# Litigating Retaliation Claims After *Baltimore Sun v. Ehrlich*

STEPHANIE L. HOGAN, AMY S. MUSHAHWAR, AND CHARLES D. TOBIN

The Fourth Circuit disappointed a lot of us—not the least of whom, of course, were the journalists and the newspaper involved—when it viewed a governor's information blackout of these journalists as run-of-the-mill politics. By failing to give any credence to *The Sun of Baltimore*'s argument that journalists cut off from information by a retaliatory ban may be less likely to confront authority, the appeals court unfortunately accepted Maryland Governor Robert L. Ehrlich's argument that journalists should be made of stronger stuff.

By characterizing bans that single out journalists who criticize an executive as the mere "rough and tumble"[1] of public debate, and therefore constitutionally insignificant events, the Fourth Circuit assumes that all journalists possess a monolithic mettle and are equally able to slough off information boycotts. And, in no small respect, the decision separates journalists as a group from, say, Democrat citizen-activists who find their municipal taxes doubled after they place signs on their front lawns campaigning for a Republican governor's reelection opponent; the activists presumably still have viable retaliation claims.

For entirely valid journalistic reasons, the *Sun* decided not to pursue further appeals in its case. Ehrlich is facing a tough reelection battle this fall. The newspaper did not want the pendency of this lawsuit to become an issue during the election cycle. As a result, the *Baltimore Sun Co. v. Ehrlich* decision will remain on the books for now. But even before the ruling came down, other officials began to mimic Ehrlich's aggressively antagonistic approach to perceived critics. One copycat ban issued from the mayor of Youngstown, Ohio, and a challenge to that measure is now pending in the Sixth Circuit.[2]

Does the *Ehrlich* decision close all doors to journalists who wish to challenge targeted information blackouts as First Amendment cases? No, it does not. But if other jurisdictions follow the Fourth Circuit's reasoning, it will be harder for journalists to prevail in these cases. Fortunately, in expressly holding that it decided the *Ehrlich* case sui generis, the court left significant clues to development of strategies, alternative approaches, and different records that may enhance the chances of future retaliation plaintiffs, including

- waiting to move for relief on a more complete discovery record;
- pushing discriminatory access and public forum arguments;
- arguing prior restraint, if a government employee can be persuaded to join the effort; and
- relying on overbreadth doctrine.

In addition to an explanation of the Fourth Circuit's reasoning and holding, we provide some practical suggestions for the development of future cases.

### *Ehrlich* Background

The *Ehrlich* case began with the November 18, 2004, issuance of the Maryland governor's edict:

> Effective immediately, no one in the Executive Department or Agencies is to speak with David Nitkin or Michael Olesker until further notice. Do not return calls or comply with any requests. The Governor's Press Office feels that currently both are failing to objectively report on any issue dealing with the Ehrlich-Steele Administration. Please relay this information to your respective department heads.[3]

In a follow-up e-mail to one of the journalists, the governor's office said it would continue to follow all of its obligations under the state public records act.[4] Although the governor continued to permit the same access to press conferences, he also began holding invitation-only "press briefings" in a smaller conference room.[5] He invited other journalists from the *Sun* to attend, but he did not let the banned journalists into these "press briefings."[6]

The journalists and the newspaper filed a complaint and, a few days later, a motion for a preliminary injunction. The district court denied the preliminary injunction and, in the same order, granted the governor's motion to dismiss.[7] The Fourth Circuit, on February 15, 2006, affirmed.

### *Snyder v. Ringgold*

*Sun* reporter David Nitkin[8] and columnist Michael Olesker[9] were the most recent casualties in a disturbing series of retaliatory press bans.[10] Indeed, the Ehrlich administration clearly took a page from the playbook of an earlier Maryland executive who had prevailed in the appeals court in *Snyder v. Ringgold*.[11] In the late 1990s, a high-ranking Baltimore police official had similarly cut off access of all information other than public records to a television reporter who had drawn the official's ire through her aggressive pursuit of stories.[12]

The Fourth Circuit, in an interlocutory decision holding that the official had sovereign immunity from money damages, did not accept reporter Terry Snyder's assertion that the exclusion of her, and no one else, constituted a constitutional deprivation:

> [T]he broad rule for which plaintiff argues would presumably preclude the common and widely accepted practice among politicians of granting an exclusive interview to a particular reporter. And, it would preclude the

*Stephanie L. Hogan (stephanie.hogan @ hklaw.com), Amy S. Mushahwar (amy.mushahwar@hklaw. com), and Charles D. Tobin (charles.tobin@ hklaw. com) are with Holland & Knight LLP in Washington, D.C. The firm represented the journalists and the newspaper in* Baltimore Sun Co. v. Ehrlich *and represents the amici curae in the pending Sixth Circuit case* Youngstown Publishing Co. v. McKelvey.

equally widespread practice of public officials declining to speak to reporters whom they view as untrustworthy because the reporters have previously violated a promise of confidentiality or otherwise distorted their comments.[13]

The district court, on remand in Snyder's case, dismissed the litigation, holding that in excluding her, the police official had "merely exercised [his] right not to answer questions from or meet with particular representatives of the news media."[14] The district court distinguished that official decision from broader measures: "If, of course, [the police department] holds a general press conference or opens certain files or records to members of the media, then whether it can exclude Snyder presents an entirely different question."[15]

**Framing the Correct Cause of Action**

Counsel in the *Snyder* case brought the claim under the traditional access theory. Their core argument was that in providing access to officials for interviews to everyone but Terry Snyder, the police department had discriminated against her on the basis of the content of her stories. By contrast, in the *Ehrlich* case, the plaintiffs framed the lawsuit around a retaliation theory: even though the government may not have a First Amendment obligation (the type of duty alleged in any access case) to provide interviews with executives, it cannot selectively ostracize reporters from that information because it disapproves of the content of their journalism. Thus, the *Sun*, Nitkin, and Olesker framed their claim around the prima facie elements of a retaliation complaint, arguing thus:

- The action that Ehrlich retaliated against was the exercise of their constitutional rights to freedom of speech and of the press.
- The governor's edict had adversely affected the journalists' and the newspaper's exercise of their First Amendment rights because it had the tendency to chill a person of ordinary firmness from similar exercise.
- A causal relationship exists between the protected activity and the retaliatory action.[16]

**If other jurisdictions follow the Fourth Circuit's reasoning, it will be harder for journalists to prevail in these cases.**

The Fourth Circuit, unlike the district court in *Ehrlich*,[17] appreciated the distinction between access and retaliation.[18] It decided the appeal under the rubric of a prima facie retaliation case.[19] The court's direct confrontation of the issue and direct references to the facts of this particular case as driving its decision[20] strongly suggest that the retaliation framework forms a vehicle superior to traditional access arguments for these kinds of cases (where the "right" of access is less than clear).

**"Reporter of Ordinary Firmness"**

However, the *Ehrlich* court, in framing the issue as whether the government's actions would "chill a person of ordinary firmness" from exercising his First Amendment rights, tailored the standard for retaliation cases to fit the case of a "reporter of ordinary firmness." Then, it applied the facts based on its assessment of the typical journalist's firmness.[21] A key to the Fourth Circuit's holding is its view that "[i]t would be inconsistent with the journalists' accepted role in the 'rough and tumble' political arena to accept that a reporter of ordinary firmness can be chilled by a politician's refusal to comment or answer questions on account of the reporter's previous reporting."[22]

Ehrlich conceded the first and third elements of the journalists' retaliation claims. He had no choice. The language of the ban itself ("The Governor's Press Office feels that currently both are failing to objectively report on any issue dealing with the Ehrlich-Steele Administration.") made the case for the reporters' claims that the ban retaliated against their journalism, a protected constitutional right. Ehrlich waged the battle entirely on the second ground, challenging the journalists' assertion that "the government responded to the plaintiff's constitutionally protected activity with conduct or speech that would chill or adversely affect his constitutionally protected activity."[23]

Under this test, courts generally inquire whether the government's measures would chill the actions of a reasonable person and prevent him from engaging in his constitutionally protected activity. "Adverse impact is thus tied to the deterrence value the retaliatory act has on the First Amendment exercise that drew the government's ire."[24] Ordinarily, adverse impact is weighed against whether the government's actions would chill a person of ordinary firmness.[25]

The Fourth Circuit just last year, in a case brought by a law student at a public university, *Constantine v. Rectors & Visitors of George Mason University,* recognized that the adverse impact test was objective and that although the actual effect on the plaintiff before the court was not irrelevant, these cases should not be decided on an actual chill or lack of a chill standard:[26] "We reject the defendants' suggestion that this inquiry depends upon the actual effect of the retaliatory conduct. . . . [S]uch a subjective standard would expose public officials to liability in some cases, but not in others, for the very same conduct, depending upon the plaintiff's will to fight."[27]

The Fourth Circuit's ruling in *Ehrlich* represents a departure from the court's analysis a year earlier in *Constantine*. Instead of measuring the impact on a person of ordinary firmness, it ushers in a new class of plaintiff, i.e., the journalist of ordinary firmness. Under this new standard, the court specifically examined the actual chill on the journalists before it.

Singling out an occupational group in a retaliation context is not entirely unheard of. Although the Fourth Circuit did not rely on the precedent, Ehrlich's lawyers cited an Ohio case, *Mezibov v. Allen*,[28] where an attorney sued for defamatory statements made by the county prosecutor. It was alleged these statements were in retaliation for motions filed on behalf of the attorney's client. The Sixth Circuit held these comments

would not "deter an ordinary criminal defense attorney from vigorously representing his clients" and noted that in the courtroom, many other restrictions apply to a counsel's exercise of what may ordinarily be considered free speech in other contexts.[29] The Sixth Circuit therefore ruled that the retaliatory act had no legally cognizable adverse impact under the retaliation cause of action.[30]

The *Ehrlich* decision, however, is unique in doling out First Amendment rights less protectively to journalists than to "ordinary" people. Unlike the attorney in *Mezibov*, "journalists' First Amendment rights are coextensive with those of the general public."[31] The U.S. Supreme Court, in decisions both granting[32] and denying petitions for access,[33] has refused to treat journalists' claims any differently from those of the public. Indeed, the district court in *Ehrlich* dismissed the lawsuit because, in its view the journalists sought preferential access over the general public.[34]

Additionally, unlike other occupations such as attorneys, journalists do not all hew to a common set of professional guidelines or rules. The reaction among journalists to this very lawsuit belies any notion of divining the reaction of an "ordinary journalist." In his decision in *Ehrlich*, the district court judge cited a *Washington Post* columnist who had written that the *Sun's* lawsuit was "grandstanding" and urged that "[t]he *Sun* should make its case through quality journalism, not legal briefs."[35] Contrast this viewpoint with the strong voices of the fifteen news organizations, newspapers, and broadcasters who joined the amici curiae brief in this case, which argued thus: "But if the First Amendment's protection of newsgathering means anything, it surely means that a reporter cannot be excluded altogether from the normal channels of newsgathering that are available to the press generally, simply because of the content of his reporting."[36]

Though the Fourth Circuit admits that "[t]he determination of whether government conduct or speech has a chilling effect or an adverse impact is an objective one," it still distinguishes plaintiffs by their tenacity to litigate.[37] As caretakers of political dialogue, journalists tend to be dogged and vigorous defenders of their First Amendment rights, yet they only possess the First Amendment rights of ordinary citizens. Although case law is replete with rejection of any notion that journalists should be carved out from the general public in a First Amendment analysis (and traditional retaliation case law examines the impact of government conduct on ordinary people), the reasoning in the *Ehrlich* decision suggests otherwise.

### Retaliation Cases After *Ehrlich*

The Fourth Circuit analysis leaves plenty for lawyers to shoot at in jurisdictions where *Ehrlich* is not binding precedent. And although the target in the Fourth Circuit is smaller now, the court also left abundant logical arguments, in the facts and procedure that it relied on. Those clues also may help those who want to embrace and work with the decision or distinguish future cases from it.

### Fight for the Objective Test

The adverse effect on a person of ordinary firmness standard remains fertile battleground. Except in cases where courts conflate the elements of a retaliation claim,[38] most defendants concede that journalists have engaged in a protected activity and that causation exists.[39]

As a result, the dispute becomes whether the court will use an objective standard, subjective standard, or a hybrid variant. As stated above, objective standards judge adverse effect based on a person of ordinary firmness.[40] Courts have largely retreated from the subjective standard, or actual chill analysis.[41] But *Ehrlich* and *Mezibov* reflect the courts' willingness to develop subjective standards while purportedly applying an objective test. In each, the court considered a distinctly subjective element, i.e., the occupational activity in which the retaliation occurred (journalism in *Ehrlich*, courtroom lawyering in *Mezibov*).

Journalists who are retaliated against and thus, in essence, told that their rights are no greater than those of ordinary citizens should persist in arguing that the objective standard ensures they are given rights that are no less than those of ordinary citizens. In fact, courts have characterized the objective standard as "well established"[42] and "settled law."[43] Plaintiffs should reinforce all of the rationales courts cite to support their use of the objective test:

- *Notice.* The objective standard provides notice to government officials of when they are impacting individual rights, regardless of which plaintiff chooses to sue.[44]
- *Hypersensitive plaintiffs.* A subjective standard rewards the unusually sensitive plaintiff who is always "chilled" and punishes resilient speakers who continue to engage in speech activities.[45]
- *Protection of government officials.* Under an objective standard, public officials will not be sued for slight injuries.[46]
- *Judicial economy.* The court should not want to find itself litigating actions to determine a new standard for every occupation.

Ample case law exists against the application of a subjective or a hybrid occupational standard as the Fourth Circuit employed in *Ehrlich*.

### Develop Evidence of a Specific and Subjective Chill

The Fourth Circuit in *Ehrlich* insisted on evidence that the journalists before it were subjectively chilled, i.e., fearful enough to alter their message to please the governor. As with many, if not most, journalists, the *Sun*'s reporter and columnist would not concede that they had succumbed to the governor's pressure.[47] The Fourth Circuit was unwilling to look to any other sort of chill, placing great reliance on its view that the numerical amount of newspaper copy showed the reporters remained in some fashion productive.[48] Finally, the court rejected counsel's assertions that the chill should be measured by the types of information these journalists no longer had access to, which could only be brought before the court after full discovery.[49]

These rigorous demands of proof are a departure from traditional First

Amendment retaliation analysis, which holds that the moment an official retaliates, the chill is presumed.[50] Courts other than the Fourth Circuit still may be willing to accept this body of previously settled law. But if *Ehrlich* reflects a change in judicial thinking on this issue, counsel for future press plaintiffs will need to prepare their proofs as they contemplate going to court and should consider advising their clients to do the following:

- *Document widespread efforts to gather information.* The journalists subject to the ban may wish to begin working the phones immediately. They should call everyone with whom they have ever spoken at the agency issuing the ban and get as many people as possible, on as wide an array of topics as possible, to decline to comment to them. The larger the scope of the deprivation, the more plaintiffs will have to point to in court papers before discovery.
- *Keep meticulous notes of these efforts and be prepared to use them in court.* The time of every phone call, the names of all government functionaries spoken with, and the precise words with which they told the journalist that they couldn't comment—all are helpful details for making the case for specific deprivation.

**The greater the evidence plaintiffs put forth regarding potential chill, the more likely they are to prevail.**

- *Refrain from certain coverage.* Obviously, no newsroom should sacrifice its obligation to readers to timely report news simply to make a favorable record for litigation. But the governor in the *Ehrlich* case got a lot of traction with the courts by showing numerical parity between the amount of journalism the *Sun* reporter and columnist produced preban and postban. The less of a record of postban journalism the plaintiff brings to the court, the less ability the government official will have to play the numbers game.
- *Enlist friends to help.* Most news organizations, as the strong support of amici in both the Maryland and Ohio cases reflects, recognize that bans like this are dangerous precedent for everyone in the news business. Consider, therefore, asking other journalists in the region to help demonstrate what information they received but the plaintiff journalist did not. Obviously, given the ongoing battle the press wages against involuntary testimony under third-party subpoenas, this is an avenue that must be pursued very carefully.
- *Flood the government with Freedom of Information Act requests.* Both the Youngstown mayor and the Maryland governor carved out public records requests from their ban. Journalists should rigorously test those carve outs.
- *Look for other areas of retaliation to complain about.* Several successful retaliation cases arose from the cancellation of advertising as a result of official displeasure with coverage.[51] Counsel should check with the advertising side of their client. If retaliation has also come in the form of a commercial reprisal, the complaint should attack that as well.
- *Admit to intimidation.* Consider carefully the chill that the Fourth Circuit pressed to determine: has the plaintiff truly been compromised in his willingness to report critically or opine against the government? If the plaintiff is willing to make a public admission of that nature, he will have met the challenge of the *Ehrlich* appeals panel head-on.

Finally, consider documenting all of this information in the complaint and not moving for an injunction until the discovery has taken place. The temptation to move for a preliminary injunction at the outset of these cases is extremely compelling: the newsroom is suffering from a very real deprivation of information, and counsel and client want to demonstrate the seriousness and urgency of the claim. But in the *Ehrlich* and *McKelvey* decisions, the courts treated the journalists' affidavits as the complete expression of the entire harm caused to them. A more complete record, including admissions and facts obtained in the depositions of government witnesses, would enhance the persuasive impact of the retaliation claim.

**Find a Government Employee to Sue**

In an important footnote, the *McKelvey* court notes that although some restrictions on employees may be constitutional, a flat ban on press comments is a prior restraint on the government employee's speech.[52] The Fourth Circuit in *Ehrlich* expressly declined to address the issue.[53] But government employees banned from speaking to the press have succeeded in other jurisdictions on grounds that broad prohibitions against all expression at any time violate their First Amendment rights to speak.[54] For example, in *Barrett v. Thomas*, the Fifth Circuit held that although government employers may have a legitimate interest in curtailing public criticism by their employees, this must be balanced against the employees' protected First Amendment speech.[55] On behalf of the plaintiff/employee, the court therefore found police department regulations overbroad where they prohibited employees from speaking to reporters on any topic "that is or could be of a controversial nature," i.e., regulations that sweep in and prohibit otherwise constitutionally protected speech.[56]

In the *Ehrlich* case, no government employee was available to join the newspaper. In *McKelvey*, the American Civil Liberties Union (ACLU) voiced the rights of the employees in a brief filed on behalf of various Youngstown city employees.[57] The ACLU amici argue that the "Mayor's ban is a prior restraint that prohibits all speech, by any City employee on any subject matter."[58] They continue to argue that "[i]t is no response that City employees may still speak to other media entities. . . . To be unconstitutional, a speech restriction need not be absolute."[59] Thus, the

city employees contend that even the Youngstown mayor's selective ban against particular journalists, rather than journalists at-large, is an unconstitutional prior restraint.

At arguments in the *Ehrlich* case, both the district court and the Fourth Circuit asked about, and noted the absence of, the government employees' case. Having someone subject to a direct prior restraint on the journalist's side will answer those inquiries and, likely, will benefit all of the plaintiffs. Although it may be understandably difficult to find a willing employee to join the suit, counsel and the journalists should try.

**Argue Unconstitutional Overbreadth**

To backstop a journalist's claim of standing to sue for redress of a direct injury, counsel may assert an argument under the overbreadth doctrine. The overbreadth doctrine is a special rule of standing that permits a party to challenge a government act facially even though the act would be constitutional as applied.

Traditionally, when a law is constitutional as applied, a plaintiff "may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court."[60] However, the First Amendment enjoys special protection due to the "sensitive nature of protected expression."[61] The Supreme Court in *Broadrick v. Oklahoma*[62] found that individuals subject to an overbroad statute might not engage in speech, let alone mount a court challenge, if subject to sanctions. Thus, the doctrine protects those who may not have the ability to assert and defend their First Amendment rights.

This doctrine is beneficial for journalists where either (1) they are reluctant to admit subjective chill, or (2) the evidence does not demonstrate subjective chill. Such journalists may assert that the government retaliation is overly broad through the hypothetical rights of third parties deterred from news coverage as a result of the government action.[63]

This doctrine requires plaintiffs to think outside the box. Not all news media organizations are alike, and some are more susceptible to the government's influence than others. Consider the following factors when assessing the likelihood of chilled speech:

- *Smaller news organizations.* The resources of a news outlet may affect the likelihood of chill. Staffing, shorter deadlines, access to official sources, and many other factors present in small news operations may cause a reporter to limit critical reports.
- *Other news markets.* Consider outlets outside of your particular market. For example, the Washington metro news market may be "rough and tumble," but would this premise hold in other geographic markets also potentially subject to the retaliation? Reporters without a multiplicity of sources may be forced to abide by the government executive's rules in order to continue press coverage.
- *Prophylactic value.* As we have seen in the *McKelvey* case, government executives may copycat behavior deemed constitutional elsewhere. Should the court take prophylactic measures to prevent nationwide applicability of a substantially overbroad statue?

Journalists should be aware that courts characterize the overbreadth doctrine as "strong medicine"[64] and will only invalidate government acts considered "substantially overbroad."[65] As a result, counsel should spend a great deal of time brainstorming about journalists in the varying factual circumstances listed above. The greater the evidence plaintiffs put forth regarding potential chill, the more likely they are to prevail.

**Argue Public Forum or Discriminatory Access**

In some litigation, reporters have sued after they were physically barred from an event or location, i.e., typically, a press conference or press room to which other members of the media have free and unfettered access. The courts have evaluated these cases as discriminatory exclusions from public forums, which may only be justified where the government demonstrates a compelling reason for the exclusion. Under the right facts, this type of analysis will provide additional and separate grounds for relief from a retaliation claim, the *Ehrlich* and other decisions notwithstanding.

*American Broadcasting Cos., Inc. v. Cuomo*[66] represents the classic formula. To avoid picketing by the ABC's striking union members, New York City mayoral candidates and the city police commissioner excluded the network's management crews from campaign premises and threatened to have them arrested for criminal trespass if they attempted to enter.[67] Other news outlets, including ABC's competitors NBC and CBS, were freely invited into the candidates' campaign facilities.[68] Although the candidates, who were defendants in the litigation, claimed their activities were private and admittance to the facilities was invitation-only, the court determined that "once there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable."[69]

Other courts have routinely held that once a previously private forum is opened for public participation, the government has created a public forum from which individual reporters cannot be arbitrarily excluded. In *Borreca v. Fasi*, the mayor of Honolulu attempted to argue that the news conferences he held in his private office were not a public forum.[70] The court rejected this argument, noting that wherever he chooses to hold a general news conference, that place becomes a "public gathering place" from which he may not discriminatorily exclude individual reporters without demonstrating a compelling governmental interest.[71] Similarly, in *Sherrill v. Knight*, the White House created a public forum when it voluntarily established press facilities that were otherwise publicly available to bona fide journalists.[72] Thus, a reporter denied a press pass based on a confidential Secret Service report was entitled to know the standards by which he was evaluated.[73] Finally, a public school board's provision of a press room for coverage of its meetings was likewise considered the establishment of a public forum in *United Teachers of Dade v. Stierheim*.[74] Therefore, the school board could not restrict the definition of *accredited news gatherers* permitted to utilize the space

to exclude representatives of the teachers union's monthly publication based on either the publication's viewpoint or the reporters' union membership.[75]

Under this analysis, members of the media have been permitted access not just to places, but also to sources of information. Thus, in *Quad-City Community News Service, Inc. v. Jebens*, the court held that the city could not bar reporters from an "underground" newspaper from accessing police files, records, or reports made available to other, more "established" newspapers.[76] To hold otherwise would allow the "funneling" of information to the public only through media representatives whom the city deemed appropriate.[77]

Although these cases do not stand for the proposition that the media has an unrestricted right to access in the pursuit of news, once the government provides the media general access to places and information, a public forum has been created from which individual members of the media may not be indiscriminately excluded. Counsel should look for every opportunity in future retaliation cases to argue that their client was deprived of access to a public forum.

### The Battle Continues

The Fourth Circuit professed to decide the case sui generis but instead laid down a broad world view of journalists, not as neutral spectators ferreting out truth, but as full combatants in the "rough and tumble political arena." The best body armor against public officials who draw arrows like this one from their quivers[78] is a battle plan that draws its strategy from the areas that the *Ehrlich* courts dodged or left untouched.

### Endnotes

1. Baltimore Sun Co. v. Ehrlich, 437 F.3d 410, 419 (4th Cir. 2006) [*Ehrlich II*].
2. Youngstown Publ'g Co. v. McKelvey, 2005 WL 1153996 (N.D. Ohio), *appeal docketed*, No. 4:05 CV 00625 (6th Cir. June 15, 2005).
3. *Ehrlich II*, 437 F.3d at 413.
4. *Id.* at 414.
5. *Id.*
6. *Id.*
7. Baltimore Sun Co. v. Ehrlich, 356 F. Supp. 2d 577 (D. Md. 2005) [*Ehrlich I*].
8. Nitkin drew the governor's wrath from an article in which he reported the name of a developer that stood to benefit from the Ehrlich administration's proposal to sell public land without an open-bidding process. In an unfortunate error that the newspaper promptly corrected, and with which Nitkin had nothing to do, a graphic accompanying the story indicated that all 450,000 acres of state-owned lands, and not just the total of 3,000 acres including the 836-acre parcel involving the developer, were up for sale.
9. The governor's office said Olesker was punished, in part, because of a column about testimony before the Maryland legislature by an Ehrlich press aide regarding a $2.7 million television campaign to promote tourism in the state. The ads depicted Ehrlich as taking over people's household chores to permit them to enjoy the state's amenities for the day. Olesker's column said the press aide "struggl[ed] mightily to keep a straight face" as did Democrat legislators. The governor charged that Olesker, who did not attend the legislative hearing, had misled readers into thinking he observed the proceedings. In a subsequent column, Olesker said he chose the phrasing as a metaphor.
10. *See e.g., McKelvey,* 2005 WL 1153996 (mayor banned city officials from speaking with members of the press); Raycom Nat'l Inc. v. Campbell, 266 F. Supp. 2d 679 (N.D. Ohio 2004) (Cleveland mayor issued a ban to city officials and employees from speaking with a particular television station).
11. Snyder v. Ringgold, 133 F.3d 917, 1998 WL 13528 (4th Cir. 1998) [*Snyder I*]; Snyder v. Ringgold, 40 F. Supp. 2d 714 (D. Md. 1999) [*Snyder II*].
12. *Id.*
13. *Snyder I*, 1998 WL 13528, at *4 (footnote omitted).
14. *Snyder II*, 40 F. Supp. 2d at 717.
15. *Id.* at 718.
16. *Ehrlich II*, 437 F.3d at 413–15.
17. *Ehrlich I*, 356 F. Supp. 2d at 577. The district court never mentioned the retaliation framework at all. Instead, it treated the case entirely as a petition for access. "Because . . . the Sun seeks the declaration of a constitutional right that neither the Supreme Court nor the Fourth Circuit has recognized–and in fact seeks more access than accorded a private citizen–the Governor's motion to dismiss will be granted." *Id.* at 582.
18. The *Business Journal* in *McKelvey*, a case pending oral argument in the Sixth Circuit, faced a fate similar to the *Sun* and its journalists in district court. The Northern District of Ohio held that *McKelvey* plaintiffs sought a "privileged right of access above that of the general public." 2005 WL 1153996, at *7. As such, it held that the plaintiff was not engaged in a constitutionally protected activity." *Id.* at *8. Unlike the *Ehrlich I* court, however, the district court in *McKelvey* did purport to apply a retaliation framework, but it held that without a predicate First Amendment right to "one-on-one interviews," the mayor's ban had no "adverse impact" under the Constitution. *Id.* at **6–7.
19. *Ehrlich II*, 437 F.3d at 415–16.
20. *See, e.g., id.* at 415 ("[W]e address the single issue whether the issuance of the Governor's November 18, 2004 directive in response to the *Sun's* exercise of its First Amendment rights gives rise to an actionable claim for retaliation under the First and Fourteenth Amendments and 42 U.S.C. §1983."); *id.* at 417–421 (for a direct statement of the facts and their applicability to the claim of retaliation).
21. *Id.* at 419.
22. *Id.*
23. *Id.* at 416.
24. Judith F. Bonilla et al., *Anatomy of a First Amendment Retaliation Claim*, 2005 MEDIA L. RESOURCE CENTER BULL., Dec. 2005, at 10.
25. *See* Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 500 (4th Cir. 2005) ("[F]or purposes of a First Amendment retaliation claim under § 1983, a plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter a 'person of ordinary firmness' from the exercise of First Amendment rights.").
26. *Id.*
27. *Id.* at 500; *see also* Bennett v. Hendrix, 423 F.3d 1247, 1252 (11th Cir. 2005) (adopting an objective standard, recognizing that a defendant should not "escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity").
28. 411 F.3d 712 (6th Cir. 2005).
29. *Id.* at 723.
30. *Id.*; *see also* Bonilla et al., *supra* note 24, at 10.
31. Bonilla et al., *supra* note 24, at 10 (citing Houchins v. KQED, 438 U.S. 1, 16 (1978)); *In re* Greensboro News Co., 727 F.2d 1320, 1322 (4th Cir. 1984).
32. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 598 n.2 (1980) ("[T]he media's right of access is at least equal to that of the general public."); *see generally* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) (referring to the rights of the public and the press together when discussing the right of access, e.g., "the circumstances under which the press and public can be barred from a criminal trial are limited").
33. *See Houchins*, 438 U.S. at 16 ("[T]he media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally. . . .");

Pell v. Procunier, 417 U.S. 817, 834 (1974) ("[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.").

34. *Ehrlich I,* 356 F. Supp. 2d at 582.

35. *Id.* at 580 n.3 (citing Mark Fisher, *The Sun Should Rise Above Ehrlich's Pique*, WASH. POST, Dec. 9, 2004, at B01); *see also* comments of Mark Hyman of Sinclair Broadcasting doubting that Ehrlich's actions prevented the reporters from writing stories:

> To my knowledge no one is prohibiting David Nitkin and Michael Olesker from writing anything–and that is what the First Amendment is all about. . . . We all know anecdotally of politicians favoring particular media outlets. . . . The elected officials just haven't all been as frank about it as the [Maryland] governor.

Greg Barrett & Stephanie Hanes, *Sun Files Suit to Lift Ban on Journalists by Ehrlich*, BALT. SUN, Dec. 4, 2004, at 1A.

36. Brief for Washington Post et al. as Amici Curiae Supporting Appellants at 9, *Ehrlich II*, 437 F.3d at 410.

37. *Ehrlich II*, 437 F.3d at 416.

38. *See, e.g.*, *McKelvey,* 2005 WL 1153996. (The *McKelvey* court, as stated above, misconstrued the place in the cause of action where it examined the First Amendment nature of the activity. The First Amendment comes into play in the first element, which looks
to whether the activity that drew the punishment is protected, not in the second element, which looks to what action the government took to retaliate.)

39. *See* Bennett v. Hendrix, 423 F.3d 1247, 1250 n.3 (11th Cir. 2005).

40. *See id.* at 1250–51 (*Bennett* was that court's case of first impression for the adverse effect standard. The Eleventh Circuit reviewed whether the objective or subjective standard is used within the federal jurisdictions. The court found that the U.S. Courts of Appeals for the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and D.C. Circuits all used the ordinary firmness test.).

41. *See, e.g., id.* (discussing that the Second Circuit appears to have taken contradictory positions on the adverse effect issue; however, the most recent decision in 2004 used the objective standard); Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999) (*Thaddeus-X* is another case of first impression on the adverse effect issue. This case also identifies which jurisdictions adhere to the objective standard versus the subjective standard regarding the adverse effect element. This case also found that the overwhelming majority of jurisdictions agreed with an objective standard.).

42. Garcia v. City of Trenton, 348 F.3d 726, 728 (8th Cir. 2003).

43. Keenan v. Tejada, 290 F.3d 252, 258 (5th Cir. 2002).

44. *Bennett*, 423 F.3d at 1251.

45. *Id.* at 1252.

46. *Id.*

47. *Ehrlich II*, 437 F.3d 413, 417 (4th Cir. 2006).

48. *Id.* at 419.

49. Failing to recognize that the argument for discovery turns on the fact that the government, and not the journalists, best knows precisely how much and what type of information it selectively withholds, the Fourth Circuit said that the argument "makes no more sense than claiming that a personal injury plaintiff needed discovery to find out if he had been injured when the defendant crashed into his car." *Id.* at 419 n.1.

50. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 373 (1976) ("The loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury."); Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 500 (4th Cir. 2005) (rejecting a subjective evaluation of actual chilling effect of retaliatory conduct in favor of the objective standard where adverse impact is presumed if "defendant's allegedly retaliatory conduct would likely deter ' a person of ordinary firmness' from the exercise of First Amendment rights"); *Bennett*, 423 F.3d at 1254 (same).

51. *See, e.g.*, El Dia, Inc. v. Rossello, 165 F.3d 106 (1st Cir. 1999) (Governor of Puerto Rico allegedly withdrew state-sponsored advertising because of past critical reports); N. Miss. Comm'rs, Inc. v. Jones, 951 F.2d 652 (5th Cir. 1992) (newspaper sued county board of supervisors for withdrawing advertising from the paper in retaliation for critical reports).

52. *McKelvey*, 2005 WL 1153996.

53. *Ehrlich II*, 437 F.3d at 415 (the court did not discuss prior restraint of a government official, addressing "the single issue" of whether the governor's actions constituted retaliation).

54. *See, e.g.*, Harman v. City of New York, 140 F.3d 111 (2nd Cir. 1998) (invalidating policies requiring employees to obtain preapproval of all statements to the press); Koziol v. Hanna, 107 F. Supp. 2d 170, 179 (N.D.N.Y. 2000) (denying qualified immunity to mayor who implemented a similar press prescreening mechanism where "[e]mployees were directed to speak only after authorization from" the mayor).

55. Barrett v. Thomas, 649 F.2d 1193, 1199 (5th Cir. 1981).

56. *Id.*

57. Brief for Teamsters Local 377 et al. as Amici Curiae Supporting Plaintiffs-Appellants, Youngstown Publishing Co. v. McKelvey, No. 05-3842 (6th Cir. Aug. 12, 2005) (filed on behalf of the Youngstown employees by the local chapters of two national unions, the Teamsters and the American Federation of State, County and Municipal Employees).

58. *Id.* at 4.

59. *Id.* at 16.

60. New York v. Ferber, 458 U.S. 747, 766 (1982).

61. *Id.*

62. Broadrick v. Oklahoma, 413 U.S. 601, 612 ("Litigants . . . are permitted to challeng[e] a state not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.").

63. The injury could be a government press ban, actual threats, withdrawal of state-sponsored advertising, or any other activity that would chill an average journalist.

64. *Broadrick*, 413 U.S. at 613.

65. R.A.V. v. City of St. Paul, 505 U.S. 377, 412 (1992) (substantial overbreadth is measured "in relation to the statute's plainly legitimate sweep").

66. Am. Broad. Co. v. Cuomo, 570 F.2d 1080 (2d Cir. 1977).

67. *Id.* at 1082.

68. *Id.*

69. *Id.* at 1083.

70. Borreca v. Fasi, 369 F. Supp. 906, 910 (D. Haw. 1974).

71. *Id.*

72. Sherrill v. Knight, 569 F.2d 124, 129–30 (D.D.C. 1997).

73. *Id.* at 130.

74. United Teachers of Dade v. Stierheim, 213 F. Supp. 2d 1368 (S.D. Fla. 2002).

75. *Id.* at 1373.

76. Quad-City Cmty. News Serv., Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971).

77. *Id.* at 14.

78. *Ehrlich II*, 437 F.3d at 420 (Ehrlich, in a press interview after imposing the ban, described deprivation of information as "the only arrow" in his "quiver.").