November 17, 2021

Re: S. 2340 The Daniel Anderl Judicial Security and Privacy Act of 2021

Dear Senator:

The American Civil Liberties Union (ACLU), on behalf of its members, writes regarding S. 2340, The Daniel Anderl Judicial Security and Privacy Act of 2021. The version introduced in the 117th Congress makes a number of improvements to the bill over the version introduced in the 116th Congress. We very much appreciate the efforts of the supporters and sponsors of the bill to make these changes which have narrowed the scope of the bill and have provided an important exception for speech on matters of public concern. In view of these improvements, we are not taking a formal position opposing the bill at this time and will not score a vote if one is taken on passage of the legislation if it remains as it is currently written. But we continue to have concerns that the bill, if applied broadly, could impose unconstitutional restrictions on speech.

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S. 2340 pursues the worthy and important goal of improving the security and privacy protections available to federal judges. For instance, the bill provides for increased funding to improve judges' home security, and to provide training to judges to help them maintain privacy and security. The need to strengthen these protections expeditiously was made all the more apparent by the tragic murder of Daniel Anderl, son of Judge Esther Salas, in 2020.

The bill also contains a number of provisions that would restrict speech—specifically, the communication of the personally identifiable information ("PII") of current and retired federal judges as well as immediate family members living with them. The bill would prohibit any person or entity from communicating the PII of such persons online, upon request from the judge or his or her agent in writing. The bill would also restrict data brokers from selling, purchasing, or otherwise making available for consideration the PII of current or retired federal judges and their immediate family (without a request from the judge).

Though the bill restricts the communication of personal information, the bill also includes robust exceptions to the bill's prohibitions on publication of PII for speech on matters of public interest and public concern, by the media and otherwise. It also includes exceptions to the prohibition on communicating PII that judges, themselves, make available online. These provisions will ensure that the bill will not prohibit the communication of PII in news reporting and all other communications of public interest to which that PII is relevant and are essential to ensuring important reporting can continue.

The version introduced in the 117th Congress also narrows the definition of "PII" to more closely tie the term to information that could be used to physically locate a judge or their immediate family. It further more clearly defines the activity of data brokers to ensure that the news media and any person engaged in speech on a matter of public concern will not be covered by the definition of data brokers and adds a "knowing" requirement to the prohibition on data broker communication of PII, and a "knowing and willful" requirement to the provision authorizing civil lawsuits for violations of the law. Finally, it defines prohibited "transfers" of PII to mean only the sale, lease or exchange for consideration of PII. These and other changes made in S. 2340 that distinguish it from the version introduced in the 116th Congress represent significant steps toward improving the legislation, and reducing its intrusion on protected speech.

However, we remain concerned that S. 2340, even with these improvements, continues to be vulnerable to constitutional challenge. We believe it is incumbent upon us to explain these concerns, though we are not taking a formal position on S. 2340 at this time.

The Supreme Court's decisions in *Bartnicki v. Vopper*[1] and *Florida Star v. BJF*[2] establish that the First Amendment imposes stringent limits on the government's ability to bar the publication of truthful information lawfully obtained, even where there are significant privacy concerns posed by the information. In *Bartnicki*, the information in question was obtained via an illegal wiretap of a private phone call. In *Florida Star*, it was the name of a rape victim. In both cases, the Court struck down the restrictions; in *Bartnicki*, it did so even though the wiretap itself was illegal, and the Court deemed the law prohibiting its communication to be content-neutral, and therefore subject to less demanding constitutional scrutiny.[3] In *Florida Star*, the Court noted that "if a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally

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[1] *Bartnicki v. Vopper*, 532 U.S. 514 (2001).
[2] *Florida Star v. BJF*, 491 U.S. 524 (1989).
[3] *Bartnicki*, 532 U.S. at 526.

punish publication of the information, absent a need to further a state interest of the highest order."[4]

Here, the Judicial Security and Privacy Act, S. 2340 prohibits communicating lawful and truthful information, much of it publicly available, even where lawfully obtained. And it does so on a content-discriminatory basis, because PII is defined by reference to its content. As a result, the law would almost certainly trigger strict scrutiny, which is rarely satisfied in First Amendment cases. While the security of members of the federal judiciary and their families is a "state interest of the highest order," we are concerned that S. 2340 is unlikely to be found to be the least intrusive means of furthering that interest, as strict scrutiny requires.

Without doubt, the changes that have been made do make the bill more tailored than its original version, in particular by exempting speech on matters of public concern, and limiting violations to those that are "knowing" or "knowing and willful." But the First Amendment protects speech generally and not solely when it relates to matters of public concern. And the difficulty of assessing whether PII is relevant to a matter of public concern could lead speakers to self-censor.

In short, the changes made to S. 2340 since the version introduced in the 116th Congress greatly improve the tailoring of the bill and create important protections for speech on matters of public concern. As a result, we are not taking a position of opposition to S. 2340 at this time, notwithstanding our continuing concerns about its constitutionality.

Thank you for your consideration. If you have any questions, please contact Kate Ruane, kruane@aclu.org, (202) 675.2336 or Kate Oh, koh@aclu.org, (202) 715.0816.

Sincerely,

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[4] *Florida Star*, 491 U.S. at 534 (quoting *Smith v. Daily Mail Pub*., 443 U.S. 97, 103 (1979)).

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