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Comments: A Poisoned Arrow in His Quiver: Why Forbidding an Entire Branch of Government from Communicating with a Reporter Violates the First Amendment

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A POISONED ARROW IN HIS QUIVER: WHY FORBIDDING AN ENTIRE BRANCH OF GOVERNMENT FROM COMMUNICATING WITH A REPORTER VIOLATES THE FIRST AMENDMENT

*"[There exists] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."*¹

*"Nothing can now be believed which is seen in a newspaper. Truth itself becomes suspicious by being put into that polluted vehicle."*²

I. INTRODUCTION

In November 2004, Governor Robert L. Ehrlich, Jr., issued a directive to all officials and employees in Maryland's State Executive Department commanding them to stop communicating with two *Baltimore Sun* reporters, David Nitkin and Michael Olesker.³ Governor Ehrlich's stated rationale for the ban against the two reporters was that they were "failing to objectively report on any issue dealing with the Ehrlich-Steele Administration."⁴ After the ban was implemented, each reporter learned Executive Department officials no longer were willing to speak with them. The two reporters and the *Baltimore Sun* collectively challenged the Governor's ban in federal court, claiming that it infringed upon their First Amendment rights of free expression and freedom of the press. The U.S. District Court for the District of Maryland dismissed the *Baltimore Sun*'s complaint for failure to state a claim, and the U.S. Court of Appeals for the Fourth Circuit affirmed.⁵

This Comment analyzes the District Court and Fourth Circuit opinions in *Baltimore Sun Co. v. Ehrlich*⁶ ("The Sun case"), and explains why these courts erred in upholding the Governor's ban. Although there is no general right of access to government information under the First Amendment, and no public official is

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1. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
 2. JAMES B. LEMERT, CRITICIZING THE MEDIA 9 (1989) (excerpt of letter from Thomas Jefferson to J. Norvell (1807)).
 3. Balt. Sun Co. v. Ehrlich, 437 F.3d 410, 413 (4th Cir. 2006).
 4. *Id.*
 5. *Id.*
 6. 437 F.3d 410.

obligated to speak to any member of the press, this does not mean government can manipulate the dissemination of government information to reporters in a manner that chills speech.⁷

There are two main flaws in the District Court's and Fourth Circuit's analysis of the Governor's ban. First, neither court acknowledged that the Governor's ban is viewpoint-based, and, as a result, neither court addressed the perilous effects of viewpoint-based restrictions in restraining ideas and opinions from entering the "marketplace of ideas."⁸ Second, neither court evaluated the Governor's ban as overarching policy. The Fourth Circuit opined there is no distinction between the hypothetical scenario of one public official refusing to speak to a reporter on account of what that reporter had written in the past, and the Governor's ban. The distinction is that one public official refusing to speak to a reporter does not eliminate that reporter's ability to communicate with any other public official or employee in the Executive Department, whereas, the Governor's ban forbids the *entire* Executive Department from communicating with Nitkin and Olesker. By not evaluating the Governor's ban as broad overarching policy, the Fourth Circuit did not properly assess the potential chilling effect of the Governor's ban.

Part II of this Comment provides further factual background about *The Sun* case, and summarizes the District Court and Fourth Circuit opinions. Part III analyzes the District Court and Fourth Circuit opinions. First, this Comment explains why there is no general right of access to government information under the First Amendment. Then, this Comment explains why viewpoint-based restrictions are the worst kind of restriction on speech, why the Governor's ban is viewpoint-based, and why, because of the wide breadth of the Governor's ban and its application to the entire Executive Department, the Governor's ban constitutes broad overarching policy.

Part IV proposes a framework for evaluating government's dissemination of information to the press. Under this framework, broad overarching viewpoint-based government policies on the dissemination of government information constitute restrictions on speech, and therefore, deserve First Amendment scrutiny. When this framework is applied to *The Sun* case, this Comment finds that the Governor's ban is broad enough to chill speech and that it therefore violates the First Amendment. To disprove the Fourth Circuit's contention that striking down the Governor's ban "would 'plant the seed of a constitutional case' in 'virtually every'

7. See *infra* notes 184-206 and accompanying text.

8. See *infra* note 172 and accompanying text.

interchange between public official and press,”⁹ this framework is applied to other hypothetical scenarios to illustrate situations that would not give rise to a First Amendment claim.

The purpose of this Comment is two-fold. First, it is to provide a response to what the author believes is a dangerous precedent set by the Fourth Circuit. Under the Fourth Circuit’s holding, a Governor can target any reporter for whatever reason and ban that reporter from communicating with all employees in the Executive Department, regardless of how many public officials that reporter has access to, or the months or years that may have gone into cultivating such access. Cultivating access to public officials is how a government reporter does her job, and forbidding an entire executive department from communicating with a reporter obstructs that reporter from being able to do her job. The second purpose of this Comment is to provide a resource for courts when evaluating government restrictions on the dissemination of information to the press.

II. FACTUAL SUMMARY OF *BALTIMORE SUN* v. *EHRlich*

A. *Factual Background*

1. The Ehrlich Administration’s Dispute with David Nitkin

The dispute between the Ehrlich administration and *Baltimore Sun* reporter David Nitkin arose over a series of articles Nitkin wrote in October and November of 2004 about a proposed sale of land by the state to a well-known contracting company owner, Willard Hackerman.¹⁰ The land was an 836 acre tract of prime conservation land in St. Mary’s County. The 836 acre tract was part of a \$34 million plan under former Governor Parris N. Glendening to protect 25,000 acres of land on the eastern shore and in southern Maryland.¹¹ Following enactment of Governor

9. *Balt. Sun*, 437 F.3d at 418.

10. Mr. Hackerman is president and chief executive officer of Whiting-Turner Contracting Company. See David Nitkin, *Land Deal Said to Aid Political Donor*, *BALT. SUN*, Oct. 14, 2004, at 1A. David Nitkin’s articles about the proposed land transaction were the main spark of the dispute that led to the Governor’s ban against Nitkin. See generally Paul Moore, Op-Ed., *Weighing the Merits of Ehrlich Complaints*, *BALT. SUN*, April 21, 2005, at 17A [hereinafter Moore, *Merits of Ehrlich Complaints*] (describing the Ehrlich administration’s complaints against the *Baltimore Sun* regarding inaccuracies and errors in its reporting). The Ehrlich administration has criticized the *Baltimore Sun* for alleged inaccuracies in other articles written between 2002 and 2004. See Paul Moore, *Text of Ehrlich Complaints Against The Sun*, *BALT. SUN*, Apr. 21, 2005, <http://www.baltimoresun.com/news/opinion/oped/bal-op.moore21,0,6197320.column> [hereinafter Moore, *Text of Ehrlich complaints*].

11. Nitkin, *supra* note 10.

Glendenning's plan, the purchase of the 836 acre tract of land was delayed as a result of budget restraints.¹²

In November 2003, the Maryland Board of Public Works, which is comprised of Governor Ehrlich, State Comptroller William Donald Schafer, and State Treasurer Nancy K. Kopp, voted to purchase the 836 acre tract of land.¹³ In February 2004, the State's purchase of the land was finalized at a price of \$2.5 million.¹⁴

In the fall of 2004, the Maryland State Department of General Services notified the General Assembly that the Ehrlich administration was considering selling the 836 acre tract of land to an unidentified "benefactor."¹⁵ Under a proposed plan, this benefactor would purchase the tract at the same price paid by the State in February 2004, and then donate 150 acres to St. Mary's County for public schools.¹⁶ The benefactor would hold the remaining property for a year, and then sell it to a conservation organization, resulting in a \$7 million tax break for the benefactor.¹⁷

On October 14, 2004, David Nitkin identified the benefactor as Willard Hackerman.¹⁸ In that article, Nitkin described Hackerman as a "politically connected force in Baltimore development," and he noted that Hackerman had made campaign contributions to both Democratic and Republican politicians.¹⁹ Nitkin also wrote that Hackerman was "a member of Comptroller William Donald Schafer's inner circle," and noted that Comptroller Schafer could cast a vote on whether the sale would go through.²⁰ After this first article, Nitkin would write eighteen more articles on the proposed land deal over the course of a month.

On October 20, 2004, in an article with the headline "Ehrlich OK'd Deal for Land," Nitkin reported on Maryland State Department of General Services Secretary Boyd K. Rutherford's testimony before the State Senate Budget and Taxation Committee regarding the land deal.²¹ Secretary Rutherford testified that the

12. David Nitkin & Andrew A. Green, *Schaefer Defends State Plan to Sell St. Mary's Acreage*, BALT. SUN, Oct. 23, 2004, at 4B.

13. David Nitkin, *Ehrlich: Probe of Land Deal Unneeded*, BALT. SUN, Nov. 12, 2004, at 1B, 5B.

14. Nitkin & Green, *supra* note 12, at 1B.

15. *Id.*

16. *Id.*

17. *Id.* at 1B, 4B.

18. Nitkin, *supra* note 10, at 1A.

19. *Id.* at 6A.

20. *Id.*

21. David Nitkin, *Ehrlich OK'd Deal for Land*, BALT. SUN, Oct. 20, 2004, at 1A. The Ehrlich administration took issue with the title of Nitkin's October 14, 2004 article, and the *Baltimore Sun* later printed a clarification of this title on

benefactor had approached him in the spring or summer of 2003 about buying the land.²² Secretary Rutherford further testified that he had briefed Governor Ehrlich about the proposed sale in 2003, and that Governor Ehrlich “said it was worth pursuing.”²³

On October 25, 2004, Governor Ehrlich pulled Nitkin aside following a press conference and explained he did not like the news articles about the land transaction and that he “viewed them as a personal attack.”²⁴ In an October 26, 2004 article, Nitkin quoted Governor Ehrlich as stating he “never discussed the deal with the benefactor or anyone representing him.”²⁵ Governor Ehrlich also was quoted as stating: “I have a big problem with the way this story has been portrayed It is so inappropriate to characterize this as some sort of negotiation, some backroom deal, when there was no back room.”²⁶ On November 2, 2004, Nitkin reported that Governor Ehrlich had “appointed Hackerman to a state board that approves financing for . . . public-sector and nonprofit construction projects.”²⁷

On November 9, 2004, Nitkin reported that Hackerman was withdrawing his bid for the tract of land.²⁸ On November 11, Nitkin reported that, according to documents released by the State, Hackerman had “hoped to build houses with a water view on preserved land in St. Mary’s County that he secretly negotiated to buy from the state.”²⁹ On November 16, Nitkin reported that, earlier that month, Governor Ehrlich had “collected \$100,000 for his re-election campaign at a private fundraiser held by a business partner of . . . Hackerman.”³⁰

December 28, 2004. See Moore, *Merits of Ehrlich Complaints*, *supra* note 10, at 17A.

22. Nitkin, *supra* note 21, at 1A.

23. Audio C.D.: Briefing on Proposed Sale of Land in St. Mary’s County, held by the Maryland State Senate Budget & Taxation Committee (Oct. 19, 2004) (on file with author); see also Nitkin, *supra* note 21, at 1A. Secretary Rutherford later clarified his statement and stated: “I told [the Governor] what we were trying to do [with the land] in the premeeting Everybody felt comfortable with that.” David Nitkin, *Ehrlich Neutral on Sale of Land*, BALT. SUN, Oct. 26, 2004, at 4B [hereinafter Nitkin, *Ehrlich Neutral on Land Deal*].

24. Complaint at ¶ 14, *Balt. Sun v. Ehrlich*, 356 F. Supp. 2d 577 (D.Md. 2004) (No. 04-CV-3822).

25. Nitkin, *Ehrlich Neutral on Land Deal*, *supra* note 23, at 4B.

26. *Id.*

27. David Nitkin & Andrew A. Green, *Ehrlich Appointed Developer to Panel*, BALT. SUN, Nov. 2, 2004, at 1A.

28. David Nitkin, *Hackerman Ends Plans to Purchase Land in S. Md.*, BALT. SUN, Nov. 9, 2004, at 1A.

29. Andrew A. Green & David Nitkin, *Hackerman Aimed to Build Houses on Preserved Land*, BALT. SUN, Nov. 11, 2004, at 1A.

30. David Nitkin & Andrew A. Green, *Hackerman’s Partner Held Fund-Raiser for Governor*, BALT. SUN, Nov. 16, 2004, at 1A. The host of the event was Howard S. Brown, president of David S. Brown Enterprises. Nitkin reported that “Brown and Hackerman’s Whiting-Turner Contracting Co. are partners in a project to

On November 18, 2004, Nitkin reported that the Ehrlich administration was in the process of reviewing state preservation lands for the purpose of selling it off to reduce the size of government.³¹ He reported that the Maryland State Department of Natural Resources recently had released a list of public lands identified as possible candidates for sale.³² Nitkin wrote:

While government officials insist they are undertaking a smart management review, some critics see a poorly conceived and executed plan unfolding. The Ehrlich Administration, they worry, may be undermining open-space goals while helping friends who stand to receive advance opportunity to snatch up valuable acreage for personal use.³³

Nitkin then noted the recently cancelled land deal with Hackerman, and wrote that Hackerman “pledged to preserve the land, but documents released [by the State] . . . reveal he intended to build homes there.”³⁴

That same day, Governor Ehrlich issued a directive to the Executive Department.³⁵ The directive was authored by Deputy Director of Communications Gregory Massoni and disseminated to the Executive Department by Press Secretary Shareese DeLeaver.³⁶ The directive stated:

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.³⁷

build a \$220 million town center at an Owings Mills Metro station parking lot.”
Id.

31. David Nitkin, *UP FOR SALE? BEACHES, WOOD, PARKS*, BALT. SUN, Nov. 18, 2004, at 1A.

32. *Id.*

33. *Id.* at 13A.

34. *Id.*

35. Complaint, *supra* note 24, at ¶ 15.

36. *Id.* at ¶¶ 15-16.

37. Balt. Sun Co. v. Ehrlich, 437 F.3d 410, 413 (4th Cir. 2006) (alterations omitted).

Several days later, Governor Ehrlich went on a talk radio show,³⁸ and explained that access to information about state government was “the only arrow in [his] quiver,” and that the ban was “meant to have a chilling effect” on Nitkin and Olesker.³⁹

2. The Ehrlich Administration’s Dispute with Michael Olesker

In his dispute with *Baltimore Sun* columnist Michael Olesker, Governor Ehrlich alleged that Olesker was fabricating quotes by public officials in his columns.⁴⁰ On November 16, 2004, Olesker wrote a column about how Governor Ehrlich was playing a starring role in the State’s advertisement campaign to promote Maryland tourism.⁴¹ In that column, Olesker described an interchange he had with a public official concerning the advertisements: “The Governor’s spokesman, Paul E. Schurick, struggling mightily to keep a straight face, said political gain was ‘not a consideration’ when making the commercials.”⁴² The Ehrlich administration challenged the column and explained that Olesker was not even present at the meeting where this discussion took place.⁴³ Olesker admitted that he was not at the meeting, and on November 24, he wrote an apology to his readers for any confusion he had caused by the November 16th column.⁴⁴

3. The Effect of the Governor’s Ban

David Nitkin made the following allegations in two affidavits filed with his complaint. On November 22, 2004, Nitkin contacted the Governor’s Press Secretary, Henry Fawell, to get a comment for an article, but Mr. Fawell replied: “[T]he ban is still in effect.”⁴⁵ That same day, Nitkin contacted the Governor’s Budget Secretary, James DiPaula, but Mr. DiPaula’s secretary informed Nitkin that he would have to contact the Governor’s Press Office.⁴⁶ On November 23, 2004, Nitkin called Anne Hubbard, a

38. Governor Ehrlich appeared on WBAL’s *Chip Franklin Show* on November 26, 2004. Jennifer McMenamin, *Ehrlich Says He Intended ‘Chilling Effect,’* BALT. SUN, Nov. 27, 2004, at 1B-2B.

39. Complaint, *supra* note 24, at ¶ 17.

40. See generally Moore, *Text of Ehrlich Complaints*, *supra* note 10 (describing several articles where the Ehrlich administration alleged Olesker fabricated quotes by public officials in his column). Michael Olesker no longer writes for the *Baltimore Sun*. Nick Madigan, *Longtime Columnist Olesker Resigns*, BALT. SUN, Jan. 4, 2006, at 1B.

41. Michael Olesker, *Ehrlich Looks Good on TV, Not on Record*, BALT. SUN, Nov. 16, 2004, at 1B.

42. *Id.* at 5B.

43. See Moore, *Merits of Ehrlich Complaints*, *supra* note 10, at 17A.

44. Michael Olesker, *It’s All About the Job—Not the Political Parties*, BALT. SUN, Nov. 24, 2004, at 4B.

45. *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 413 (4th Cir. 2006).

46. *Id.*

spokeswoman for the Department of General Services, to get a comment for an article.⁴⁷ Ms. Hubbard replied: "David, I can't talk to you."⁴⁸

On December 30, 2004, Nitkin was excluded from a press briefing held in the Governor's conference room.⁴⁹ Later, Nitkin received invitations to attend press briefings from the Governor, and he attended three of them during the two months after the ban was implemented.⁵⁰ Nitkin is still allowed to make public information requests pursuant to Maryland's Public Information Act,⁵¹ and he has continued to receive public press releases from the Governor's Office.⁵²

Olesker alleged in his affidavit that several state government representatives and employees have not returned his telephone calls.⁵³ On November 29, 2004, Olesker made three telephone calls to the Governor's Press Office that were not returned.⁵⁴

Other *Baltimore Sun* reporters still have access to Executive Department officials and employees.⁵⁵ Requests made on behalf of Nitkin and Olesker by other *Sun* reporters have been answered by the Ehrlich administration.⁵⁶

In December 2004, the *Baltimore Sun*, David Nitkin and Michael Olesker collectively filed a lawsuit against Governor Ehrlich, seeking preliminary and permanent injunctions against enforcement of the ban.⁵⁷ In its claim, the *Baltimore Sun* alleged that Governor Ehrlich's ban was unconstitutional retaliation and that it violated *The Sun's* First Amendment free speech and press rights.⁵⁸

47. *Id.*

48. *Id.*

49. *Id.* at 414.

50. *Id.*

51. MD. CODE ANN., STATE GOV'T § 10-630 (West 2002).

52. *Balt. Sun*, 437 F.3d at 414.

53. *Id.*

54. *Id.*

55. *Id.*

56. In his appellate brief, the Governor described one occasion where Nitkin stood beside a television reporter conducting an interview with the Governor, and Nitkin passed questions to the television reporter so that the Governor would answer. Brief of Respondent-Appellee at 49, *Balt. Sun*, 437 F.3d 410 (4th Cir. 2006) (No. 05-1297).

57. *Balt. Sun*, 437 F.3d at 413.

58. Complaint, *supra* note 24, at ¶¶ 1, 25. The *Sun's* claim was brought under 42 U.S.C. § 1983 (2006). *Id.* at ¶ 21.

B. Lower Court Opinions

1. The District Court Opinion

The U.S. District Court for the District of Maryland, Judge Quarles, dismissed the *Baltimore Sun*'s complaint.⁵⁹ In his opinion, Judge Quarles explained that the Supreme Court has "refused to recognize—or construct—a First Amendment right of access to all sources of information within governmental control."⁶⁰ Quoting the Supreme Court plurality opinion, *Houchins v. KQED*,⁶¹ Judge Quarles explained that "there is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information."⁶² Judge Quarles also cited an unreported Fourth Circuit opinion, *Snyder v. Ringgold*,⁶³ where the Fourth Circuit "declined to recognize a journalist's right to have equal access to public information sources and to be treated the same as other journalists."⁶⁴

Following *Ringgold*, Judge Quarles held: "[A] government may lawfully make content-based distinctions in the way it provides press access to information not available to the public generally."⁶⁵ Judge Quarles explained the press has no right of access beyond that of the public, and that the information sought by Olesker and Nitkin was "far beyond any citizen's reasonable expectations of access to his or her government."⁶⁶

2. The Fourth Circuit Opinion

The Fourth Circuit focused its analysis of the *Baltimore Sun*'s retaliation claim on whether the Governor's ban had created a chilling effect on the speech of Nitkin and Olesker.⁶⁷ The court explained that the standard applied in evaluating the potential chilling effect of government conduct is an objective one, and the

59. *Balt. Sun Co. v. Ehrlich*, 356 F. Supp. 2d 577, 578 (D.Md. 2005), *aff'd*, 437 F.3d 410 (4th Cir. 2006).

60. *Id.* at 580.

61. 438 U.S. 1 (1978).

62. *Balt. Sun*, 356 F. Supp. 2d at 580 (quoting *Houchins*, 438 U.S. at 14).

63. No. 97-1358, 1998 WL 13528 (4th Cir. Jan. 15, 1998) (dismissing reporter's claim that her First Amendment rights were violated by the police department requiring her to send *written* requests for information, whereas, other reporters were permitted to page the police department and the police would respond by phone to their information requests).

64. *Balt. Sun*, 356 F. Supp. 2d at 581.

65. *Id.*

66. *Id.* at 582.

67. *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 417 (4th Cir. 2006) (noting that Governor Ehrlich conceded all elements of a retaliation claim, except the element that the Governor's ban had allegedly chilled the speech of Nitkin and Olesker).

court defined it as being “whether a similarly situated person of ‘ordinary firmness’ reasonably would be chilled by the government conduct in light of the circumstances presented in the particular case.”⁶⁸ The court noted that, in order to have an actionable retaliation claim, the challenged government conduct must be “something more than a ‘*de minimis* inconvenience’ to [an individual’s] exercise of First Amendment rights.”⁶⁹ The court also noted that no actionable retaliation claim exists if recognizing the claim would “‘plant the seed of a constitutional case’ in ‘virtually every’ interchange” between government operations and the public.⁷⁰

At the beginning of its analysis, the Fourth Circuit noted that the *Baltimore Sun* had conceded at oral argument that the hypothetical scenario of one “public official’s selective preferential communication to his favorite reporter or reporters would not give the much larger class of unrewarded reporters retaliation claims.”⁷¹ The court then proclaimed there is no distinction between the hypothetical scenario of one public official refusing to speak to a reporter and the facts of *The Sun* case, and that as a result, “allow[ing] The Sun to proceed on its retaliation claim . . . would ‘plant the seed of a constitutional case’ in ‘virtually every’ interchange between public official and press.”⁷² The court then held: “[I]n the circumstances of this case, no actionable retaliation claim arises when a government official denies a reporter access to discretionarily afforded information or refuses to answer questions.”⁷³

The court then evaluated the potential chilling effect of the Governor’s ban, and held that the ban posed a *de minimis* inconvenience and therefore was not actionable.⁷⁴ In response to the *Baltimore Sun*’s argument that the Governor’s ban “greatly disadvantaged” Nitkin and Olesker in their reporting, the court explained: “While Nitkin and Olesker might now be disfavored, they are no more disfavored than the many reporters without access to the Governor.”⁷⁵ The court then held:

We cannot accept that the Governor’s directive . . . created a chilling effect any different from or greater than that experienced by The Sun and by all

68. *Id.* at 416.

69. *Id.* (quoting *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005)).

70. *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 149 (1983)).

71. *Id.* at 418.

72. *Id.* (quoting *Connick*, 461 U.S. at 149).

73. *Id.*

74. *Id.* at 418-19.

75. *Id.* at 419-20.

reporters in their everyday journalistic activities. Accordingly, we conclude . . . a reporter endures only *de minimis* inconvenience when a government official denies the reporter access to discretionary information or refuses to answer the reporter's questions because the official disagrees with the substance or manner of the reporter's previous expression in reporting.⁷⁶

The court also noted that each reporter had written nearly the same number of articles on state government in the eight weeks after the ban was implemented as they had written in the eight weeks prior to the ban being implemented,⁷⁷ and the court pointed to this as evidence that the reporters had "not been chilled to any substantial degree in their reporting."⁷⁸

III. ANALYSIS OF LOWER COURT OPINIONS

A. *The Lower Courts Correctly Held No General Right of Access to Government Information*

The U.S. District Court in *Baltimore Sun v. Ehrlich* correctly held there is no general right of access to government information under the First Amendment.⁷⁹ In his opinion, Judge Quarles cited the Supreme Court case,⁸⁰ *Houchins v. KQED*.⁸¹ In *Houchins*, a sheriff denied a T.V. news station access to part of a jail where an inmate had recently committed suicide.⁸² In holding that the sheriff's denial of access did not violate the First Amendment, the Supreme Court stated in its plurality opinion: "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."⁸³ Although *Houchins* was a plurality opinion, the Court eventually adopted the plurality holding of

76. *Id.* at 420. The court also held that the implied threat of the Governor's ban to Nitkin and Olesker, and Governor Ehrlich's comments on the news radio show, were protected government speech. *Id.* at 420-21.

77. *Id.* at 415.

78. *Id.* at 419. The court also noted that at oral argument, counsel for the reporters could not answer the question of whether the reporters had been chilled in their speech. *Id.* at 419 n.1.

79. *See* *Balt. Sun Co. v. Ehrlich*, 356 F. Supp. 2d 577, 582 (D.Md. 2005), *aff'd*, 437 F.3d 410 (4th Cir. 2006). The only discussion of the right of access issue in the Fourth Circuit opinion is when the court repeats the District Court's holding. *See* *Balt. Sun*, 437 F.3d at 415.

80. *Balt. Sun*, 356 F. Supp. 2d at 580.

81. 438 U.S. 1 (1978).

82. *Id.* at 3.

83. *Id.* at 15.

*Houchins in Los Angeles Police Department v. United Reporting Publishing Corp.*⁸⁴

The fact that *Houchins* was a plurality opinion is evidence of the difficulty the Supreme Court had throughout the 1960s and 1970s deciding whether the First Amendment provided a right of access to government information.⁸⁵ During this period, there was a spirited debate among legal commentators over whether the Free Press clause provided rights for the press distinct from rights provided under the Free Speech clause.⁸⁶ Some commentators opined that the Free Press clause provided additional rights for members of the press.⁸⁷ These commentators suggested that these additional rights included, in certain circumstances, a special right of access to government information.⁸⁸ Other commentators rejected this theory and explained that the First Amendment did not impose any duty on government to disclose information.⁸⁹

84. 528 U.S. 32 (1999). For a discussion of *United Reporting*, see *infra* notes 201-206 and accompanying text.

85. The Supreme Court first addressed the issue of whether the First Amendment provided a right to gather information in *Zemel v. Rusk*, 381 U.S. 1 (1965). The plaintiff in *Zemel* challenged a State Department policy that prohibited Americans from traveling to Cuba, claiming the policy violated his First Amendment right to gather information. *Id.* at 16. The Court dismissed this challenge, explaining: "The right to speak and publish does not carry with it the unrestrained right to gather information." *Id.* at 17.

86. See generally Lillian R. BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 482 (1980) (noting "the appearance in the legal literature of arguments by prominent and respected commentators about whether the [Free Press clause] . . . ought to be construed independently of the [Free Expression clause] so that new constitutional doctrine can be developed.").

87. See, e.g., Melville B. Nimmer, *Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 650 (1975) (suggesting that "for some purposes freedom of the press should confer greater rights than does freedom of speech"); William W. Van Alstyne, *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1, 14 (1980) (suggesting that the Supreme Court ought to "constitutionalize a 'preferred' position for the regularly reporting press").

88. See, e.g., Nimmer, *supra* note 87, at 653-55 (explaining that the Free Expression Clause and the Free Press Clause each serve unique interests, and in the context where a government restriction affects both free expression and free press interests, the "combined speech-press interests" may outweigh the government interest behind the restriction, when "[e]ither interest alone might not"); Van Alstyne, *supra* note 87, at 13 (suggesting a "'system' of differentiated [F]irst [A]mendment freedoms for the regularly reporting press[,] including "[m]ore substantial entitlements of access" to information).

89. See BeVier, *supra* note 86, at 484 (explaining the author "is skeptical about whether the [Supreme] Court's rhetorical affirmations of the public's right to be informed and the press' contribution to the flow of information . . . can legitimately be invoked to transform the Constitution into a vehicle for imposing a duty to disclose upon the government."); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1512-13 (1974) ("[N]either the courts nor Congress has recognized an affirmative constitutional obligation to

These commentators explained that government's release of information was an issue for the political branches to decide, and that courts are ill-suited to resolve such issues.⁹⁰

Justice Potter Stewart offered his own commentary on the subject in a speech at Yale Law School in 1974.⁹¹ In this oft-quoted speech, Justice Stewart explained that the textual distinction in the Constitution between freedom of speech and freedom of the press is significant, and that the rights provided under the Free Press clause are not merely redundant of the Free Speech clause.⁹² In Justice Stewart's view, the Free Press clause was intended by the Founders to serve as a check on government.⁹³ He explained that to the British Crown "the free press meant organized, expert scrutiny of government" and that "[t]his formidable check on official power was what the British Crown had feared—and what the American Founders decided to risk."⁹⁴

After recognizing the important check on government that the Free Press clause was meant to provide, Justice Stewart, in the same breath, rejected any notion of a constitutional right of access to government information.⁹⁵ Offering insight into the Supreme Court's thinking at that time, he explained:

The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act. The Constitution . . . establishes the contest, not its resolution. Congress may provide a resolution . . . through carefully drawn legislation. For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society.⁹⁶

disclose, and the Constitution itself contains no language from which such a duty could readily be inferred.”).

90. BeVier, *supra* note 86, at 516-17 (“[T]he question of whether citizens’ demands for information ought to be honored is not merely quite unsuitable for judicial resolution, but also seems plainly to have been committed to the branches of government entrusted with making and administering the laws.”); Note, *supra* note 89, at 1511 (“[I]t is unrealistic to expect the courts . . . to assume a continuing supervisory role to assure that the branches of government meet affirmative disclosure obligations.”).

91. See Potter Stewart, “*Of the Press*,” 26 HASTINGS L.J. 631 (1975).

92. *Id.* at 633-34. Justice Stewart noted that “[b]etween 1776 and the drafting of our Constitution, many of the state constitutions contained clauses protecting freedom of the press while at the same time recognizing no general freedom of speech. By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two.” *Id.*

93. See *id.* at 634 (“The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches.”).

94. *Id.*

95. See *id.* at 636.

96. *Id.*

The Supreme Court grappled with the right of access issue in a series of cases involving access to prisons.⁹⁷ The first of these cases were *Pell v. Procunier*⁹⁸ and *Saxbe v. Washington Post Co.*,⁹⁹ both decided on the same day in 1974.¹⁰⁰ In both cases, members of the press challenged prison regulations that prohibited reporters from having one-on-one interviews with prisoners.¹⁰¹ The asserted government interest behind the regulations was security—prisoners who were receiving press attention had a tendency to cause disturbances in the prisons.¹⁰²

Justice Stewart, writing for the Court in both cases, noted that despite the ban on one-on-one interviews, the press still enjoyed a right of access equal to that of the public, and Justice Stewart characterized the press' challenge of the prison regulations as a demand for "special access" to government information.¹⁰³ The Court upheld the prison regulations, explaining: "The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally."¹⁰⁴

While in *Pell* and *Saxbe* the Supreme Court affirmatively stated the First Amendment provides no "special right of access" for the press beyond that provided to the public generally, the Court did not answer the question of whether government is obligated under the First Amendment to open its prison doors to the public and press at all.¹⁰⁵ The Court examined this issue in *Houchins* and, as previously noted, decided the First Amendment does not mandate any right of access to government information or sources of information within the government's control.¹⁰⁶ The Court's

97. See *Houchins v. KQED*, 438 U.S. 1 (1978); *Pell v. Pecunier*, 417 U.S. 817 (1974); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974).

98. 417 U.S. at 819.

99. 417 U.S. at 843.

100. The main distinction between *Pell* and *Saxbe* is that *Pell* involved a state prison, and *Saxbe* involved a federal prison. See *Pell*, 417 U.S. at 819; *Saxbe*, 417 U.S. at 844.

101. See *Pell*, 417 U.S. at 819; *Saxbe*, 417 U.S. at 844.

102. See *Pell*, 417 U.S. at 831; *Saxbe*, 417 U.S. at 846.

103. See *Pell*, 417 U.S. at 834. In deciding *Saxbe*, the Court relied on its holding in *Pell*, explaining the two cases were "constitutionally indistinguishable from [one another]." *Saxbe*, 417 U.S. at 850.

104. *Pell*, 417 U.S. at 834. In their dissenting opinion in *Saxbe*, Justices Powell, Brennan and Marshall suggested a balancing approach to analyzing the prison regulations. They explained:

At some point official restraints on access to news sources, even though not directed solely at the press, may so undermine the function of the First Amendment that it is both appropriate and necessary to require the government to justify such regulations in terms more compelling than discretionary authority and administrative convenience.

Saxbe, 417 U.S. at 860.

105. See *Pell*, 417 U.S. 817; *Saxbe*, 417 U.S. 843.

106. *Houchins v. KQED*, 438 U.S. 1, 15 (1978).

rationale was that there is “no discernible basis for a constitutional duty to disclose” information and that “absent statutory standards, hundreds of judges would . . . be at large to fashion ad hoc standards . . . according to their own ideas of what seems ‘desirable’ or ‘expedient.’”¹⁰⁷

Another category of “press access” cases are ones in which reporters have demanded access to criminal trials.¹⁰⁸ In *Richmond Newspapers, Inc. v. Virginia*,¹⁰⁹ reporters challenged a court order that prohibited the public from attending a murder trial.¹¹⁰ The Supreme Court struck down the court order, and in doing so, gave special attention to the history of criminal trials being open to the public.¹¹¹ The Court explained that “throughout its evolution, the trial has been open to the public to all who care to observe.”¹¹² Based upon the historical record of criminal trials being open to the public, the Court recognized a right of access to criminal trials under the First Amendment.¹¹³ The Court held: “Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.”¹¹⁴

The rule to be taken from the Supreme Court’s right of access cases is that, with the exception of criminal trials, government is not obligated under the First Amendment to provide the public with access to information within its control.¹¹⁵ The press’ only

107. *Id.* at 14. Justice Stewart concurred with the plurality that the public has no right of access to information controlled by government, noting: “The Constitution does no more than assure the public and the press equal access once government has opened its doors.” *Id.* at 16. But in diverging from the plurality opinion, Justice Stewart explained there are “practical distinctions” between the press and public, providing as an example a reporter’s use of cameras and sound equipment during a prison tour, compared to a member of the public who carries no equipment. *Id.* at 16-17. Justice Stewart explained “equal access” among the press and public “must be accorded more flexibility . . . to accommodate the practical distinctions between the press and the general public.” *Id.* at 16.

108. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

109. 448 U.S. 555.

110. *Id.* at 559-60.

111. *Id.* at 564-75.

112. *Id.* at 564.

113. See *id.* at 577 (“The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press . . .”).

114. *Id.* at 581. Although *Richmond Newspapers* was a plurality opinion, its holding was later adopted by a majority of the Court in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

115. See Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 309 (2004) (“[The Supreme Court] has declined to recognize the existence of a First Amendment right to gather information from government sources outside of the discrete area of criminal judicial proceedings.”).

right of access to government information is a right of access equal to that of the public generally.¹¹⁶

Thus, to the extent that the *Baltimore Sun*'s argument before the U.S. District Court or the Fourth Circuit was that Nitkin and Olesker must be permitted to speak to Executive Branch employees because of their special rights under the Free Press clause, the courts correctly rejected this argument.

B. Why the District Court and Fourth Circuit Erred in Upholding the Governor's Ban

1. Each Court Failed to Acknowledge that the Governor's Ban is Viewpoint-Based

Neither the District Court nor the Fourth Circuit in *Baltimore Sun v. Ehrlich* acknowledged that the Governor's ban is viewpoint-based. And in doing so, both courts overlooked cases from other jurisdictions where courts have struck down viewpoint-based restrictions on the dissemination of government information.¹¹⁷ The District Court and the Fourth Circuit also overlooked the Supreme Court case, *Los Angeles Police Department v. United Reporting Publishing Corp.*,¹¹⁸ where, in dictum, eight out of nine Justices agreed that government cannot condition the release of government information on a recipient's viewpoint if doing so threatens to chill or suppress that viewpoint.¹¹⁹

Before discussing these cases, this Comment explains the difference between content-neutral, content-based, and viewpoint-based restrictions on speech, the legal standards applied to each type of restriction, and why viewpoint-based restrictions are considered the worst kind of restriction on speech. After discussing why viewpoint-based restrictions are considered the worst kind of restriction on speech, this Comment explains why the Governor's ban is viewpoint-based. Then this Comment discusses two cases where courts struck down viewpoint-based restrictions on government's dissemination of information, and the Supreme Court's dictum in *United Reporting*.

116. See *supra* note 104 and accompanying text.

117. See *infra* notes 184-200 and accompanying text.

118. 528 U.S. 32 (1999).

119. See *id.* at 41-43 (Scalia, J., concurring) (Ginsburg, J., concurring), 47-48 (Stevens, J., dissenting).

a. *First Amendment Free Expression Standards*

The Supreme Court has recognized three general types of restrictions on speech: content-neutral, content-based, and viewpoint-based.¹²⁰

i. Content-neutral restrictions

Content-neutral restrictions limit speech without regard to the content of what is being expressed.¹²¹ Examples of content-neutral restrictions include laws that regulate the “time, place, and manner”¹²² of speech, such as laws that restrict noisy speeches near hospitals or ban billboards in residential neighborhoods.¹²³ The general standard applied to content-neutral restrictions is that they must further a substantial government interest, and they are not substantially broader than necessary and leave open alternative channels for communication.¹²⁴

ii. Content-based restrictions

Content-based restrictions limit speech based upon the content of the expression.¹²⁵ Content-based restrictions can be viewpoint-based or viewpoint-neutral.¹²⁶ While all viewpoint-based restrictions are also content-based, not all content-based restrictions are viewpoint-based.¹²⁷ For the purpose of clarity, in

120. See generally John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1104-05 (2005) (distinguishing among content-neutral, content-based, and viewpoint-based speech restrictions).

121. See *Hill v. Colorado*, 530 U.S. 703, 720 (2000) (“[G]overnment regulation of expressive activity is ‘content neutral’ if it is justified without reference to the content of regulated speech.”); see also Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) (“Content-neutral restrictions limit communication without regard to the message conveyed.”).

122. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

123. See Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48 (1987).

124. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 800 (1989) (explaining content-neutral time, place, and manner restrictions on speech are justified if “they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information,” and defining “narrowly tailored” to mean the restriction is “not substantially broader than necessary”); see also *City of Ladue v. Gilleo*, 512 U.S. 43, 56-59 (1994) (holding a city ordinance that prohibited homeowners from displaying signs on their property violated the First Amendment because the ordinance did not leave open adequate alternative channels of communication).

125. Fee, *supra* note 120, at 1133 (“[A] regulation of speech is content-based if it is justified by reference to speech content, or if it facially discriminates on the basis of speech content . . .”).

126. See Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 100-01 (1996) (explaining that the Supreme Court sometimes uses the terms “content” and “viewpoint” interchangeably).

127. For a discussion of the distinction between content-based and viewpoint-based restrictions, see *infra* notes 150-157 and accompanying text.

this Comment, "content-based restrictions" denotes content-based restrictions that are viewpoint-neutral.¹²⁸

Content-based restrictions that are viewpoint-neutral limit speech based upon the subject matter or category of speech, but do not target specific ideas or viewpoints within those categories of speech.¹²⁹ For example, a regulation that bans the distribution of all leaflets on state fair grounds is content-neutral;¹³⁰ but a regulation banning the distribution of political campaign leaflets would be content-based.¹³¹ Other examples of content-based restrictions include, a statute prohibiting all types of picketing near public school buildings, except for peaceful labor picketing;¹³² a statute prohibiting political messages on the interior advertising spaces of city transit vehicles;¹³³ or, a statute prohibiting political campaigning within 100 feet of a polling place.¹³⁴

In contrast to content-neutral restrictions on speech, which the Supreme Court has recognized often serve legitimate government purposes,¹³⁵ content-based restrictions on speech are "presumptively invalid,"¹³⁶ and the Court applies strict scrutiny to content-based restrictions.¹³⁷ Strict scrutiny means that in order for a statute to be upheld, "it must be narrowly tailored to promote a compelling Government interest."¹³⁸ When strict scrutiny is

128. Content-based restrictions that are viewpoint-neutral are sometimes referred to as "subject matter restrictions." See *Hill v. Colorado*, 530 U.S. 703, 723 (2000) (referring to viewpoint-neutral, content-based restrictions as "subject matter" restrictions); see also *Stone*, *supra* note 121, at 239.

129. See *Stone*, *supra* note 121, at 239 ("[Content-based] restrictions are directed, not at particular ideas, viewpoints, or items of information, but at entire subjects of expression.").

130. *Stone*, *supra* note 121, at 223; see also *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648-49 (1981) (holding state fair grounds rule prohibiting distribution on fair grounds of any printed or written material, except from a fixed location, was content-neutral).

131. *Cf. Burson v. Freeman*, 504 U.S. 191 (1992) (holding statute prohibiting political campaigning within 100 feet of a polling place was content-based).

132. See *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95-96 (1972); see also *Carey v. Brown*, 447 U.S. 455, 471 (1980) (holding a ban on residential picketing that exempted labor picketing was content-based).

133. See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

134. See *Burson*, 504 U.S. at 191.

135. See *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) ("Civil liberties . . . imply the existence of an organized society maintaining public order The authority of a municipality to impose [time, place, and manner restrictions] in order to assure the safety and convenience of the people . . . has never been regarded as inconsistent with civil liberties.").

136. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); see also *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible.").

137. See *Fee*, *supra* note 120, at 1120.

138. *Playboy Entm't*, 529 U.S. at 813.

applied to a statute, the statute is usually held unconstitutional,¹³⁹ unless it is a restriction on speech on government property.¹⁴⁰

Content-based restrictions on speech receive heightened scrutiny because such restrictions pose a danger of censoring ideas and opinions.¹⁴¹ The Supreme Court has explained: “[C]ontent discrimination ‘raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.’”¹⁴²

Nonpublic forums are the only instance where content-based restrictions on speech are generally upheld.¹⁴³ For example, the Supreme Court upheld content-based restrictions in allowing access to public school interoffice mailboxes,¹⁴⁴ and to charity drives among federal government employees.¹⁴⁵ The Court also upheld content-based restrictions on the distribution of literature on sidewalks near post office entrances.¹⁴⁶ The Court applies a lesser standard of scrutiny—not strict scrutiny—to content-based restrictions on speech in nonpublic forums.¹⁴⁷ The reason for this

139. See *Fee*, *supra* note 120, at 1120 (explaining whenever the Court applies strict scrutiny to a law, the Court “usually finds the law unconstitutional.”); see also *Stone*, *supra* note 123, at 48 (explaining that from 1957 to 1987, “the Court . . . invalidated almost every content-based restriction that it . . . considered”). But see *Burson*, 504 U.S. at 206-11 (holding statute prohibiting political campaigning within 100 feet of a polling place was narrowly tailored and served a compelling government interest in preventing voter intimidation and election fraud).

140. See, e.g., *Greer v. Spock*, 424 U.S. 828 (1976) (holding regulation prohibiting political speeches and demonstrations on military base did not violate the First Amendment).

141. “[T]he ‘danger of censorship’ presented by a facially content-based statute requires that that weapon be employed only where it [meets strict scrutiny] . . .” *R.A.V.*, 505 U.S. at 395 (quoting *Leathers v. Medlock*, 499 U.S. 439, 448 (1991) (internal citations omitted)); see also *Aschcroft v. ACLU*, 542 U.S. 656, 660 (2004) (“Content-based prohibitions . . . have the constant potential to be a repressive force in the lives and thoughts of a free people.”).

142. *R.A.V.*, 505 U.S. at 387 (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). One commentator notes that what courts really look for in content discrimination cases is how closely the discrimination resembles viewpoint discrimination. *Heins*, *supra* note 126, at 101.

143. There are three general types of fora: (1) traditional public fora (e.g., public streets and parks), (2) the public fora created by government designation (e.g., a municipal auditorium and a city-leased theatre designed and dedicated for expressive activity), and (3) nonpublic fora (e.g., military bases and prison grounds). *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802-04 (1985). The Court has explained: “Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 (1983).

144. See *Perry Educ. Ass’n*, 460 U.S. 37.

145. See *Cornelius*, 473 U.S. 788 (1985).

146. See *U.S. v. Kokinda*, 497 U.S. 720, 732-33 (1990) (holding ban against solicitation on Postal Service grounds was reasonable because “solicitation is inherently disruptive of the Postal Service’s business”).

147. See *infra* note 149 and accompanying text.

lesser standard of scrutiny is that "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."¹⁴⁸ Although a lesser standard of scrutiny is applied in nonpublic forums, and content-based restrictions need only be "reasonable in light of the purpose served by the forum[.]" the government "violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."¹⁴⁹

iii. Viewpoint-based restrictions

Viewpoint-based restrictions limit speech based upon the specific idea or opinion that is being expressed.¹⁵⁰ Viewpoint-based restrictions are a subcategory of content-based restrictions.¹⁵¹ Viewpoint-based restrictions differ from content-based restrictions in that government suppresses entire categories of speech in content-based restrictions, including all viewpoints within that category of speech, while with viewpoint-based restrictions, the government is "taking sides" on a particular issue.¹⁵² The government's purpose in enacting viewpoint-based restrictions on speech is to advance a favored viewpoint and suppress a disfavored viewpoint,¹⁵³ or "create an unequal playing field" between competing views.¹⁵⁴ For example, as noted previously, a regulation banning the distribution of political campaign leaflets on state fair grounds is a content-based restriction.¹⁵⁵ Regulations banning the distribution of Democratic party leaflets, but not Republican,¹⁵⁶ or banning anti-war leafleting, but not pro-war leafleting, would be viewpoint-based restrictions.¹⁵⁷

Other examples of viewpoint-based restrictions include a statute that prohibits flag-burning for purposes of dishonoring the flag, but

148. *Perry Educ. Ass'n*, 460 U.S. at 46 (quoting *U.S. Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129-30 (1981)).

149. *Cornelius*, 473 U.S. at 806.

150. See *Stone*, *supra* note 121, at 199 ("[Viewpoint-based] restrictions attempt substantially to eliminate particular ideas, viewpoints, or items of information from public debate and thus undermine the values and purposes underlying the [F]irst [A]mendment.").

151. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830-31 (1995).

152. *Id.* at 894-95 (Souter, J., dissenting).

153. See *id.* at 894 (Souter, J., dissenting) ("[V]iewpoint discrimination occurs when government allows one message while prohibiting the messages of those who can reasonably be expected to respond.").

154. *Fee*, *supra* note 120, at 1108.

155. See *supra* note 131 and accompanying text.

156. See *Stone*, *supra* note 121, at 223.

157. See *Fee*, *supra* note 120, at 1108.

not flag-burning for purposes of disposing of flags (disfavors the viewpoint that is critical of American government);¹⁵⁸ or an ordinance that prohibits “fighting words”¹⁵⁹ when used to express racial or religious hatred, but not “fighting words” when used to express racial or religious tolerance (disfavors the viewpoint of the bigot);¹⁶⁰ or a policy that permits groups to meet in school classrooms after hours to discuss child-rearing, but not religious groups discussing child rearing (disfavors the religious viewpoint on child-rearing).¹⁶¹

This element of government “taking sides” and favoring one viewpoint while suppressing another makes viewpoint-based restrictions “the most pernicious of all [restrictions] based on content.”¹⁶² The Supreme Court has recognized that “[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”¹⁶³ And that “[v]iewpoint discrimination is . . . an egregious form of content discrimination.”¹⁶⁴

Viewpoint-based restrictions are the worst kind of government restriction on speech because such restrictions have a “uniquely powerful distorting effect”¹⁶⁵ and they “skew[] public debate.”¹⁶⁶ As Alexander Meiklejohn explains, government “*mutilat[es]*. . . the thinking process of the community” when it favors one viewpoint over another.¹⁶⁷

This “mutilation” of the public’s thinking process strikes at the core principles underlying the First Amendment.¹⁶⁸ One of these

158. *Texas v. Johnson*, 491 U.S. 397 (1989).

159. “Fighting words” are defined as words, “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

160. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

161. *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

162. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 895 (1995) (Souter, J., dissenting).

163. *Id.* at 829 (majority opinion).

164. *Id.* See also *Hill v. Colorado*, 530 U.S. 703, 723 (2000) (noting that viewpoint-based restrictions are a more “obnoxious” form of speech regulation than content-based restrictions).

165. Stone, *supra* note 121, at 200.

166. *Rosenberger*, 515 U.S. at 894 (Souter, J., dissenting).

167. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948) (some emphasis removed).

168. *Id.* at 26-27. The Supreme Court has explained: “At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression Our political system and cultural life rest upon this ideal Government action that stifles speech [because] of its message . . . contravenes this essential right.” *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). See also Heins, *supra* note 126, at 100 (explaining the core values underlying the First Amendment include the “right to think, believe, and speak freely, the fostering of intellectual and spiritual growth, and the free exchange of ideas [And that] [g]overnment action that

core principles is the principle that more speech is better than less speech; that it is better for government to allow the expression of all views and ideas—even those views that are false or dangerous—than to suppress speech.¹⁶⁹

Why must government allow all speech, even dangerous speech under the First Amendment? Because, as Justice Holmes explained in his famous dissent, “the ultimate good desired is better reached by free trade in ideas[,] [and] the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution.”¹⁷⁰ Justice Brandeis added to this explanation:

[Those who won our independence] believed liberty to be the secret of happiness and courage to be the secret of liberty. . . . [They believed that] discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; . . . They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.¹⁷¹

Because viewpoint-based restrictions restrain ideas and opinions from entering the “marketplace of ideas,”¹⁷² and distort public debate, such restrictions are heavily scrutinized.¹⁷³ While

suppresses or burdens speech on the basis of its viewpoint threatens . . . these values . . .”).

169. See *Whitney v. Ca.*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”); see also *Stone*, *supra* note 121, at 212-13 (“[T]he [F]irst [A]mendment assumes that ideas and information are not in themselves ‘harmful,’ that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.” (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976))).

170. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

171. *Whitney*, 274 U.S. at 375-76.

172. *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

173. See *id.* (explaining though sometimes a “state may . . . curtail speech when necessary to advance a significant and legitimate state interest[,] . . . there are

content-based restrictions receive strict scrutiny, viewpoint-based restrictions receive even stricter scrutiny. Once a court finds that a particular restriction on speech is viewpoint-based, the court almost always strikes it down.¹⁷⁴

b. Why the Governor's Ban is Viewpoint-Based

The Governor's ban is facially viewpoint-based as a result of its stated rationale that Nitkin and Olesker were "failing to objectively report" on the Ehrlich administration.¹⁷⁵ "Objectivity" in reporting is inherently viewpoint-based because, ironically, defining objectivity in reporting is a subjective process.¹⁷⁶ Defining objectivity in reporting is a subjective process because what is objective reporting to one person inevitably will be considered

some purported interests—such as a desire . . . to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule.”).

174. The Supreme Court case, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), illustrates how viewpoint-based restrictions receive stricter scrutiny than the already heightened scrutiny applied to content-based restrictions. *R.A.V.* involved a city ordinance that prohibited the “plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” *Id.* at 380. The ordinance was construed as only reaching those expressions that constitute “fighting words” on the basis of race, color, creed, religion or gender. *Id.*

The Court first explained how the city ordinance was facially content-based: “Those who wish to use ‘fighting words’ in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered.” *Id.* at 391. The Court then explained how the ordinance, in its “practical operation” went “beyond mere content discrimination, to actual viewpoint discrimination.” *Id.* The Court explained how under the Minnesota Supreme Court’s construction of the ordinance, to which the Supreme Court was bound, it prohibited fighting words only when used to express intolerance or “‘bias-motivated’ hatred” on the basis of the specified categories. *Id.* at 392.

After identifying the ordinance as being both content-based and viewpoint-based, the Court applied strict scrutiny to the content-based distinction. *Id.* at 395. The Court held the ordinance failed strict scrutiny because it was not narrowly tailored—the Court explained an ordinance that did not list the specific categories of speech would have been just as effective. *Id.* at 395-96. The Court then explained the only purpose served by the content limitation was to display the city council’s “special hostility” towards the viewpoint of the bigot. *Id.* at 396. The Court noted: “That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility—but not through the means of imposing unique limitations upon speakers who . . . disagree.” *Id.* Thus, under the Court’s analysis, the ordinance’s facially content-based restriction was invalid because the ordinance failed strict scrutiny and was not narrowly tailored, but the ordinance’s viewpoint-based restriction was treated as if it automatically violated the First Amendment.

175. *Balt. Sun Co. v. Ehrlich*, 356 F. Supp. 2d 577, 579 (D.Md. 2005), *aff’d*, 437 F.3d 410 (4th Cir. 2006).
176. *See Borreca v. Fasi*, 369 F. Supp. 906 (D.Haw. 1974) (defining City Mayor’s demand for objectivity from a reporter as requiring that that reporter pass “a subjective compatibility-accuracy test” with the Mayor (emphasis added)).

biased reporting to another.¹⁷⁷ Some scholars of journalism have noted that true objectivity in reporting is an impossible feat, and it is only an ideal that reporters should strive towards.¹⁷⁸

Professor John C. Merrill explains that objectivity is impossible in journalism because a necessity of reporting is selection—selection of “which facts are reported, which quotations are used, which individuals are used, which viewpoints are presented, which aspects are shown.”¹⁷⁹ Professor Merrill explains a reporter’s “selection of what to put in a story automatically *subjectivizes* [the report], in a sense biasing and distorting the reality that the reporter is claiming to objectify in the report.”¹⁸⁰ As a result, “it is impossible for journalism to reflect the whole of reality; it is always the result of choice or selection. . . . [N]ews is always different from the reality it reports.”¹⁸¹

Thus, based on Professor Merrill’s theory, regardless of how objective David Nitkin attempts to be in his reporting, so long as he is selecting certain facts over others or is approaching certain individuals for quotes over others, Nitkin’s articles ultimately portray his subjective perception of the event that is being reported. David Nitkin’s subjective perception of certain events is what Governor Ehrlich takes issue with; Nitkin’s subjective perception of certain events conflict with Governor Ehrlich’s subjective perception of those events. When the Governor reads Nitkin’s articles, he immediately identifies facts or quotes that, to him, are false or misleading, and he thinks of facts or quotes that were omitted but should have been included. Such conflicts of perception are inevitable because, as one writer explains, “every person perceives things differently based on his own imperfect senses.”¹⁸² Therefore, when Governor Ehrlich labels Nitkin’s reporting as biased or non-objective, the Governor is challenging Nitkin’s subjective perception of certain events—or, in other

177. See generally Gilles Gauthier, *In Defence of a Supposedly Outdated Notion: The Range of Application of Journalistic Objectivity*, 18 CAN. J. COMM. 497, 501 (1993), available at <http://www.cjc-online.ca/viewarticle.php?id=201&layout=html> (explaining the challenges that have been made against objectivity in journalism based upon the “necessity of selection in journalism”).

178. See generally *id.* at 497-99 (explaining objectivity is impossible in specific areas of journalism but possible in others, and advocating for objectivity in journalism where it is possible).

179. *Id.* at 501 (describing theory of Professor John C. Merrill).

180. John C. Merrill, *Semantics and Objectivity*, in RALPH L. LOWENSTEIN & JOHN C. MERRILL, *MACROMEDIA: MISSION, MESSAGE, AND MORALITY* 272 (Gordon T. R. Anderson ed., 1990).

181. See Gauthier, *supra* note 177, at 502 (describing theory of Professor John C. Merrill).

182. Lisa Donnici, *The Irony of Journalism*, THE COLLEGIAN, March 31, 2004, available at <http://www.mobap.edu/student/Collegian> (search “The Irony of Journalism”).

words, Nitkin's viewpoint. The Governor's definition of "objectivity," in reality, is his own subjective perception of events, or viewpoint, and the Governor demands that his own viewpoint prevail over Nitkin's. The Governor's ban is thus viewpoint-based.

In failing to acknowledge that the Governor's ban is viewpoint-based, the District Court and Fourth Circuit overlooked authority from other jurisdictions where courts struck down viewpoint-based restrictions on the dissemination of government information to the press.¹⁸³

c. Authority on Viewpoint-Based Restrictions on the Dissemination of Government Information

Several courts have held that government cannot make viewpoint-based distinctions in its release of information because such distinctions pose a risk of chilling speech.¹⁸⁴ For example, in *Chicago Reader v. Sheahan*,¹⁸⁵ reporter Tori Marlan was denied access to a prison program after writing an article that criticized prison strip search policies.¹⁸⁶ After the strip search article was printed, Marlan sought access to a prison program called Chicago Legal Aid for Incarcerated Mothers (CLAIM), which involved a classroom component.¹⁸⁷ Although the CLAIM classes were closed to the general public, accredited press members, including Marlan, were routinely admitted prior to her strip search article.¹⁸⁸

After denying Marlan access to the CLAIM classes, prison officials offered Marlan alternative sources of information,

183. See *infra* notes 184-200 and accompanying text.

184. See, e.g., *United Teachers of Dade v. Stierheim*, 213 F. Supp. 2d 1368, 1372 (2002) (holding government policy that prohibited labor union publications from using general press room violated the First Amendment). Courts have struggled with defining the correct legal standard to apply to disputes between the press and government over dissemination of government information. Courts have held in favor of reporters on the basis of Equal Protection. See *McCoy v. Providence Journal Co.*, 190 F.2d 760 (1st Cir. 1951); *Quad-City Cmty. News Serv. v. Jebens*, 334 F. Supp. 8 (S.D.Iowa 1971). Courts have also held content-based restrictions on dissemination of information violate the First Amendment. See *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977); *Times-Picayune Publ'g Corp. v. Lee*, No. 88-1325, 1988 U.S. Dist. LEXIS 3506, *23-29 (E.D.La. 1988); *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 365 F. Supp. 18 (D.D.C. 1973), *rev'd on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975). Some courts have held the First Amendment provides a right of equal access among reporters to government information. See *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986); *Am. Broad. Co. v. Cuomo*, 570 F.2d 1080 (2d Cir. 1977); *Westinghouse Broad. Co. v. Dukakis*, 409 F. Supp. 895 (D.Mass. 1976); *Sw. Newspapers Corp. v. Curtis*, 584 S.W.2d 362 (Tex. Civ. App. 1979).

185. 141 F. Supp. 2d 1142 (N.D. Ill. 2001).

186. *Id.* at 1143.

187. *Id.*

188. *Id.*

including answering her questions by telephone, an attendee list so Marlan could interview CLAIM participants on her own, and a videotape of the classes.¹⁸⁹ Prison officials admitted that "another reporter would have been permitted to attend the CLAIM class as a matter of course[,] [a]nd that Marlan would have been granted access but for her article."¹⁹⁰

The U.S. District Court for the Northern District of Illinois, Judge Moran, held that the prison policy violated Marlan's First Amendment rights.¹⁹¹ The court found that the prison policy could "chill someone's speech[.]" because "[a] reporter might well tone down a critical article if she feared that jail officials might terminate, or even restrict, her future access."¹⁹² The court explained the prison had no legal obligation to admit Marlan to the CLAIM classes, but held that "it may not refuse to do so because [Marlan] exercised her First Amendment rights[.]" and noted that "denial of even discretionary perquisites, if motivated by plaintiff's views, violates the First Amendment."¹⁹³

Another case with a fact pattern similar to *The Sun* case is *Borreca v. Fasi*.¹⁹⁴ In *Borreca*, the Mayor of Honolulu, Frank Fasi, considered the reporting of reporter, Richard Borreca, to be "irresponsible, inaccurate, biased, and malicious."¹⁹⁵ Mayor Fasi ordered his staff to "keep Borreca out of the mayor's office," including general news conferences held at the Mayor's office.¹⁹⁶ After Borreca was denied access to two news conferences, Mayor Fasi informed the *Honolulu Star-Bulletin*, the newspaper for which Borreca reported, that Borreca was no longer welcome at the Mayor's news conferences, but that "any other reporter from [the *Honolulu Star-Bulletin*] would be welcome."¹⁹⁷

189. *Id.*

190. *Id.* at 1146.

191. *Id.*

192. *Id.*

193. *Id.* Ultimately, the court held the prison policy was content-based and not viewpoint-based, but the court held the content-based policy violated the First Amendment nonetheless. *See id.* at 1146 (accepting defendant-prison's version of the facts that Marlan was denied access not because Marlan criticized the prison, but because she misled prison officials when reporting on her strip search article and holding that this constituted a content-based decision).

194. 369 F. Supp. 906 (D.Haw. 1974).

195. *Id.* at 907.

196. *Id.* at 907-08. These news conferences were open to "all media generally." *Id.* at 907.

197. *Id.* at 907-08. Interestingly, in his original complaint against Mayor Fasi, Borreca alleged "Mayor Fasi had instructed other city officials not to talk to Borecca," and Borreca had requested an injunction against this order. *Id.* at 908. Shortly after Borreca's complaint was filed, "Mayor Fasi issued [a directive] . . . making it clear that it was his personal policy not to deal with Borreca and that each city department head was free to exercise his own discretion in this regard[.]" and Borreca subsequently dismissed this part of the complaint. *Id.* Mayor Fasi's policy, therefore, was the reverse of Governor Ehrlich's ban: where

Although the court's legal analysis in *Borreca* is somewhat flawed,¹⁹⁸ the court ultimately concluded Mayor Fasi's policy was viewpoint-based and struck it down.¹⁹⁹ The court explained:

Requiring a newspaper's reporter to pass a subjective compatibility-accuracy test as a condition precedent to the right of that reporter to gather news is no different in kind from requiring a newspaper to submit its proposed news stories for editing as a condition precedent to the right of that newspaper to have a reporter cover the news. Each is a form of censorship.²⁰⁰

The Supreme Court has addressed the issue of viewpoint-based restrictions on the dissemination of government information only in dictum. In *United Reporting*, the statute at issue was a California statute that authorized the Los Angeles Police Department to release arrestee address information to the public, but not to persons or entities seeking to use the information for commercial purposes.²⁰¹ The Court held the statute did not violate the First Amendment.²⁰² The Court explained the statute was "nothing more than a governmental denial of access to information in its possession[.]" and that "California could decide not to give out arrestee information at all without violating the First Amendment."²⁰³

Mayor Fasi's policy excluded *Borreca* from news conferences, Governor Ehrlich's ban permits Nitkin and Olesker to attend; and where Mayor Fasi's policy permitted other city hall officials to speak to *Borreca*, Governor Ehrlich's ban prohibits all executive branch staff and officials from speaking to Nitkin and Olesker. See *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 413-14 (4th Cir. 2006); *Borreca*, 369 F. Supp. at 908.

198. The court explains: "[The] First Amendment freedom of the press includes a limited right of reasonable access to news" and that "[t]his right of access includes a right of access to the public galleries, the press rooms, and the press conferences dealing with government." See *Borreca*, 369 F. Supp. at 908-09. Such an analysis conflicts with Supreme Court precedent that there is no right of access to government information under the First Amendment. See *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999) (holding that a government entity "could decide not to give out [government] . . . information at all without violating the First Amendment").
199. See *Borreca*, 369 F. Supp. at 910 (explaining Mayor Fasi's policy was "an attempt to use the powers of governmental office to intimidate or to discipline the press . . . because of what appears in print").
200. *Id.* at 909-10.
201. *United Reporting*, 528 U.S. at 32. The plaintiff in *United Reporting*, United Reporting Publishing Corporation, sought arrestee address information for commercial purposes, and it challenged the California statute as posing an impermissible burden on commercial speech. *Id.* at 36-37.
202. *Id.* at 40.
203. *Id.* Here, the Court cites *Houchins*, thus finally adopting the plurality opinion of that case. See *id.*

In dictum in *United Reporting*, eight out of the nine Justices agreed that government cannot make viewpoint-based distinctions in its release of information to the public.²⁰⁴ In her concurrence, Justice Ginsburg explained that the provision of arrestee address information is “a kind of subsidy” to people who wish to use such information for speech purposes.²⁰⁵ She explained: “[O]nce a state decides to make such a benefit available to the public, there are no doubt *limits* to its freedom to decide how that benefit will be distributed[;] [and that] the award of the subsidy [cannot be] . . . based on an illegitimate criterion such as viewpoint.”²⁰⁶

2. The Fourth Circuit Did Not Evaluate the Governor’s Ban as Broad Overarching Policy

The fundamental problem of the Fourth Circuit’s opinion is the court’s inability to see the distinction between the hypothetical scenario of “a public official’s selective preferential communication to his favorite reporter or reporters”²⁰⁷ and Governor Ehrlich’s conduct, which was to command the entire Executive Department to not communicate with Nitkin and

204. See *id.* at 43 (Ginsburg, J., concurring); *id.* at 42 (Scalia, J., concurring) (agreeing with Justice Ginsburg, impliedly, that viewpoint-based restrictions on dissemination of government information violate the First Amendment); *id.* at 46 (Stevens, J., dissenting) (agreeing with Justice Ginsburg that viewpoint-based restrictions on dissemination of government information violate the First Amendment).

205. *Id.* at 43 (Ginsburg, J., concurring).

206. *Id.* (emphasis added). The rule Justice Ginsburg applies here is the same rule the Supreme Court applies whenever it analyzes government funding schemes under the First Amendment. See *id.* (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983)). The Court has acknowledged that in granting subsidies for speech, government can “indirectly abridge speech . . . if the funding scheme is manipulated to have a coercive effect” on those seeking the government subsidy. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 552 (2001) (emphasis removed) (internal quotation marks omitted).

Although there is no constitutional “right” to receive a government subsidy or benefit, and the government may deny subsidies to persons for “any number of reasons,” *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), the Court has recognized: “[T]here are some reasons upon which the government may not rely. [Government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.” *Id.* at 597. The Court has held that where the denial of a government benefit “threatens ‘to drive certain ideas or viewpoints from the marketplace,’” *Velazquez*, 531 U.S. at 552 (Scalia, J., dissenting) (quoting *Nat’l Endowment for Arts v. Finley*, 524 U.S. 569, 587 (1998)), or is “the product of invidious viewpoint discrimination,” *Finley*, 524 U.S. at 587, the First Amendment is violated. See *Regan*, 461 U.S. at 548 (explaining First Amendment issues would arise concerning a federal statute denying tax exemption for lobbying activities of general charities “if Congress were to discriminate invidiously in its subsidies in such a way as to ‘[aim] at the suppression of dangerous ideas.’” (quoting *Cammarano v. U.S.*, 358 U.S. 498, 513 (1959)).

207. *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 418 (4th Cir. 2006).

Olesker. The court described the two scenarios as “materially indistinguishable,” and explained:

Both [scenarios] . . . are merely two different ways of describing the same pervasive and everyday relationship between government officials and the press. . . . Both the hypothetical and the facts of this case present instances in which government officials disadvantage some reporters because of their reporting and simultaneously advantage others by granting them unequal access to nonpublic information. Thus, whether the disfavored reporters number two or two million, they are still denied access to discretionarily afforded information on account of their reporting. The facts of this case and the hypothetical stand or fall together²⁰⁸

In other words, the court’s logic is that because it is generally accepted that public officials can refuse to speak to certain reporters based upon what those reporters have written in the past, government can therefore create broad viewpoint-based policies that discriminate against reporters in granting them access to communicate with public officials.

The court takes quite a leap in holding the Governor’s ban must be upheld for the same reasons that any public official’s refusal to speak to a reporter must be upheld. In taking this leap, the court overlooks some important distinctions between its hypothetical scenario and the facts of *The Sun* case. The first distinction is that while the First Amendment protects a public official’s decision to not speak,²⁰⁹ no such protection is afforded to the Governor’s ban. Although the ban implicitly communicates Governor Ehrlich’s dislike of the two reporters, that communication is not what the reporters were challenging. The reporters were challenging the ban itself—i.e. Governor Ehrlich’s command to the Executive Department that no one is allowed to communicate with the two reporters. The ban itself is not an exercise of Governor Ehrlich’s

208. *Id.*

209. Freedom of speech under the First Amendment includes the right to speak and to *not* speak when one chooses. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (“[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say” (internal quotations marks omitted)); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”). Government officials and employees “retain their personal rights [under the First Amendment] to engage in freedom of speech and association.” MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 172 (1983).

First Amendment right of free expression. The Governor's ban is an exercise of state power. That the First Amendment was intended to protect the Governor's exercise of such power is an untenable argument.²¹⁰

The most important distinction between the court's hypothetical scenario of a public official selectively choosing to communicate with favored reporters and *The Sun* case is the level of disadvantage created for reporters in either scenario. The disadvantage created by Governor Ehrlich forbidding the entire Executive Department from speaking to Nitkin and Olesker is substantially greater than the disadvantage created by one public official refusing to speak to either reporter. The Governor created broad overarching policy by commanding the Executive Department to stop communicating with Nitkin and Olesker. No such policy is created when one public official refuses to speak to either reporter. The disadvantage created by the broad overarching policy of the Governor's ban is sufficient to chill a reasonable reporter's speech, whereas, one public official's refusal to speak to a reporter is a *de minimis* inconvenience, and thus, insufficient to chill a reasonable reporter's speech.

The Fourth Circuit itself noted that "reporting is highly competitive, and reporters cultivate access—sometimes exclusive access—to sources, including government officials."²¹¹ The importance of a government reporter "cultivating access" to public officials is fairly obvious: public officials provide insider information about government; insider information ultimately leads to the "scoop;" and newspapers that get the scoop sell the most copies. Thus, reporters that have the greatest access to public officials are more likely to get the scoop, and reporters with greater access to public officials ultimately are more valuable to newspapers than reporters with lesser access.

There is evidence that David Nitkin, as the *Baltimore Sun's* State House Bureau Chief, had "cultivated access" to public officials in the Executive Department prior to the Governor's ban.²¹² These relationships were destroyed by the Governor's ban, and the ban has eliminated Nitkin's ability to cultivate new sources of information within the Executive Department. While before the Governor's ban was implemented, Nitkin could, in the court's

210. "The First Amendment has been viewed historically as involving limitations on government, not as a source of government rights. Constitutional rights like those embodied in the Bill of Rights have not been extended to *government bodies . . .*." YUDOF, *supra* note 209, at 44 (emphasis added).

211. *Balt. Sun*, 437 F.3d at 417.

212. *Balt. Sun Co. v. Ehrlich*, 356 F. Supp. 2d 577, 579 (D.Md. 2005), *aff'd*, 437 F.3d 410 (4th Cir. 2006) (noting that before the ban was implemented, there were state employees in the Governor's Office and agencies who regularly spoke to Nitkin).

words, “curry[] [his] sources’ favors” in order to get interviews or quotes from public officials,²¹³ no such options remain for Nitkin as a result of the ban. Where before the Governor’s ban was implemented, Nitkin could pick up a telephone to contact Executive Department officials or employees to obtain information, now he is entirely dependent on third-parties to do such research.²¹⁴

Although the distinction between speaking to a public official directly and having someone else speak for you may seem trivial, such complications eat up a reporter’s time. Time is of the essence for reporters considering today’s 24-hour news cycle and the perpetual deadlines that reporters face. Where a reporter’s job is to cover state government, policies like the Governor’s ban obstruct a reporter from being able to do his job. While reporters who are not included under the Governor’s ban can work independently of other reporters, David Nitkin cannot write his articles without the help of other reporters. It is not entirely unlikely that other *Sun* reporters who are unburdened by the Governor’s ban can now do a better job of reporting on the State House than David Nitkin.

The Fourth Circuit offers no explanation for how, after first noting the competitive nature of reporting and explaining that reporters routinely cultivate access to public officials as sources of information, it can then hold a ban that eliminates two reporters’ ability to cultivate access with an entire branch of government poses a *de minimis* inconvenience. The fact that reporting is very competitive and that reporters rely on public officials as sources of information is the precise reason why forbidding an entire branch of government from speaking to two reporters on account of their viewpoint is likely to chill the expression of the viewpoint that is disfavored under the government ban.²¹⁵

Although the Fourth Circuit came to a different conclusion concerning the potential chilling effect of the Governor’s ban, the

213. *Balt. Sun*, 437 F.3d at 419.

214. *See supra* notes 55-56 and accompanying text.

215. The court noted that during the eight weeks before the Governor’s ban was implemented, Nitkin wrote 45 articles related to state government, and during the eight weeks after the ban, Nitkin wrote 43 articles. *Balt. Sun*, 437 F.3d at 415. The court pointed to this as evidence that Nitkin has “not been chilled to any substantial degree in [his] reporting.” *Id.* at 419. The court also noted that at oral argument, the *Baltimore Sun* could not answer the question of whether it was in fact chilled in its speech. *Id.* at 419 n.1. While it is puzzling that the *Baltimore Sun* was unable to answer the question at oral argument of whether it was chilled in its speech, the court’s reliance on the sheer number of articles written by Nitkin after the ban was implemented seems to be a cursory approach to evaluating whether Nitkin’s speech was in fact chilled. The number of articles written by Nitkin after the Governor’s ban was implemented provides no information about whether the *viewpoint* expressed in Nitkin’s reporting has changed as a result of the ban.

court did not evaluate the Governor's ban as overarching policy. Instead, the court evaluated the Governor's ban by looking at individual instances of a public official refusing to speak to a reporter.²¹⁶ By only looking at the "trees" of the Governor's ban, the court failed to appreciate the "forest" that is the overarching policy of the ban. As a result, the Fourth Circuit's evaluation of the Governor's ban is flawed. When the Governor's ban is properly evaluated as broad overarching viewpoint-based policy, its potential to chill a reasonable reporter's speech becomes apparent.

C. Conclusion

The U.S. District Court and the Fourth Circuit in *Baltimore Sun v. Ehrlich* were correct in holding the First Amendment guarantees no general right of access to government information. Each court, however, failed to acknowledge that the Governor's ban is viewpoint-based, and neither court evaluated the ban for what it is—broad overarching policy. As a result, neither court appreciated the potential chilling effect of the Governor's ban. In upholding the ban, the courts created a dangerous precedent.

In the next section, this Comment defines a workable framework for evaluating how government disseminates information to the press. The purpose of this framework is to disprove the Fourth Circuit's contention that striking down the Governor's ban would "plant the seed of a constitutional case in virtually every interchange between public official[s] and press."²¹⁷ This framework also is meant to provide a resource for other courts when evaluating disputes between government and the press over the government's dissemination of information.

216. For example, when the court begins its analysis of the Governor's ban, it notes: "It would be inconsistent with the journalist's 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." *Balt. Sun*, 437 F.3d at 419 (emphasis added). Later, the court describes the ban as if it is merely a denial of access to Governor Ehrlich: "While Nitkin and Olesker might now be disfavored, they are no more disfavored than the many reporters *without access to the Governor*." *Id.* at 420 (emphasis added). Then, finally, the court holds: "[A] reporter endures only *de minimis* inconvenience when a government official denies the reporter access to discretionary information or refuses to answer the reporter's questions" *Id.* (second emphasis added).

217. *Balt. Sun*, 437 F.3d at 418 (internal quotations omitted).

IV. FRAMEWORK

A. Introduction

A workable First Amendment framework for determining what government can and cannot do when disseminating information to the press can be defined as follows: broad overarching viewpoint-based government policies on the dissemination of government information constitute restrictions on speech, and should be struck down in almost all situations.

The element within this framework that distinguishes the scenario of one public official refusing to speak to a reporter from the Governor's ban is "policy." To constitute "policy" under this framework, a government restriction on the release of government information must be so expansive and create such a disadvantage that it will chill a reasonable reporter's speech. The distinction between policy and non-policy is the level of disadvantage or burden created by a particular restriction on the release of government information. An individual's decision to not speak to a reporter is not policy.

"Government information" is broadly defined under this framework, and includes government information and statistics, access to public facilities, and ideas, opinions and views from public officials. This framework only applies to viewpoint-based policy, and not content-based policies that are viewpoint-neutral.²¹⁸

218. In *United Reporting*, the Supreme Court was divided over the issue of whether content-based restrictions on the dissemination of government-held information constitute restrictions on speech. In his concurrence, Justice Scalia defined content-based restrictions on the release of government information as "restriction[s] upon speech rather than upon access to government information." *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 42 (1999) (Scalia, J., concurring). In Justice Scalia's view, such restrictions therefore deserve some level of First Amendment scrutiny. See *id.* (explaining that what "renders [the California] statute immune from a facial challenge [does not] necessarily render[] it immune from an as-applied challenge," thus implying that under an as-applied challenge, some level of scrutiny should be applied to the content-based statute). Justice Ginsburg, in contrast, thinks government should be allowed to make content-based distinctions in its release of information. See *id.* at 43 (Ginsburg, J., concurring). She explains that if states were forced to choose between keeping information to themselves and releasing it without limits, "states might well choose the former" and such a rule "would lead not to more speech overall but to more secrecy and less speech." *Id.* Although content-based restrictions on government's release of information are tangential to the issue discussed in this Comment, one suggestion for analyzing content-based restrictions on government's release of information is to apply a lesser standard than strict scrutiny, such as the "reasonableness" standard that is applied to restrictions on speech in nonpublic forums. See *supra* note 149 and accompanying text.

In order to illustrate how this framework works, first it will be applied to *The Sun* case. After discussing *The Sun* case, this Comment applies the framework to other hypothetical scenarios.

B. *The Sun case*

The Governor's ban is facially viewpoint-based because of its stated rationale that Olesker and Nitkin were "failing to objectively report" on the Ehrlich administration.²¹⁹ The government information at issue in *The Sun* case is ideas, opinions and views from public officials in the Executive Department. This information is being released to other reporters, but not Olesker and Nitkin as a result of the Governor's ban.²²⁰ The Governor's ban applies to all employees and officials within the Executive Department. Under the ban, the targeted reporters cannot obtain information from Executive Department officials or employees without the help of third-parties. The ban is broad enough to create a substantial disadvantage for the two reporters, and therefore, it constitutes policy.²²¹ The effect of this policy is to chill speech.²²² As a result, the Governor's ban constitutes a restriction on speech and it violates the First Amendment.

C. *Hypotheticals*

1. Interviews with Public Officials; Press Conferences

Excluding one reporter from an exclusive interview with the Governor is not broad enough and it does not create enough of a disadvantage for the excluded reporter to constitute policy. Such conduct creates a minimal disadvantage for a reporter because all other reporters, with the exception of the one who was granted the exclusive interview, also are denied access to the Governor. Because this conduct does not constitute policy, it does not deserve scrutiny under this framework. As a result, the routine practice of public officials granting interviews to reporters with favorable viewpoints can continue unabated under this framework.²²³

Excluding one reporter from a small gathering of about five to ten reporters in the Governor's office also is not broad enough and

219. See *supra* notes 175-183 and accompanying text.

220. *Balt. Sun*, 437 F.3d at 414.

221. See *supra* notes 211-215 and accompanying text.

222. Complaint, *supra* note 24, at ¶ 26 ("The [Governor's] policy was intended to have and *has had* an impermissible chilling effect on The Sun's right to free expression." (emphasis added)).

223. The U.S. Court of Appeals for the District of Columbia has noted: "It would certainly be unreasonable to suggest that because the President [of the United States] allows interviews with some bona fide journalists, he must give this opportunity to all." *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977).

does not create enough of a disadvantage for the excluded reporter to constitute policy. The disadvantage created in this situation is still minimal because, although several reporters are receiving favorable treatment, the majority of reporters are still being denied access to the Governor.²²⁴

Excluding one reporter from a press conference open to all other reporters is broad enough and creates a sufficient disadvantage for that reporter to constitute policy.²²⁵ The disadvantage created in this situation is significant because the excluded reporter is being denied access to information that all other reporters are receiving. The next issue is whether the reporter is being excluded from the press conference on account of his or her viewpoint. If so, the reporter's First Amendment rights are violated. If the reporter is being excluded for some reason other than his or her viewpoint, then they have no claim under this framework,²²⁶ but courts should, of course, beware of justifications that are mere pretext for viewpoint discrimination.

2. Bans Imposed on Divisions/Agencies within the Executive Department

In evaluating a ban that applies to one division or agency within the Executive Department, courts should take into consideration the extent to which that division or agency regularly interacts with the media. For example, the Governor's press division obviously deals extensively with the media. Banning the entire press division from speaking to a reporter likely creates a sufficient disadvantage for that excluded reporter to constitute policy. This is because the excluded reporter is being denied information that all other reporters can access on a daily basis. If such policy is viewpoint-based, it should be struck down under this framework.

In contrast, an agency such as the Department of Corrections does not regularly interact with the media. As a result, placing a ban on the Department of Corrections from speaking to a particular reporter does not create a sufficient disadvantage for that reporter to constitute policy. Although the Department of Corrections ban may apply to a larger number of state employees than the press

224. Alaska Governor Frank Murkowski has implemented a policy where, instead of holding press conferences, he selectively chooses several reporters to meet with at a time. See Jennifer Myers, *Clamping Down*, 29 NEWS MEDIA & THE LAW 20 (2005).

225. Cf. *Sherrill*, 569 F.2d at 129 (“[Denying] a White House press pass is violative of the [F]irst [A]mendment . . . if it is based upon the content of the journalist’s speech or otherwise discriminates against a class of protected speech.”).

226. Cf. *id.* at 130 (holding security concerns were a legitimate reason to deny a White House press pass to a reporter with a history of violent behavior).

division ban, the Department of Corrections ban still poses a minimal disadvantage for the excluded reporter because the majority of Corrections employees do not regularly interact with the media, and would not do so even if the ban were not in place.

V. CONCLUSION

The U.S. District Court and Fourth Circuit in *Baltimore Sun v. Ehrlich* failed to properly define Governor Ehrlich's ban as viewpoint-based policy. As a result, the courts did not properly evaluate the level of disadvantage that the Governor's ban creates for David Nitkin and Michael Olesker, and they underestimated the potential chilling effect of the ban. The framework discussed in this Comment illustrates that Governor Ehrlich's conduct in creating broad overarching viewpoint-based policy can be distinguished from other scenarios, such as one public official refusing to speak to a reporter, which pose a *de minimis* inconvenience for reporters.

Governor Ehrlich is wrong when he says that banning his Executive Department from communicating with reporters is his "only arrow" in responding to so-called biased reporting. The Governor is the most powerful government official in the State of Maryland. He is in the public spotlight at all times. His mere presence in any public setting commands public attention. The Governor's ability to attract public attention is far greater than that of any reporter at the *Baltimore Sun*. The Governor's most powerful "arrow" in responding to attacks by the media is his power to command public attention. By exercising this power, the Governor can speak out against unfair reporting, and he can identify inaccuracies and explain why particular stories are misleading. What the Governor cannot do is create broad overarching viewpoint-based policies that suppress unfavorable reporting. Such action strikes at the very heart of the First Amendment.

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