

Fourth Circuit Skeptical of Maryland Ban on Rebroadcast of Court Recordings

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The Fourth Circuit appeared unlikely Thursday afternoon to side with Maryland in a dispute over state courts' ability to limit the dissemination of otherwise publicly available court recordings.

"The government has already made the subject information available," said U.S. Circuit Judge Pamela Harris, a Barack Obama appointee, who at times sounded noticeably perturbed by the state's claim that broadcasting raw audio or video is illegal but allowing reenactments of that same content is fine.

"What matters is what they made public," she said. "You're getting an actual video or audio record."

The dispute stems from a 1981 state law which allows people to obtain recordings of virtually any criminal proceeding under Maryland court rules, but the same law prohibits the recordings from being shared with the broader public.

Journalists Brandon Soderberg and Baynard Woods, activist Quiana Johnson and the nonprofits Open Justice Baltimore and Baltimore Action Legal Team sued to challenge the law as unconstitutional in May 2019.

"This regime violates the Constitution's dual guarantees of freedom of speech and freedom of the press," the federal lawsuit states.

Soderberg and Woods were working on a book and documentary film about corrupt officers in the Baltimore Police Gun Trace Task Force. Open Justice Baltimore and Baltimore Action Legal Team seek to improve transparency in the legal system and police department. Johnson is a Prince George's County activist for police and court transparency and aids in the defense of criminal defendants.

The district court sided with the state and dismissed the case, finding that Maryland's rebroadcast ban is similar to restrictions on courtroom broadcasting that have been upheld by other courts.

The journalists and their co-plaintiffs appealed to the Fourth Circuit, which heard oral arguments in a virtual hearing Thursday.

"There's a difference between hearing someone's voice and reading a transcription," Nicolas Y. Riley, an attorney with Georgetown University Law Center's Institute for Constitutional Advocacy and Protection, argued on behalf of the plaintiffs.

“It’s like when a reporter gets a recording of a politician saying something scandalous. They don’t use actors, they play the phone call,” he added.

But Maryland Solicitor General Steven Sullivan defended the state law and said the dissemination of raw audio or video can have a negative effect on juries, witnesses and the court system more broadly. He cited a 2008 study conducted by the Maryland Judicial Conference as the basis for his argument.

“Trial participants react differently if the hearings will be broadcasted, whether audio or visual or both,” he argued. “The state studied this and unanimously concluded that the ability to publicize the actual performance in court affects the way jurors and witnesses view the process.”

U.S. Circuit Judge Robert B. King, a Bill Clinton appointee, pushed back on this theory.

“Judges tell jurors to try the case on the evidence,” he argued, noting that juries can and should be sequestered or ordered not to read the news to avoid undue influence. “That’s the way cases are tried every day.”

“But witnesses can’t be assumed to do so when they don’t even show up or say they don’t remember,” Sullivan replied, suggesting publicity could have such an effect on court proceedings.

Eugene Volokh, a lawyer with the Cato Institute think tank and UCLA School of Law’s First Amendment Clinic, also argued in support of the plaintiffs Thursday. He said Maryland was trying to “claw back” the content’s initial release, but he also expressed some concern about what a ruling in the case could mean for the state’s imperfect public access law.

“Sometimes a rule, if enforced, might lead the government to implement broader restrictions but those would be constitutionally permissible,” he argued, noting courts are allowed to limit the broadcast of court proceedings and Maryland is the only state which has this unique law.

“It’s conceivable Maryland won’t release the information at all,” he added. “But the First Amendment says once the info is released, it abridges that right if you tell people they can’t say it.”

Harris also harped on this issue. The judge questioned why the state still allowed its unique version of public records release if its study had found the recordings influenced jurors.

“It seems incomprehensible,” she said. “That the state has considered this to be such a big problem but they haven’t taken steps to address it.”

But Sullivan again emphasize the middle-of-the-road approach the law sought to create.

“The state has tried to be more accommodating to the public than it has to be as it tries to balance these competing concerns,” he said, arguing Maryland tried to weigh the protections of the First Amendment against the Sixth Amendment’s right to a fair trial.

Sullivan’s office said after the hearing that it has a policy of not commenting on pending litigation.

Riley, the plaintiffs' attorney, said in a statement before the hearing that he hoped the Fourth Circuit would vindicate the right to free speech "for the many journalists and community organizations whose speech has been constrained by this Maryland law."

U.S. Circuit Judge Allison Jones Rushing, a Donald Trump appointee, rounded out Thursday's three-member panel. None of the judges signaled when they intended to rule.