

SCALIA, J., concurring

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 SCALIA, with whom JUSTICE THOMAS joins,
concurring.

I join the Court’s opinion because I agree that, insofar as this case presents a facial challenge to the statute, the fact that it is formally nothing but a restriction upon access to government information is determinative. As the Court says, that fact eliminates any “chill” upon speech that would allow a plaintiff to complain about the application of the statute to someone other than himself.

I understand the Court’s opinion as not addressing the as-applied challenge to the statute, and as leaving that question open upon remand. That seems to me a permissible course, since the Court of Appeals’ judgment here affirmed without qualification the judgment of the District Court, which rested exclusively upon the facial unconstitutionality of the statute and hence purported to invalidate it in all its applications. Though there are portions of the Court of Appeals’ opinion that address the particular circumstances of this respondent, I do not read it as narrowing the facial invalidation, nor as offering as-applied invalidation as an alternative ground for affirmance.

I do not agree with JUSTICE GINSBURG that what renders this statute immune from a facial challenge necessarily renders it immune from an as-applied challenge as

well. A law that is formally merely a restriction upon access to information subjects no speaker to the risk of prosecution, and hence there is no need to protect such speakers by allowing someone else to raise their challenges to the law. But it is an entirely different question whether a restriction upon access that *allows* access to the press (which in effect makes the information part of the public domain), but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech rather than upon access to government information. That question— and the subsequent question whether, if it is a restriction upon speech, its application to this respondent is justified— is not addressed in the Court’s opinion.