

STEVENS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 98–678

LOS ANGELES POLICE DEPARTMENT, PETITIONER
v. UNITED REPORTING PUBLISHING
CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[December 7, 1999]

JUSTICE STEVENS, with whom JUSTICE KENNEDY joins,
dissenting.

The majority’s characterization of this case as an improper facial challenge is misguided. Even a brief look at the complaint reveals that respondent unequivocally advanced both a facial and an “as applied” challenge to the constitutionality of California Government Code §6254(f)(3) (hereinafter Amendment). In each of the six counts of its complaint, respondent explicitly challenged the Amendment on its face “and as applied.” Complaint ¶¶29, 32, 35, 38, 41, 43. Respondent also alleged that it “will be and has already been injured in a serious way by the Amendment;” specifically, it claimed that it “has lost prospective clients and sales, and will ultimately be put out of business.” *Id.*, ¶23. Finally, respondent has maintained before us that it continues to challenge the Amendment “on its face and as applied.” Brief for Respondent 15.¹ It is, therefore, perfectly clear that respond-

¹The majority suggests that respondent was denied the information simply because it “did not attempt to qualify” under the statute. *Ante*, at 8. This suggestion assumes that respondent’s publication might qualify as “journalistic” even though it serves primarily as a mere conduit of data to prospective commercial users. The Amendment

ent's allegations of direct injury justified the decision of the District Court and the Court of Appeals to pass on the validity of the Amendment.²

To determine whether the Amendment is valid as applied to respondent, it is similarly not necessary to invoke the overbreadth doctrine. That doctrine is only relevant if the challenger needs to rely on the possibility of invalid applications to third parties. In this case, it is the application of the Amendment to respondent itself that is at issue. Nor, in my opinion, is it necessary to do the four-step *Central Hudson* dance, because I agree with the majority that the Amendment is really a restriction on access to government information rather than a direct restriction on protected speech. For this reason, the majority is surely correct in observing that "California could decide not to give out arrestee information at all without violating the First Amendment." *Ante*, at 8. Moreover, I think it equally clear

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provides, however, that even a "journalistic" publication must sign, under risk of criminal prosecution for perjury, an affidavit stating that the information will "not be used directly or indirectly to sell a product or service to any individual or group of individuals." Cal. Govt. Code §6254(f)(3) (West Supp. 1999). Not coincidentally, that is precisely how respondent uses the information. Accordingly, not only is the belief that respondent would have qualified under the statute unrealistic, but the notion that respondent must put itself at risk of 2-to-4 years' imprisonment in order to raise a constitutional challenge to a state statute is alarming, to say the least.

²The majority's characterization of both the lower court decisions as simple facial invalidations is perplexing. See *ante*, at 4. The District Court explicitly phrased the issue presented as whether "the amendment to Cal. Gov. Code §6254 [is] an unconstitutional limitation on plaintiff's commercial speech." *United Reporting Publishing Corp. v. Lungren*, 946 F. Supp. 822, 824 (SD Cal. 1996) (emphasis added). Similarly, the Ninth Circuit concluded its opinion by stating that it need not reach respondent's "overbreadth arguments," *id.*, at *United Reporting Publishing Corp. v. California Highway Patrol*, 146 F.3d 1133, 1140, n. 6 (1998), clearly indicating that it was not deciding the case as a facial challenge.

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that California could release the information on a selective basis to a limited group of users who have a special, and legitimate, need for the information.

A different, and more difficult, question is presented when the State makes information generally available, but denies access to a small disfavored class. In this case, the State is making the information available to scholars, news media, politicians, and others, while denying access to a narrow category of persons solely because they intend to use the information for a constitutionally protected purpose. As JUSTICE GINSBURG points out, if the State identified the disfavored persons based on their viewpoint, or political affiliation, for example, the discrimination would clearly be invalid. See *ante*, at 1 (concurring opinion).

What the State did here, in my opinion, is comparable to that obviously unconstitutional discrimination. In this case, the denial of access is based on the fact that respondent plans to publish the information to others who, in turn, intend to use it for a commercial speech purpose that the State finds objectionable. Respondent's proposed publication of the information is indisputably lawful—petitioner concedes that if respondent independently acquires the data, the First Amendment protects its right to communicate it to others. Brief for Petitioner 27; see also *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 496 (1975). Similarly, the First Amendment supports the third parties' use of it for commercial speech purposes. See *Shapero v. Kentucky Bar Assn.*, 486 U. S. 466, 472 (1988). Thus, because the State's discrimination is based on its desire to prevent the information from being used for constitutionally protected purposes, I think it must assume the burden of justifying its conduct.

The only justification advanced by the State is an asserted interest in protecting the privacy of victims and arrestees. Although that interest would explain a total ban on access, or a statute narrowly limiting access, it is

insufficient when the data can be published in the news media and obtained by private investigators or others who meet the Amendment's vague criteria. This Amendment plainly suffers from the same "overall irrationality" that undermined the statutes at issue in *Rubin v. Coors Brewing Co.*, 514 U. S. 476, 488 (1995), and *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U. S. ____ (1999). By allowing such widespread access to the information, the State has eviscerated any rational basis for believing that the Amendment will truly protect the privacy of these persons. See *Cox Broadcasting Corp.*, 420 U. S., at 493–495.

A different, and more likely, rationale that might explain the restriction is the State's desire to prevent lawyers from soliciting law business from unrepresented defendants.³ This interest is arguably consistent with trying to uphold the ethics of the legal profession. Also at stake here, however, are the important interests of allowing lawyers to engage in protected speech and potentially giving criminal defendants better access to needed professional assistance. See *Bates v. State Bar of Ariz.*, 433 U. S. 350, 376 (1977). Ultimately, this state interest must fail because at its core it relies on discrimination against disfavored speech.⁴

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³While there is no direct evidence that the State is acting with intended animus toward respondent and others' speech, see Brief for Petitioner 13, n. 5, we have expressly rejected the argument that "discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas," *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 117 (1991).

⁴Our cases have repeatedly frowned on regulations that discriminate based on the content of the speech or the identity of the speaker. See, e.g., *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U. S. ____, ____ (1999) (slip op., at 1933) (Government cannot restrict advertising for private casinos while allowing the advertising for tribal casinos); *Simon & Schuster, Inc.*, 502 U. S., at 116 (government cannot "singl[e] out

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That the State might simply withhold the information from all persons does not insulate its actions from constitutional scrutiny. For even though government may withhold a particular benefit entirely, it “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests— especially his interest in freedom of speech.” *Perry v. Sindermann*, 408 U. S. 593, 597 (1972). A contrary view would impermissibly allow the government to “produce a result which [it] could not command directly.” *Ibid.* It is perfectly clear that California could not directly censor the use of this information or the resulting speech. It follows, I believe, that the State’s discriminatory ban on access to information— in an attempt to prohibit persons from exercising their constitutional rights to publish it in a truthful and accurate manner— is equally invalid.

Accordingly, I respectfully dissent.

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income derived from expressive activity for a burden the State places on no other income”); *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U. S. 221, 229 (1987) (a tax that applies to some magazines but not to others “is particularly repugnant to First Amendment principles: a magazine’s tax status depends entirely on its content” (emphasis omitted)); *Regan v. Time, Inc.*, 468 U. S. 641, 648–649 (1984) (“Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment”); *Minneapolis Star & Tribune Co. v. Minnesota Comm’n of Revenue*, 460 U. S. 575, 582 (1983) (a tax that “single[s] out the press for special treatment” is unconstitutional); *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 96 (1972) (“[W]e have frequently condemned . . . discrimination among different users of the same medium for expression”).