
RECENT CASES

CONSTITUTIONAL LAW — FIRST AMENDMENT — FOURTH CIRCUIT HOLDS THAT REPUBLISHING SOCIAL SECURITY NUMBERS GLEANED FROM ONLINE PUBLIC RECORDS IS PROTECTED SPEECH. — *Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2010).

With the advent of the internet, states like Virginia have placed many public records online,¹ causing concern that widespread access to these records may “increasingly pos[e] a serious threat to privacy in the Information Age.”² Recently, in *Ostergren v. Cuccinelli*,³ the Fourth Circuit held that a Virginia statute prohibiting the posting of records displaying Social Security Numbers (SSNs) gleaned from a government-run internet database violated an individual’s First Amendment right to free speech.⁴ The court indicated that — because the case involved a conception of privacy based on control rather than on secrecy⁵ and the government was not responsible for the initial disclosure of information⁶ — a new narrow tailoring test ought to be adopted. On its face, the narrow tailoring analysis used in *Ostergren* represents a departure from the test applied in precedent. However, it is difficult to determine whether the differences between the old and new tests are significant since the Fourth Circuit’s articulation in *Ostergren* is unclear in two critical respects — first, it fails to clearly articulate the contours of the new analysis, and second, it gives little guidance regarding the application of this analysis. As a consequence, the test could lead to confusion among both those seeking to comply with and those attempting to apply the new narrow tailoring requirements.

By summer 2008, Virginia had made over 200 million land records obtainable through an online “secure remote access” system.⁷ Many of these records initially contained SSNs, which lawyers included on real estate documents.⁸ Recognizing privacy concerns, 105 counties completed a redaction process to remove SSNs by July 2008,⁹ with the fif-

¹ Virginia clerks began placing land records online in the 1990s. *Ostergren v. Cuccinelli*, 615 F.3d 263, 267 (4th Cir. 2010).

² Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1217 (2002).

³ 615 F.3d 263, at 263.

⁴ *Id.* at 286–87.

⁵ *Id.* at 282–85.

⁶ *Id.* at 285–86.

⁷ *Id.* at 267. This system required individuals to register, sign an agreement, pay a fee for access, and provide personal information. *Id.*

⁸ *Ostergren v. McDonnell*, 643 F. Supp. 2d 758, 760 (E.D. Va. 2009).

⁹ *Ostergren*, 615 F.3d at 268. However, the redaction software was imperfect. A review of about five million of fifty million processed images revealed that roughly 3.21% of the records still contained SSNs. *Id.*

teen remaining counties reporting that the process was underway; records were kept available online throughout.¹⁰ Privacy advocate Betty Ostergren established the website The Virginia Watchdog, posting examples of internet-accessible public records containing government officials' SSNs to oppose the practice of making such records available online.¹¹ Virginia responded by amending its Personal Information Privacy Act¹² to bar Ostergren from reposting these documents.¹³ She filed suit, asserting that the revised statute was unconstitutional as applied to her¹⁴ and seeking declaratory and injunctive relief.¹⁵

In an opinion by Judge Payne, the district court rejected Virginia's argument that the revised statute was constitutional as a generally applicable law.¹⁶ The court reasoned that Ostergren's website was protected speech¹⁷ and further ruled that Virginia's own treatment of SSNs indicated that it did not consider the privacy right in SSNs "a State interest of the highest order" that could justify overriding the interests protected by the First Amendment.¹⁸

The Fourth Circuit affirmed in part and reversed in part. Writing for the panel, Judge Duncan¹⁹ tackled two inquiries: whether the dissemination of SSNs qualified as speech protected by the First Amendment, and if so, whether restricting SSN republication could nevertheless be constitutionally permissible.²⁰ The court first upheld the determination that Ostergren's republication of SSNs was protected speech, reasoning that "drawing attention to the problem [of mismanagement of sensitive documents] by displaying those very documents" was a form of political expression.²¹ The court acknowledged

¹⁰ *Id.* These counties anticipated finishing by July 2010.

¹¹ 643 F. Supp. 2d at 760.

¹² VA. CODE ANN. § 59.1-442-444 (2006 & Supp. 2009).

¹³ Section 59.1-443.2 of the Virginia Code bars persons from "[i]ntentionally communicat[ing] another individual's social security number to the general public." The new provision removed the statute's prior exception for records "required by law to be open to the public." *Ostergren*, 615 F.3d at 269 (quoting 2008 Va. Acts 837, 838) (internal quotation mark omitted).

¹⁴ *Ostergren v. McDonnell*, No. 3:08CV362, 2008 WL 3895593, at *2 (E.D. Va. Aug. 22, 2008).

¹⁵ Adjudication of the injunction occurred in a separate proceeding, *Ostergren*, 643 F. Supp. 2d 758, and determination of its proper reach is ongoing. The injunction will not be further discussed here.

¹⁶ *Ostergren*, 2008 WL 3895593, at *13.

¹⁷ Judge Payne held that Ostergren's use of SSNs constituted speech that was "clearly political" and thus protected. *Id.* at *12.

¹⁸ *Id.* at *10.

¹⁹ Judge Duncan was joined by Judge Davis and Chief District Judge Goodwin, sitting by designation.

²⁰ *Ostergren*, 615 F.3d at 272.

²¹ *Id.* at 271. While in many instances displaying SSNs would have "no essential part of any exposition of ideas" and would not qualify as speech, the court reasoned that the SSNs displayed "are [Ostergren's] message" since they demonstrated the problem she wanted to combat. *Id.*

that a compelling state interest might be endangered by the republication of SSNs,²² however, and stated that it would be necessary to determine whether Virginia's statute could survive First Amendment scrutiny.

Judge Duncan began this evaluation by emphasizing that the extent of First Amendment protections must be weighed against "the 'right of privacy' which the Supreme Court has also recognized."²³ She highlighted prior cases as instructive for conducting this analysis, cases in which courts had appraised the permissibility of government attempts to ban publication of information in order to protect privacy interests. Among the cases discussed were *Cox Broadcasting Corp. v. Cohn*,²⁴ which upheld a television station's right to broadcast the name of a rape victim obtained from judicial records despite a Georgia statute forbidding such practice,²⁵ and *Smith v. Daily Mail Publishing Co.*,²⁶ which held it unconstitutional to impinge on a newspaper's First Amendment right to publish the name of a juvenile offender.²⁷ The court also reviewed at length *Florida Star v. B.J.F.*,²⁸ which permitted the republication of a rape victim's name after a newspaper obtained it from a police report even though the government had only inadvertently released that report.²⁹ These cases applied the "*Daily Mail* standard,"³⁰ which allows the state to restrict publication of lawfully obtained, truthful information *only* when its means of restriction are "narrowly tailored to a state interest of the highest order."³¹

The Fourth Circuit explained that a privacy conception rooted in secrecy was at issue in cases that had conducted a *Daily Mail* narrow tailoring analysis.³² Under a secrecy conception, privacy constitutes matters "one would prefer to keep hidden . . . because disclosure would be embarrassing or compromising."³³ This kind of privacy interest

²² The court cited "modern privacy concerns surrounding SSNs," *id.* at 278, and SSNs' role as "a vital piece of information needed to function in American society," *id.* at 279 (quoting U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-759T, IDENTITY THEFT 8 (2009)) (internal quotation marks omitted), as reasons to assume that Virginia's interests in restricting republication of SSNs could possibly constitute a compelling state interest. Also, Judge Duncan disagreed with Judge Payne's assertion that the court is bound by "the State's view and its conduct" to determine when a compelling state interest is implicated. *Id.* at 277 (quoting *Ostergren*, 2008 WL 3895593, at *10).

²³ *Id.* at 273.

²⁴ 420 U.S. 469 (1975).

²⁵ *Id.* at 471-72, 494-95.

²⁶ 443 U.S. 97 (1979).

²⁷ *Id.* at 103.

²⁸ 491 U.S. 524 (1989).

²⁹ *Id.* at 527, 541.

³⁰ *Ostergren*, 615 F.3d at 274.

³¹ *Florida Star*, 491 U.S. at 541.

³² *Ostergren*, 615 F.3d at 282.

³³ *Id.*

dissolves once the secret has been publicly disclosed, since reputational harm cannot be undone once initiated.³⁴ Given this quality, courts agreed that penalizing truthful republication of a secret matter could “almost never be narrowly tailored to safeguard privacy when the government itself released that information to the press,”³⁵ as the government was in a position to take measures to restrict access to such information to ensure that the harm from disclosure was avoided.³⁶

However, the Fourth Circuit asserted that application of such a stringent narrow tailoring standard to the issue at hand was not appropriate.³⁷ The privacy interest implicated in *Ostergren* “hinge[d] upon control”³⁸ rather than on secrecy, as evidenced by the fact that the affected individuals’ “interest in controlling the dissemination of information . . . does not dissolve simply because that information may be available to the public in some form.”³⁹ Judge Duncan also emphasized that the rationale relied on in prior cases “assume[d] that the government could have easily prevented initial disclosure.”⁴⁰ She stated that this rationale did “not fully apply in this case”⁴¹ since “private attorneys (rather than the government) were responsible” for the initial release of SSNs,⁴² and the government had needed to search for the sensitive information to prevent dissemination. Recognizing that the State faced “considerable obstacles in avoiding initial disclosure,”⁴³ and that the implicated privacy interest in *Ostergren* was “consistent with limited disclosure,” Judge Duncan maintained that this case warranted “more latitude” than precedent allowed.⁴⁴

Despite modifying its narrow tailoring analysis, the Fourth Circuit declared the State’s remedy insufficiently narrowly tailored, and thus unconstitutional.⁴⁵ Judge Duncan explained that Virginia’s practice of

³⁴ *Id.* at 283 (explaining that, under a secrecy conception, “publicly accessible information could not be considered private anymore and any emotional distress resulting from disclosure would likely have already occurred”).

³⁵ *Id.*

³⁶ See, e.g., *Florida Star*, 491 U.S. at 538 (“[W]here the government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination . . .”).

³⁷ See *Ostergren*, 615 F.3d at 281 (“[T]his case requires a more nuanced analysis . . .”).

³⁸ *Id.* at 283.

³⁹ *Id.* at 284 (quoting *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500 (1994) (upholding the right to redact personal home addresses in a Freedom of Information Act request)). The court clarified that because “publically accessible SSNs could be misused repeatedly over time until they become less easily accessed,” interest in limiting their dissemination was ongoing after exposure. *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 285.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 287.

allowing continued online publication of records containing unredacted SSNs was ultimately too inconsistent with the prohibition it had placed on Ostergren for the commonwealth's sanction to be upheld.⁴⁶ Thus, though it acknowledged that "preserving total secrecy" was "unrealistic" in this case,⁴⁷ the court concluded that sanctioning Ostergren when "Virginia currently makes those same records available" online was not narrowly tailored to protecting individual privacy.⁴⁸

In a concurring opinion, Judge Davis wrote to endorse the district court's test for assessing whether "a state interest of the highest order" was implicated in the constitutional evaluation.⁴⁹ Judge Davis asserted that determining the magnitude of state interest required evaluating the "state's view and its actual conduct," rather than permitting objective data to "supplant" the inquiry.⁵⁰

On its face, the narrow tailoring analysis used in *Ostergren* represents a departure from the test as applied in *Daily Mail* and other precedents. As the court acknowledged, application of the stringent standard used in *Cox Broadcasting* and *Florida Star* "suggest[s] that preventing Ostergren from publishing [the unredacted] records could almost never be narrowly tailored" to remedy the disclosure once these records had been lawfully obtained.⁵¹ The strict analysis of the old test reflected an administrability concern that anything less than a clear rule could lead to unconstitutional hampering of the press. It was feared that "forc[ing] upon the media the onerous obligation of sifting through [government documents] to prune out material arguably unlawful for publication"⁵² would create an uncertain process that could engender troubling "self-censorship."⁵³ Thus, though courts acknowledged that the old narrow tailoring analysis imperfectly dealt with harms generated by disclosure of private materials,⁵⁴ they adopted a straightforward rule — one that would not require the press to make tricky *ex ante* constitutional determinations⁵⁵ and instead in-

⁴⁶ *Id.* at 286 (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989), for the proposition that "[w]here the government has made certain information publically available, it is highly anomalous to sanction persons other than the source of its release").

⁴⁷ *Id.* at 285.

⁴⁸ *Id.* at 286.

⁴⁹ *Id.* at 291 (Davis, J., concurring) (internal quotation marks omitted).

⁵⁰ *Id.* at 290.

⁵¹ *Id.* at 280 (majority opinion).

⁵² *Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989).

⁵³ *Id.* at 532 n.7 (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975)) (internal quotation mark omitted).

⁵⁴ See *Cox Broadcasting*, 420 U.S. at 488 n.16 (recognizing that even mere gossip can be harmful when disseminated).

⁵⁵ Cf. *id.* at 495 ("By placing the information in the public domain . . . , the State must be presumed to have concluded that the public interest was thereby being served.").

centivized the government to take every precaution against initially releasing the information.⁵⁶

The *Ostergren* court made clear that it was inappropriate to adopt this high, perhaps insurmountable,⁵⁷ bar in certain cases, and in so doing indicated that it intended to diverge from precedent. However, it is difficult to determine whether the differences between the new test developed by the Fourth Circuit and the traditional standard are truly significant, as the court's decision fails to clearly articulate the contours of its new analysis. First, the Fourth Circuit was ambiguous about when this new analysis ought to be used. Second, it remains uncertain which factors should be weighed in application when the new analysis is deemed appropriate. As a result, *Ostergren* may generate considerable confusion among the press, since the standard makes it unclear when it is permissible to republish information released by the government. Additionally, lower courts will have difficulty employing this standard because the relevant factors in the new analysis are underarticulated.

The Fourth Circuit did not explain when it might be suitable to apply the new standard created in *Ostergren*. In her opinion, Judge Duncan identified two factors that differentiated the situation in *Ostergren* from that in precedential cases — one, that a control-based rather than secrecy-based privacy right was implicated,⁵⁸ and two, that the government had much more difficulty in preventing the release of the SSNs, as it was not responsible for initial disclosure. Despite articulating these reasons for its departure, the court was unclear regarding the relative weight of each factor in determining when to apply its modified analysis. For one thing, it remains uncertain whether either factor on its own would be enough to trigger the Fourth Circuit's analysis or if both conditions would be necessary.⁵⁹ For

⁵⁶ See *Florida Star*, 491 U.S. at 538 (stating that the government's only recourse after initial release is "to compensate victims for their loss of privacy and to protect them from the other consequences of its mishandling of the information").

⁵⁷ See Andrew P. Napolitano, *Whatever Happened to Freedom of Speech? A Defense of "State Interest of the Highest Order" as a Unifying Standard for Erratic First Amendment Jurisprudence*, 29 SETON HALL L. REV. 1197, 1224 (1999) (describing the narrow tailoring analysis in prior cases as "exacting"); Jared Lenow, Note, *First Amendment Protection for the Publication of Private Information*, 60 VAND. L. REV. 235, 275–76 (2007) (stating that the Court "has set the bar for overcoming the First Amendment so high that no plaintiff stands a realistic chance" at penalizing the press for republication of previously released data).

⁵⁸ Judge Duncan rejected *Ostergren*'s assertion that all original land records had to undergo redaction before Virginia could prevent her from publishing them, given that the State's interest in preventing identity theft of its citizens did not dissipate after the SSNs' initial disclosure. *Ostergren*, 615 F.3d at 285 & n.18.

⁵⁹ Cf. *id.* at 281 (stating that the differences in these "two critical respects . . . warrant consideration because they impact our narrow-tailoring analysis," thus requiring a "more nuanced" examination).

another, it appears that an additional factor, the importance of the privacy interest implicated, may have also played a critical role in triggering the alternative new analysis. Indeed, the court spoke at length about the unique and devastating nature of the harm in this case, which may indicate that the decision to use the modified analysis could be extremely contextual.⁶⁰ It is thus unclear whether application of the modified test was triggered by the *type* of privacy right implicated⁶¹ and the ease with which the information could initially be protected and controlled, or whether the test was meant to be a limited and specialized standard applicable even under such circumstances to only a small fraction of cases involving SSNs or an equivalent.⁶²

Because it remains uncertain when the new analysis would be applicable, fear of prosecution under this standard could potentially affect the primary behavior of the press. A virtue of the old standard was that it engendered predictability — once the government released information, it was fair game for the press to republish. This predictability is lost when an alternative standard — one more likely to permit sanctions against republication of previously released information — may potentially apply. The fact that the scope of this new standard is unknown is problematic and may induce the very “self-censorship” and confusion about the limits of permissible behavior that the prior test sought to avoid.

Even if a court were to determine that the new test were applicable, the Fourth Circuit gave very little guidance regarding how to apply this new analysis in practice. In *Ostergren*, Judge Duncan stated that she could not conclude that prohibiting Ostergren from republishing land records could be narrowly tailored “when Virginia currently makes those same records available through secure remote access without having redacted SSNs.”⁶³ Though the Fourth Circuit purported to apply an analysis allowing “more latitude” to Virginia,⁶⁴ in practice it seemed to demand a high degree of consistency from the commonwealth, requiring it to take uniformly aggressive measures to

⁶⁰ See *id.* at 278 (emphasizing that “SSNs provide unique permanent identification for almost every person”); *id.* at 279 (stressing that the harm resulting from disclosure of an SSN “to an unscrupulous individual is alarming and potentially financially ruinous” (quoting *Greidinger v. Davis*, 988 F.2d 1344, 1354 (4th Cir. 1993)) (internal quotation mark omitted)).

⁶¹ Judge Duncan stated that applying a modified analysis might be appropriate when the implicated privacy right was “consistent with limited disclosure.” *Id.* at 285.

⁶² For example, in previous cases courts have found a compelling privacy interest in preventing the disclosure of individuals’ home addresses, even though this information does not implicate reputational harm. See, e.g., *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500–02 (1994). However, it is far from clear that a court would allow the press to be sanctioned for republication of this information.

⁶³ *Ostergren*, 615 F.3d at 286.

⁶⁴ *Id.* at 285.

rectify the problems of ongoing disclosure.⁶⁵ The ruling in *Ostergren* indicates that the measures Virginia was already conducting — pursuing an ongoing redaction process of its own website to limit disclosure, despite not being responsible for the initial disclosure, and requiring registration to log on to its online database in order to restrict and monitor access to the records while Ostergren’s unsecured blog took no such precautions — were not adequate to outweigh the fact that Virginia’s system still permitted some disclosure when the commonwealth attempted to penalize Ostergren for republication.⁶⁶ Because none of these measures proved sufficient to the ruling in *Ostergren*, it is uncertain what degree of impact these restrictions had on the court’s evaluation of Virginia’s narrow tailoring efforts.

Moreover, the court declined to explain which additional safeguards *would* be constitutionally required under its new analysis. This outcome only further confuses the new narrow tailoring test, as the court’s silence on this matter means that lower courts have not been provided any guidance about how to apply this “more nuanced” analysis accurately in a different factual scenario. And, since the application of this “new” analysis yielded the same result that the old test would have — namely, a ruling that Virginia’s sanctions were unconstitutional⁶⁷ — it is uncertain how consequential the analysis developed in *Ostergren* really is. Because the court would have reached the same conclusion under the previous standard, it is not only difficult to determine which specific factors the Fourth Circuit deemed most salient to its evaluation in this case, but also impossible to assess whether applying the modified analysis could prove dispositive to the outcome of a case.

Ultimately, *Ostergren*’s new narrow tailoring standard constitutes a departure from precedent, but the magnitude of this departure is unclear. Because the standard articulated by the Fourth Circuit is ambiguous in two important respects — when use of the modified analysis is appropriate and which factors are relevant to the modified evaluation — its primary consequence will likely be to muddle previously straightforward First Amendment jurisprudence. As a result, both the press and lower courts will struggle to evaluate the constitutionality of state-initiated sanctions for republication of private information. This indeterminacy will incentivize harmful self-censorship for the press and confuse and frustrate lower courts.

⁶⁵ It was not sufficient that Virginia was taking many simultaneous steps to control the dissemination of SSNs when it had not yet taken the most logical step of making land records available through the secure remote access system only after SSNs had been redacted. *Id.*

⁶⁶ Judge Duncan indicated that it was dispositive that fifteen counties in Virginia still permitted unredacted SSNs on their online records at the time Ostergren was sanctioned. *Id.*

⁶⁷ *Id.*