the board responded that a "professional" gave a "clinical opinion" that his "escalating hostility" posed "a serious threat," the parent submitted a FOIA request for all records showing the basis for the order. The board granted itself an extension but ultimately filed a declaratory action instead of responding, relying on the Texas *Garland* decision as the basis for asking the court to decide if the records were exempt from production. Employing the same reasoning we advocated in *Greenville Daily News*, the court ruled that the State's declaratory judgment act did not expand the court's jurisdiction, and nothing in Vermont's version of FOIA gave public bodies the right to sue requestors; only requestors can sue. The court dismissed the action for want of jurisdiction, finding *Garland* inconsistent with the purpose and text of Vermont's statute.

**The Battle of Montana**—*City of Billings v. Billings Gazette Communications*.<sup>21</sup> In 2014, *The Billings Gazette* requested records about an investigation into cash being diverted

from the city's recycling program to coffee, food, kitchen supplies, and personal use. Rather than release the records, the city filed a declaratory action, asking the court to decide if releasing the records would impinge on the privacy rights of the wrongdoers under Montana's constitution. In 2015, the court ruled that the city had improperly sued the newspaper, and it ordered the city to disclose over 1,000 pages of records.

**The Battle of New Jersey**—*Hamilton Township v. Scheeler*.<sup>22</sup> In 2015, a requestor asked for a copy of surveillance footage of the town hall and police department under New Jersey's version of FOIA. Instead of responding to the request, the township filed a declaratory action, seeking a ruling that it had no duty to respond. The requestor then narrowed his request, only to be met with an amended complaint that also asked for attorney fees. The township would have done well to heed Princess Leia's advice to Grand Muff Tarkin: "The more you tighten your grip, Tarkin, the more star systems will slip through your fingers." The court held that the township had no legal right to file a declaratory action; New Jersey's version of FOIA only gives requestors the right to sue. For extra measure, the court allowed the requestor to ask for his fees, essentially holding that public bodies that try to evade FOIA by imposing litigation burdens on requestors should not escape the fee-shifting provision in the statute.<sup>23</sup>

**The Battle of California at Alameda**—*Newark Unified School District v. Brazil*.<sup>24</sup> In 2014, a requestor asked a school district for records under California's version of FOIA. The school district produced records but later claimed to have inadvertently produced privileged information. It sued the requestor to recover the records when the requestor refused to return the records. In a move that would make Senator Palpatine smile a sinister smile, the school district demanded attorney fees from the requestor—\$449,317.60 to be exact. Because that's reasonable, right? ("Darth Vader. Only you could be so bold.") The court rejected the demand, holding that the school district was not a "plaintiff" under the

applicable statute.<sup>25</sup>

### **The Debate in the Galactic Senate: Should the Government Be Allowed to Sue Requestors?**

A key argument running through several of these lawsuits, including the one we handled in Michigan, is that the government is stuck in a Catch 22. If it releases private information under FOIA that is protected under another law, then it may be sued by the person whose privacy interests are invaded. If it refuses to disclose information but is wrong about the privacy protections afforded by another law, then the requestor may sue. In both cases, the government may incur not only the normal costs of litigation, but also the other side's attorney fees. How best to protect the public fisc? File a declaratory judgment and let the court make the decision, so it can release or withhold records without fear of a fee award. Plus, in the government's view, the specter of litigation will diminish "abusive" FOIA requests and lead to "better" requests that will reveal information truly helpful to FOIA's purpose: to shed a light on agency action and increase government accountability.

We are unmoved by these arguments for several reasons.

First, these lawsuits rob requestors and public bodies of the benefits of administrative appeals. Because exemptions are largely permissive, not mandatory, an administrative appeal gives a requestor the chance to plead his or her case directly to the public body (not the FOIA coordinator who denied the request), while also giving the public body an opportunity to decide whether to keep invoking an exemption at the risk of being sued.

Second, this approach upsets the decision, made by most legislatures, that requestors should not be required to pay litigation expenses if they prevail in obtaining records in court. In those states, the legislatures have built into FOIA a "risk-reward" element. If a requestor obtains a judicial ruling in favor of disclosure, then the requestor is relieved of the financial burdens of litigating the matter. If a court finds the records to be exempt, then the requestor bears those financial burdens. If public

bodies bring declaratory actions, a requestor may be denied reasonable attorney fees even if he or she wins because the case was not "commenced by the requestor" under the state's FOIA law.

Third, when public bodies obtain TROs in declaratory actions, they can impermissibly shift the burden of proof. Under most FOIA statutes, the public body has the burden of proving that an exemption applies.<sup>26</sup> But, in the *Greenville Daily News* case, the TRO required the newspaper to show cause why the records should be disclosed. Such requirements impermissibly interfere with a pro-disclosure scheme that puts the onus on a public body to justify withholding information under an exemption.

Fourth, third parties are perfectly capable of protecting their own privacy interests. Reverse FOIA lawsuits already provide a mechanism for third parties to seek court intervention. Nothing stops the government from notifying the third party so that it can protect its own interests. If the third party doesn't act, then why should the government care more about that person's privacy interests than the person does?

Fifth, the government's interest in protecting itself from litigation isn't the only interest in play. We are a sovereign people. Although we entrust the day-to-day operations of our government to elected and appointed officials, we exercise self-government as an informed electorate by supervising them and holding them accountable for their work. It is essential to the health of our republic to be able to inform ourselves about the workings of our government by accessing its records, attending its meetings, and questioning its activities.

Sixth, the notion of an "abusive" FOIA request is in the eye of the beholder. Usually, this boils down to one of three complaints: (1) the requestor asks for too much, (2) the requestor makes too many requests, and (3) it's too expensive to respond to the requests. If only people would make "better" requests, right? Superficially, these are reasonable complaints. But they don't hold much water when you think about

them.

*The Twin Suns of Tatooine.* The volume of requests likely signals an active voter who cares enough to take the time to become informed so as to responsibly exercise the franchise at the next election—or a reporter looking to help the electorate do that. Does it make sense that the government can complain a citizen is too informed about what government is doing in the citizen's name? These are “sunshine laws.” The government should hardly be heard to complain it's too bright.

*These Are Not the Droids You're Looking for.* The volume of data responsive to a request may simply mean that the requestor is unsure of exactly how to word a request to capture what the requestor wants, so the requestor is overbroad to obtain the desired information. We lawyers do that all the time in discovery requests. And we all know how our judges deal with that. They tell the lawyers to talk to each other and work it out. What's more time-consuming: kvetching about overbroad requests while you search for, review, redact, and produce everything requested or *picking up the phone* and *asking* the person if there's a way to get at the heart of the request? The Michigan Department of Corrections did just that when one of us issued a broadly worded FOIA request in a civil rights case. A ten-minute telephone call reduced the burden on corrections officials and speeded production, and we still obtained everything we needed. If C-3PO can be fluent in over six million forms of communication, we're betting a public body can handle a telephone call.

*It's a Trap!* (What *Star Wars*-themed article could be complete without a nod to everyone's favorite character, Admiral Ackbar?) On the expense issue, it is our experience that the vast majority of a public body's “cost” to answer a FOIA request comes from redacting information from responsive documents. But the government isn't *required* to redact anything, except in narrow circumstances. In Michigan, for example, the only educational records that fall under FERPA are subject to a mandatory exemption

under FOIA.<sup>27</sup> Every other exemption is permissive. So, when public bodies redact in Michigan, it is almost always a *voluntary choice*. If the government has no legal duty to redact, then why should it get to shift the costs to requestors? Your choice, your cost.

### Proposed Legislation

These problems are not without sensible solutions. Here are some simple proposals to amend state FOIA laws to address the competing concerns in ways that don't harm the average requestor.

*Section 1.* A public body cannot sue a person who makes a request under this Act for any reason related to the request.

*Section 2.* A public body cannot recover its attorney fees incurred in connection with a lawsuit brought by a requestor under this Act, even if the public body prevails.

*Section 3.* A public body shall not withhold a public record from inspection or production under any other law, unless that law states, by specific reference to this section, that it controls in the event of a conflict between this Act and that law.

*Section 4.* A public body cannot charge a fee for time spent redacting information exempt from production, unless the exemption is mandatory or unless the head of the public body certifies, on a per-redaction basis, that the redaction is necessary to protect the physical safety of a person because of a specific, credible threat of physical violence.

By adding these four clauses, we can end this battle tactic in the FOIA wars. The requesting public would be protected from lawsuits and vengeful demands for attorney fees, public bodies would be given clear guidance on how to address perceived conflicts between statutes, and public bodies would be incentivized financially to expedite the release of information without compromising legal duties or public safety.

### Endnotes

1. Michigan's FOIA largely follows the federal format, which makes almost every record possessed by a federal agency disclosable to the public unless

it is specifically exempted from disclosure or excluded from the Act's coverage. *Compare* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975), with MICH. COMP. LAWS § 15.233(1) (“Except as expressly provided in [exemptions], upon . . . request . . . a person has a right to inspect, copy, or receive copies of the requested public record of the public body.”)

2. Newark Morning Ledger Co. v. Saginaw Cty. Sheriff, 204 Mich. App. 215, 221 (1994).

3. MICH. COMP. LAWS § 423.507.

4. *Id.* § 423.510.

5. *Id.* § 15.240(4) (in a lawsuit to compel disclosure, “[t]he court shall determine the matter *de novo* and the burden is on the public body to sustain the denial”). Importantly, the statutory exemptions to disclosure found in MICH. COMP. LAWS 15.243 are narrowly construed and largely permissive: “FOIA is intended primarily as a prodisclosure statute and the exemptions to disclosure are to be narrowly construed.” Swickard v. Wayne Cty. Med. Examiner, 438 Mich. 536, 544 (1991). “Michigan FOIA authorizes, but does not require, nondisclosure of public records falling within a FOIA exemption.” Tobin v. Mich. Civil Serv. Comm'n, 416 Mich. 661, 667 (1982).

6. *Tobin*, 416 Mich. at 670.

7. MICH. CT. R. 2.605(A)(2).

8. MICH. COMP. LAWS § 15.240(1)(b).

9. *See* King v. Mich. State Police, 303 Mich. App. 162, 188–91 (2013).

10. *See* MICH. COMP. LAWS § 15.240(1)(b).

11. Hat tip to Jonathan Peters at the COLUMBIA JOURNALISM REVIEW. Jonathan Peters, *When Governments Sue Public-Records Requesters*, COLUM. JOURNALISM REV. (June 30, 2015), [https://www.cjr.org/united\\_states\\_project/when\\_governments\\_sue\\_public\\_record\\_requesters.php](https://www.cjr.org/united_states_project/when_governments_sue_public_record_requesters.php).

12. 22 S.W.2d 351, 358 (Tex. 2000).

13. *Id.* at 357–58.

14. H.R. 4077, 99th Legis., Reg. Sess. (Mich. 2017).

15. Brian Dickerson, *Subject Michigan Legislature to FOIA? Meekhof Says MYOB*, DETROIT FREE PRESS (Feb. 3, 2017).

16. 28 Cal. 4th 419 (2002).

17. 166 N.C. App. 186 (2004).

18. 164 N.C. App. 459 (2004).

19. City of Burlington v. Boney Publ'rs, Inc., 359 N.C. 187 (2004)

(granting leave), 359 N.C. 422 (2005)

(rescinding leave).

20. No. 275-4-12 (Vt. Super. Ct., Civ. Div., Rutland Unit 2012).

21. No. 14-0964 (Yellowstone Cty. Dist. Ct., Mont. 2015).

22. 2015 WL 3915926, at \*1 (N.J. Super., Law Div., 2015).

23. *Id.* at \*6.

24. No. RG14738281 (Cal. Super. Ct. 2018).

25. Hat tip to Nikki Moore with the California News Publisher's Association for letting us know about this recent victory for the Republic.

26. *See, e.g.*, COLO. REV. STAT. 24-72-204(6)(a); D.C. CODE ANN. § 2-537(b); 5 ILL. COMP. STAT. 140/1.2; MICH. COMP. LAWS § 15.240(1), (4); N.J. STAT. ANN. 47:1A-6; N.Y. PUB. OFF. LAW § 89(4)(b); 65 PA. CONS. STAT. § 67.708(a); VA. CODE § 2.2-3713(E); W. VA. CODE § 29B-1-5(2).

27. *See, e.g.*, MICH. COMP. LAW § 15.243(2) (“A public body shall exempt from disclosure information that, if released, would prevent the public body from complying with 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974.”); 5 U.S.C. § 552(b) (federal exemptions); *id.* § 552(c) (federal exclusions). *See also* U.S. DEP’T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT: DISCRETIONARY DISCLOSURE (Dec. 8, 2014), available at [https://www.justice.gov/sites/default/files/oip/pages/attachments/2014/12/08/discretionary\\_disclosure\\_sent\\_for\\_posting\\_december\\_5\\_2014.pdf](https://www.justice.gov/sites/default/files/oip/pages/attachments/2014/12/08/discretionary_disclosure_sent_for_posting_december_5_2014.pdf) (explaining the different considerations agencies examine when determining whether to disclose information). “As a general rule, the ability to make a discretionary release will vary according to the exemption involved and whether the information is required to be protected by some other legal authority.” *Id.* at 3.

## Close Enough for Jazz?

### Continued from page 1

sending tens of thousands of text messages to a woman whom he had known in high school and appearing unannounced and uninvited outside her home. The challenged news story stated that the individual was “convicted of felony aggravated stalking and sentenced to three years’ probation.” The pro se libel plaintiff argued (among numerous other claims) that the news report was actionable because he was not a convicted felon; instead, he had agreed to a judicial deferral. The plaintiff therefore argued that the media defendants could not rely upon the fair report privilege, claiming that the reporting that he had been “convicted” was simply wrong.

Recently appointed District Judge Wm. “Chip” Campbell dismissed the case on two grounds. The court held that the defendants did not publish the news reports with knowledge that any statement was false and defamatory, with reckless disregard for the truth of the statements, or with negligence in failing to ascertain the truth of the statements. The court also held that the news reports were a fair and accurate summary of the “gist” of the plaintiff’s court records and therefore dismissed the case on the basis of the fair report privilege. The *Molthan* case has been appealed.

Another case in which a “deferred conviction” was characterized as a conviction was *Williams v. Cordillera Communications*.<sup>4</sup> In that case, a television station had reported that the plaintiff had “one conviction” for telephone harassment of a sexual nature. In fact, the individual had acknowledged the factual basis of the harassment charge and negotiated a deferred conviction pending successful probation.

The *Williams* court ultimately granted summary judgment in favor of the television station on plaintiff’s libel claims, holding that the report was “substantially true” and thus non-actionable. “While Williams was not convicted of a crime, he confessed to the crime and was punished for it. The

damaging issue in the mind of an ordinary viewer with respect to Williams’ reputation is guilt and KRIS’s statement that Williams had been convicted did not carry a heavier sting than the truth of his confessed guilt.”<sup>5</sup> The Williams court also held that the reporting was subject to the fair report/fair comment privilege. Thanks to our friends at Haynes and Boone for the win in Williams.

Whether or not news reports like those in *Williams* and *Molthan* will be held to be “substantially true” or fall under the fair report privilege depends on a myriad of factors. How the trial court views the media in general is one of those factors.

What can media professionals do to ensure accurate reporting of the conviction status of a criminal defendant?

- Obtain an official determination of an individual’s conviction status from a government office prior to publication or obtain an interpretation from an attorney. Beware of online docket searches, as the shorthanded nature of the system may prevent a full explanation of the disposition of charges.

- Keep a copy of any documentation showing a conviction status. Relying upon public records will allow a media defendant to assert the fair report privilege, assuming the privilege is recognized.

- Take screen shots of online databases showing particular conviction statuses to bolster the media outlet’s position as to propriety of the fact gathering that took place prior to publication.

The media are inarguably under heightened scrutiny in today’s environment. Reporters easily can misinterpret a judicial report, leading to costly litigation. Media lawyers should advise their clients about the morass of pleas, convictions, deferrals, and diversions.

### Endnotes

1. *See* TENN. CODE ANN. § 40-35-313.
2. *Id.*
3. No. 3:17-cv-00380 (M.D. Tenn. 2018).
4. 26 F. Supp. 3d 624 (S.D. Tex. 2014).
5. *Id.* at 632.

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