

# Maryland “Broadcast Ban” Is Unconstitutional as Applied to NPR Podcast

By Leslie Minora, Max Mishkin, and Charles D. Tobin

A Maryland federal judge has ruled that a state law banning the broadcast of lawfully-obtained recordings of criminal trials violates the First Amendment as applied to a National Public Radio podcast. [\*National Public Radio v. Klavans\*](#).

The podcast, which has [now aired](#), includes audio from the trial and sentencing of Jarrod Ramos, who murdered five journalists in 2018 in the offices of the *Capital Gazette*. *NPR, Inc. v. Klavans*, No. RDB-21-2247 (D. Md. Sept. 21, 2021) (granting permanent injunction) (Lexis citation unavailable at time of publication); 2021 U.S. Dist. LEXIS 175456 (D. Md. Sept. 15, 2021) (granting preliminary injunction). Maryland, following its decision not to appeal the injunction, agreed to reimburse NPR \$40,000 in attorneys’ fees and costs.

## Background

*Maryland Law*. The State of Maryland mandates the official recording of state trial court proceedings “verbatim in their entirety,” and provides that the public, including members of the press, has the right to obtain copies of these recordings, save for certain limited exceptions. *See* Md. Rule 16-502 (requiring electronic recordings of district court proceedings); Md. Rule 16-503 (same for circuit courts).

Another law, however, prohibits the broadcasting of criminal trial court proceedings and provides that violators may be held in contempt of court. Md. Code Ann., Crim. Proc. § 1-201 (a), (c) (the “Broadcast Ban”). Maryland law therefore requires the court to provide journalists with official recordings but threatens them with contempt if they broadcast the same recordings.

*The Soderberg v. Carrion Litigation*. At the same time as NPR challenged the application of the Broadcast Ban against it, a group of journalists, criminal justice advocacy organizations, and a community organizer have been litigating a facial challenge to the same law. These plaintiffs had their claim dismissed by Maryland District Judge Richard D. Bennett, but the U.S. Court of Appeals for the Fourth Circuit reversed, concluding that the district court had “erroneously treated the Broadcast Ban as a content-neutral time, place, and manner regulation and thus subjected it to intermediate scrutiny,” and remanded the case for the application of strict scrutiny. *Soderberg v. Carrion*, 999 F.3d 962, 969-70 (4th Cir. 2021). (NPR was among the press amici in *Soderberg* at the Fourth Circuit.) The case remains pending before Judge Bennett on remand.

*The Capital Gazette Shooting and NPR’s Reporting*. On June 28, 2018, Jarrod Ramos entered the offices of the *Capital Gazette* newspaper in Annapolis, Maryland, and murdered five

journalists. His case was one of the most significant criminal proceedings in Maryland history. Ramos pleaded guilty but not criminally responsible to the charges against him, and after a two-week trial in July 2021, a jury rejected that mental illness plea.

After NPR's award-winning podcast *Embedded* reported a four-part series focused on the surviving staff, NPR decided to devote a fifth episode to in-depth coverage of Ramos's trial—and decided to include excerpts from the audio recordings it obtained from the court. But NPR found itself facing the untenable choice of either airing the audio and potentially being held in contempt of court or forgoing its use of the lawfully-obtained recordings.

*NPR's Challenge.* In August 2021, [NPR submitted a letter](#) to the Maryland Office of the Attorney General to “respectfully request that the State commit not to seek sanctions against NPR for [its] reporting in the public interest.” In response, the [Attorney General's Office refused](#) to commit not to enforce the Broadcast Ban against NPR, stating that “[i]t would not be appropriate for the State to commit in advance to not take enforcement action for a hypothetical violation of the law that has not yet occurred.”

Unable to reach a resolution, and considering the lingering risk of being held in contempt for releasing its podcast, NPR filed its complaint on September 1, 2021 and simultaneously moved for a preliminary injunction.

### **The Court's Rulings**

Judge Bennett, the same judge overseeing the *Soderberg* litigation, was assigned to this case and promptly scheduled a hearing on NPR's motion for a preliminary injunction. At the hearing, NPR's motion was granted from the bench. The court issued a thorough written [preliminary injunction opinion](#) two days later.

The court's analysis focused on the first preliminary injunction factor: whether the movant is likely to succeed on the merits. The court noted at the outset that it must apply strict scrutiny to the Broadcast Ban, “a penal sanction for publishing information released to the public,” in line with the Fourth Circuit's ruling in *Soderberg*. The court held that “on the facts of this case, the state's asserted interests in witness protection and trial fairness are too speculative—and its solution too loosely tailored—to justify prohibiting NPR's broadcast of the Ramos trial.”

The court emphasized the long line of Supreme Court precedent holding that state action to punish the publication of lawfully-obtained truthful information violates the First Amendment, absent a state interest of the highest order, citing (among other cases) *Bartnicki v. Vopper*, *Florida Star v. B.J.F.*, *Smith v. Daily Mail Publishing Co.*, and *Cox Broadcasting Co. v. Cohn*.

The Maryland Office of the Attorney General had asserted that the Broadcast Ban is necessary to avoid making witnesses more hesitant to testify and placing them at higher risk of retaliation, and thus to maintain the integrity of criminal trials. The court observed that, although this “unequivocally qualifies as ‘a state interest of the highest order,’” as applied here, it is “prophylactic at best, and speculative at worst.” The court emphasized the State's lack of

evidence that NPR’s podcast would “endanger witnesses or undermine the fairness of the proceedings against Jarrod Ramos—whose trial is concluded, whose sentencing is imminent, and whose potential appeal will not require witness participation.” And it concluded that “mere speculation about serious harms” is insufficient to survive strict scrutiny.

The court additionally held that the Broadcast Ban is not narrowly tailored to the State’s asserted interest. Responding to the State’s argument that broadcasts of criminal trial proceedings will undermine courts’ ability to hold fair and just trials, the court stressed the First Amendment principle that “public scrutiny of trials is preservative—not deleterious—of fairness.”

After the court granted NPR’s motion, the parties agreed to stand on their preliminary injunction briefing and arguments for the court’s consideration of a permanent injunction. On September 21, 2021, the [court granted](#) NPR’s request for a permanent injunction.

Notably, Judge Bennett stressed the differences between NPR’s as-applied challenge to the Broadcast Ban and the facial challenge against the same law in *Soderberg*. In NPR’s case, the court noted, “Defendants must demonstrate that applying the Broadcast Ban to NPR’s podcast is necessary to advance a ‘state interest of the highest order’—it is not enough to argue that the Broadcast Ban would be justified by a compelling state interest in other, hypothetical circumstances.” But the court stated that “[i]n cases featuring evidence of witness intimidation, harassment, or other serious safety and fairness concerns, the Broadcasting Ban may well be ‘narrowly tailored’ to protect witnesses and preserve the integrity of criminal proceedings.”

NPR had included in its complaint a request for an award of attorneys’ fees and costs under 42 U.S.C. § 1988. The State agreed to pay NPR \$40,000 to resolve that claim.

In the criminal case that was the subject of NPR’s reporting, on September 27, 2021, circuit court judge, the Hon. J. Michael Wachs, sentenced Ramos to five consecutive terms of life in prison without the possibility of parole. NPR then obtained recordings from the proceeding. On October 14, 2021, NPR aired the episode of its *Embedded* podcast that included the recordings of both the trial and the sentencing.

The public can now hear for itself the story of Ramos’s trial and sentencing from the perspective of victims who survived the attack on the *Gazette* and testified in court, and the pivotal contribution the audio recordings made to NPR’s reporting. The audio includes victim-impact statements made in court by survivors and a stirring observation at the proceedings by Judge Wachs, just before he sentenced Ramos, noting that the *Capital Gazette* newspaper continued to publish from makeshift facilities immediately following the horrific shooting. He told the courtroom: “The defendant did not get the final say. The First Amendment and the community got the final say.”

*Plaintiff National Public Radio, Inc. was represented by Charles D. Tobin, Maxwell S. Mishkin, and Leslie Minora of Ballard Spahr LLP. The State of Maryland was represented by Robert A. Scott and Ann Marie Sheridan of the Maryland Office of the Attorney General.*