

reason

Ban on Broadcasting Court's Own Recordings of Criminal Hearings Likely Unconstitutional

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Maryland court rules "broadly require the electronic recording of proceedings, including criminal proceedings, in the state trial courts"; and, as court records, such recordings can be obtained by members of the public. But Maryland law forbids people from broadcasting those recordings, whether via radio, television, podcasts, or anything else. This isn't just a ban on the media broadcasting court proceedings on its own (which remains the general rule in federal courts); it's a ban even on using the recordings that the courts themselves create and release to the public.

In today's *Soderberg v. Carrion* (written by Judge King, joined by Judges Harris and Rushing), the Fourth Circuit held that this prohibition is subject to strict scrutiny, a test that is notoriously hard to satisfy when it comes to speech restrictions:

In its *Cox Broadcasting* decision in 1975, the Supreme Court ruled that the First Amendment barred an invasion-of-privacy action against a television station for broadcasting a rape victim's name learned from publicly available court records. In so doing, the Court highlighted "[t]he special protected nature of accurate reports of judicial proceedings." The Court also emphasized the public interest in such reports and their "critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business."

As the Court saw it, by placing "information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served." ... [T]he First Amendment ... "command[s] nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." The Court also cautioned that to the extent "there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." ...

In the wake of *Cox Broadcasting*, in its *Daily Mail* decision in 1979, the Supreme Court ruled that a West Virginia statute contravened the First and Fourteenth Amendments by making it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender.... Viewing the West Virginia statute "as a penal

sanction for publishing lawfully obtained, truthful information," the *Daily Mail* Court easily concluded that the statute was unconstitutional....

"[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." ... [I]t "is not controlling" whether "the government itself provided or made possible press access to the information" (as in *Cox Broadcasting*), or whether the information was lawfully obtained in some other manner, such as by way of "routine newspaper reporting techniques" (as in *Daily Mail*).... [A]lthough the *Daily Mail* Court did not refer to its standard as "strict scrutiny," that term has since been used to describe the standard.

Such strict scrutiny review of the Broadcast Ban is clearly required here....

Instead of engaging in the strict scrutiny assessment required by *Cox Broadcasting* and *Daily Mail*, the district court erroneously treated the Broadcast Ban as a content-neutral time, place, and manner regulation and thus subjected it to intermediate scrutiny. The court's first mistake was analogizing the Ban, at the State's urging, to Federal Rule of Criminal Procedure 53. As heretofore explained, Rule 53 prohibits live broadcasts of federal criminal proceedings.... [S]ection 1-201's prohibition on live broadcasts is not the subject of this civil action. Rather, the plaintiffs are challenging the Broadcast Ban, i.e., section 1-201's distinct prohibition on the broadcasting of the official court recordings of state criminal proceedings....

The district court further erred in refusing to apply strict scrutiny on the premise, advanced by the State, that *Cox Broadcasting* and *Daily Mail* demand such scrutiny only where there is an absolute prohibition on the publication of information in any form. That proposition is belied by *Daily Mail* itself, which involved a partial ban on the publication of information [which was limited to newspapers, and didn't cover broadcasters]....

At bottom, the district court was wrong to apply intermediate scrutiny, rather than strict scrutiny, to the Broadcast Ban. {Because the district court incorrectly characterized the Broadcast Ban as a content-neutral time, place, and manner regulation, it never addressed whether the State can show that the Ban is "narrowly tailored to a state interest of the highest order," as required under the proper strict scrutiny standard.

Consistent with "the principle that the district court should have the first opportunity to perform the applicable analysis," we remand so that the district court may decide in the first instance whether the Broadcast Ban can survive that rigorous review. We also do not unnecessarily reach and resolve other arguments raised by the plaintiffs, including that the Ban cannot withstand even intermediate scrutiny.}

My UCLA First Amendment Amicus Brief Clinic filed an amicus brief in this case on behalf of the Cato Institute; many thanks to students Robert Bowen, Megan McDowell, and Emily Rehm, who worked on the brief, and, as always, to Scott & Cyan Banister, whose generous support makes the Clinic possible.