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Tenth Circuit Holds That Key Provision of Colorado's Child Abuse Confidentiality Law Violates the First Amendment

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Given the rationales underlying the ruling in 'Peck v. McCann', similar confidentiality laws in other states could now be in jeopardy.

In a decision with potentially wide-ranging impact, *Peck v. McCann*, 2022 U.S. App. LEXIS 21956, 43 F.4th 1116 (10th Cir. Aug. 9, 2022), the U.S. Court of Appeals for the Tenth Circuit ruled that a Colorado statute that requires records of reports of child abuse to be kept confidential violated the First Amendment. The court reasoned that a key provision of the law, which punishes disclosure of information and data that does not identify the child, family, or informant, isn't narrowly tailored to promote the state's compelling interest in preventing disclosure of identifying information concerning child abuse. Given the rationales underlying this ruling, similar confidentiality laws in other states could now be in jeopardy.

Colorado's Law on the Confidentiality of Child Abuse Records

Section 19-1-307 of the Colorado Children's Code Records and Information Act requires that "reports of child abuse or neglect and the name and address of any child, family, or informant or any other identifying information contained in such reports … be confidential." C.R.S. §19-1-307(1)(a) (2021). This requirement is enforced by two subsections containing separate penalties. *First*, under subsection 307(c)(1), "[a]ny person who violates any provision of [] subsection (1) is guilty of a class 2 petty offense … ." *Second, under subsection 307(4*),

> Any person who improperly releases or who willfully permits or encourages the release of data or information contained in the records and reports of child abuse or neglect to persons not entitled to access such information by this section or by section 19-1-303 commits a class 1 misdemeanor … .

While this appeal was pending, Colorado Legislature's reduced the penalties in both of these subsections—to a civil infraction and a class 2 misdemeanor, respectively—but plaintiff's constitutional challenge wasn't based on the severity of the penalties. See *Peck*, 2022 U.S. App. LEXIS 21956, at *4, n.1.

Section 307 functions in part "to fulfill Colorado's obligations under the Child Abuse Prevention and Treatment Act ('CAPTA'), which conditions federal funding for the state child protection systems on" a state's

preservations of the confidentiality of child-abuse records. Id. “Each year, Colorado's Department of Human Services certifies that Section 307's confidentiality requirement is being enforced in order to ensure that the state receives CAPTA funding from the federal government.” Id. at *4-*5.

The Dispute

The plaintiff, attorney Jessica Peck, represents family members in child abuse and neglect investigations in Colorado. Id. at *5. In 2019, she represented the mother of a minor girl in a dependency and neglect case in Denver Juvenile Court. Id. While the case was pending, she made statements to Westword, a Denver weekly magazine, contending that Denver Human Services had no evidence against her client. She provided Westword with a caseworker's email about her client and gave Westword the time and location of an upcoming hearing. Id.

The Juvenile Court judge issued an order stating that she thereby '“may have disclosed information … in violation of §19-1-307(1)(a).'” Id. at *5-*6. She wasn't sanctioned or contacted by law enforcement, and “Denver's District Attorney had never prosecuted anyone under Section 307.” Id. at *6. But the defendants—the Denver District Attorney and Executive Director of Colorado's Department of Human Service—did not disavow an intent to prosecute Peck or anyone else under the statute. Id. at *6-*7.

Peck then sued the defendants contending that §307 was unconstitutional and seeking to enjoin its enforcement. Id. at *6. The parties filed stipulated facts for summary judgment purposes, and Peck submitted a sworn declaration asserting that she (1) “desires in the future to rely on the child abuse reports … to call out misconduct by government officials and government employees to the public,” (2) believes the statute is unconstitutional, and (3) “would risk prosecution under the statute by engaging in her desired speech.” Id. at *7. The district court granted her summary judgment motion, ruled that both §307(1)(A) and 307(4) are unconstitutional, and enjoined their enforcement. Id.

Plaintiff Establishes Standing To Challenge Prohibition Against Disclosure of Non-Identifying Information

Before reaching the merits of Peck's First Amendment challenge, the circuit court addressed subject matter jurisdiction. Notably, Peck had expressed a desire to disclose non-identifying information, and if the statute prohibited only the disclosure of identifying information, then she had alleged no injury. Id. at *9. The court thus began by interpreting both subsections at issue to determine what information they prohibited from disclosure.

The court first ruled that the “plain text of Section 307(1) limits its scope to identifying information only,” as indicated by both its subheading and its text. Id. at *10. The court thus concluded that Peck lacked standing to challenge this subsection, and because she had alleged no injury at all under that subsection, it need not inquire whether she had suffered an “injury in fact.” Id. at *13.

By contrast, §307(4) prohibits "the release of data or information contained in the records and reports of child abuse or neglect to persons not entitled to access such information by this section[.]" Id. (quoting C.R.C. §19-1-307(4) (2021)). The circuit court observed that by prohibiting disclosure of any "data or information," §307(4) was "unambiguously broad" and was *not* limited to non-identifying information. Id. at *14. Compared to §307(1), it "is not only harsher (by making the act a misdemeanor, not just a petty offense or civil infraction) on people who intentionally disclose information; it is also broader, by punishing nonidentifying disclosures as well as identifying disclosures[.]" Id. at *14-*15. The court thus concluded that Peck had alleged an injury under §307(4). Id. at *18.

The Tenth Circuit then determined that Peck had standing to challenge §307(4). As to injury-in-fact, the court noted that Peck had not yet been subjected to prosecution or the threat of prosecution. Id. at *19. But Peck had adequately established a "chilling effect" on her desired speech in her unchallenged, sworn declaration, where she claimed a present desire to engage in speech prohibited by §307(4) and a credible threat that it would be enforced against her. Id. at *20-29. As to the latter factor, the court reiterated that defendants had *not* disavowed any intent to prosecute her. Id. at *28. "Indeed, they could not do so, because they assert that certifying enforcement of Section 307 is essential to their access to federal funding under CAPTA." Id. For similar reasons, the circuit court held that her constitutional challenge was ripe under its lenient approach to ripeness in First Amendment cases. Id. at *30-*33.

The Tenth Circuit Rules That §307(4) Violates the First Amendment

Having finally reached the merits of Peck's claim, the Tenth Circuit had relatively little difficulty concluding that §307(4) violated the First Amendment. The circuit court began with the premise that this subsection "is a content-based restriction on speech," meaning it was subject to strict scrutiny. Id. at *33. There was no dispute that Colorado had "a compelling state interest in protecting its child abuse information." Id. (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)). Peck contended instead that banning disclosure of non-identifying information was not a narrowly tailored means of achieving that goal. Id. The court noted that it was defendants' "heavy burden" to show that their content-based restriction was the least-restrictive means of achieving the compelling state interest. Id. at *33-*34.

The court then rejected defendants' justifications. Defendants first insisted that prohibiting disclosure of all information within child abuse records was "the only feasible way" to protect children and their families and that drawing a line between identifying and non-identifying information would be difficult. Id. at *34. The court agreed it would be difficult but noted that this was not the test; instead, the question was whether no existing alternative would be both less restrictive and achieve the state's compelling interest. Id. at *35. Defendants had presented no evidence that Peck's proposed alternative would be ineffectual. Id.

Defendants also contended that §307 in its entirety was necessary to fulfill the state's obligations in order to continue receiving federal funds under

CAPTA. Id. at *38. The circuit court retorted: “It is no excuse for a state that is violating the constitutional rights of its citizens to say 'the federal government is paying us to do it.'” Id. at *38-*39.

Finally, defendants observed that 48 other states have laws similar to §307. But defendants provided no explanation for those other laws, nor did this observation support a conclusion that limiting Colorado's prohibition to identifying information would be unworkable. Id. at *38. The court thus affirmed the district court's order to the extent it ruled that §307(4) was unconstitutional and remanded for the lower court to consider whether §307(4) was severable from the rest of the statute. Id. at *40.

Though the Tenth Circuit's ruling plainly does not invalidate child abuse confidentiality laws of any other state, its reasoning appears to have broad applicability. Other states may now have to justify their similar laws, and the circuit court's ruling and rationales will surely be debated in any such cases.

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