

Congress enacted a statute that made it illegal for "any employee, without the consent of his or her employer, to post on the Internet any information concerning the employer." The purpose of the statute was to prevent employees from revealing their employers' trade secrets.

Is the statute constitutional?

- A. No, because it is not narrowly tailored to further a compelling government interest.
- B. No, because it targets a particular medium of communication for special regulation.
- C. Yes, because it leaves open ample alternative channels of communication.
- D. Yes, because it prevents employees from engaging in unethical conduct.

Explanation:

The First Amendment **free speech clause** prohibits the government from unduly restricting an individual's right to freely communicate information and ideas. **Restrictions** based on the **content of speech** (ie, its message or ideas) are **presumptively invalid** and will only be upheld if they survive **strict judicial scrutiny**. Under this standard of review, the government has the nearly impossible task of proving that the restriction is **necessary and narrowly tailored** (ie, the least restrictive means) to further a **compelling government interest**.

Here, the statute targets speech based on its content since the statute prohibits employees from posting information concerning their employer. And though the government may have a compelling interest in preventing employees from revealing trade secrets, the statute is *not* necessary or narrowly tailored to further that interest. That is because less restrictive means could be used to protect trade secrets—eg, barring employees from posting information concerning their employers' trade secrets. As a result, the statute is unconstitutional.

(Choice B) A speech regulation does not violate the First Amendment simply because it targets a particular medium of communication (eg, Internet postings—as seen here).*

*In *Packingham v. North Carolina*, the Supreme Court equated the Internet to public streets and parks in dicta but never expressly held that the Internet is a [public forum](#). Several cases dealing with this issue are currently being litigated in lower courts.

(Choice C) The availability of alternative channels of communication is one factor in evaluating content-*neutral* speech restrictions (ie, time, place, or manner restrictions). But since this statute is a content-*based* restriction, the fact that it leaves open channels of communication other than the Internet is irrelevant.

(Choice D) The statute may prevent employees from engaging in unethical conduct (eg, revealing trade secrets). But regardless, it is unconstitutional because it cannot survive strict scrutiny.

Educational objective:

Content-based restrictions on speech are presumptively invalid and will only be upheld if they survive strict scrutiny—ie, the government must prove that the restriction is necessary and narrowly tailored to achieve a compelling government interest.

References

- *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816–17 (2000) (explaining that content-based restrictions on speech require the government to satisfy strict scrutiny).

