

1156 15th St. NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300 • www.rcfp.org

Bruce D. Brown, Executive Director
bbrown@rcfp.org • (202) 795-9301

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By email

May 11, 2021

The Honorable Kelly M. Cassidy
253-S Stratton Office Building
Springfield, IL 62706

Re: Objections to S.B. 2340 based on First Amendment concerns

Dear Rep. Cassidy:

I write on behalf of the Reporters Committee for Freedom of the Press—a national nonprofit dedicated to protecting First Amendment freedoms and the newsgathering rights of journalists—to respectfully note certain constitutional concerns with S.B. 2340. As drafted, the bill would permit prior restraints on members of the press, which are strongly disfavored under the First Amendment, and run afoul of the press and public’s well-established right of access to court records. This law is also unnecessary as there are already safeguards in place to protect the identity of adult victims of sexual assault where appropriate.

First, the provision within Section 10 (“Victim privacy”) of the current S.B. 2340 would restrict the “inspection and copying of law enforcement records” and “all circuit court records” in a manner that contravenes well-settled First Amendment precedent.¹ As an initial matter, it requires any individual who copies such records—except certain exempt parties like judges and prosecutors—“to exclude the identity of any adult victim of [a] criminal sexual offense” or alleged offense absent a court order. Thus, if a member of the press or public lawfully receives law enforcement or court records containing a sexual assault victim or alleged victim’s name, this law would presumably bar that person from publishing the information.

This amounts to a blanket “prior” restraint on speech that could chill lawful reporting on public records, even in cases where a victim wanted the information to be public. Prior restraints are “the most serious and the least tolerable infringement on First Amendment rights” because they act as “an immediate and irreversible sanction,” not only “chill[ing]” speech but “freez[ing]” it. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). They are the “most extraordinary remedy” and may be used only in “exceptional cases” where “the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures.” *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (citations omitted).

¹ Amendment to S.B. 2340, 102d Gen. Assemb., Reg. Sess., <https://bit.ly/3y36nrC> (filed May 7, 2021).

The damage done by a prior restraint is “particularly great” where, as here, it “falls upon the communication of news and commentary on current events.” *Neb. Press Ass’n*, 427 U.S. at 559. And prior restraints on covering court proceedings and records may never be permissible, because “[w]hat transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity.” *Craig v. Harney*, 331 U.S. 367, 374 (1947).

“[T]he Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial.” See *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 227 (6th Cir. 1996). Rather, beginning in 1931 with *Near v. Minnesota*, the Supreme Court has without fail rejected all prior restraints on the press.² It has also prohibited states from punishing the press for publishing lawfully obtained, truthful information about matters of public significance—including information about sexual assault victims—“absent a need to further a state interest of the highest order.” *Fla. Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (citation omitted) (finding that state law used to punish a newspaper’s publication of a rape victim’s name, which it had lawfully obtained from police reports, violated First Amendment); see also *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (finding that a state could not punish the accurate publication of a rape victim’s name obtained from publicly available court records).

Recognizing this authority, the Illinois Supreme Court has similarly struck down a gag order barring the press from publishing the name of a minor criminal defendant that had been lawfully obtained from a police chief and city council members. *In re A Minor*, 127 Ill. 2d 247, 251 (1989).

In addition, this provision would require courts to seal automatically all court records containing a sexual assault victim or alleged victim’s name, improperly flipping the presumption of access to court records to one of secrecy, in violation of the First Amendment, common law, and Illinois law. *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 230–33 (2000) (recognizing First Amendment right of access to court records) (citing *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994)); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597–98 (1978) (recognizing common law right to “inspect and copy” judicial records); 705 Ill. Comp. Stat. 105/16(6) (requiring court records to be filed publicly with the clerk’s office); Corrected Order, *Chi.*

² 283 U.S. 697, 716–18, 722 (1931) (invalidating prior restraint against defamatory and racist publication that allegedly disturbed the “public peace”); *Neb. Press Ass’n*, 427 U.S. at 570 (rejecting prior restraint intended to protect Sixth Amendment rights of criminal defendant); *CBS Inc.*, 510 U.S. at 1316 (rejecting prior restraint intended to protect “confidential and proprietary” business information); *N.Y. Times Co. v. United States*, 403 U.S. 713, 741 (1971) (rejecting prior restraint on publication of the Pentagon Papers, despite government’s claim that an injunction was necessary to prevent a “grave and immediate danger” to national security); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 104 (1979) (invalidating state law prohibiting newspaper from publishing identity of juvenile defendant).

Pub. Media, Inc. v. Gaughan, No. 123569 (Ill. Sup. Ct. May 23, 2018), <https://bit.ly/2R8dyy5> (granting motion for supervisory order and vacating trial court’s “decorum order” requiring court records to be filed under seal by default).

Public access to court proceedings and records ensures judicial legitimacy and promotes core democratic values by assuring the public that the proceedings are “conducted fairly,” while discouraging perjury, “the misconduct of participants, and decisions based on secret bias or partiality.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

Second, S.B. 2340 allows courts to issue a gag order on any member of the public “present in court from further disclosing the adult victim’s identity,” after notice and a hearing, considering the “best interest of the adult victim” and “whether such nondisclosure would further a compelling State interest.” Like the first provision, this one also amounts to an unconstitutional prior restraint, and procedural protections in the form of notice and a hearing cannot save it. As set forth above, courts have held that the First Amendment demands a state interest of the highest order to justify a prior restraint, and anything short of that does not suffice.

A prior restraint prohibiting members of the press from reporting on publicly disclosed information in open court is clearly not warranted, since courts already can—and do—protect the privacy of sexual assault victims by closing proceedings and redacting records where appropriate. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 n.2 (1986) (recognizing that the “protection of victims of sex crimes from the trauma and embarrassment of public scrutiny may justify closing certain aspects of a criminal proceeding”). Consistent with the First Amendment, such closure is only permitted on a case-by-case basis and must be “essential to preserve higher values” and “narrowly tailored to serve that interest.” *Id.* at 9 (citation omitted).

For these reasons, the Reporters Committee opposes the passage of S.B. 2340. We are not planning to give oral testimony but are available to answer questions if members have any. Please feel free to contact me at smatthews@rcfp.org to discuss this further.

Respectfully,



Sarah Matthews
Senior Staff Attorney
Reporters Committee for Freedom of the Press

cc: Members of the Judiciary – Criminal Committee