

A state court issued a gag order that prohibited the publication of information about a pending murder trial until the jury had been impaneled. The purpose of the order was to avoid pretrial publicity that would prejudice the criminal defendant's right to an impartial jury.

Several newspapers that sought to report about the trial's pretrial events challenged the order, arguing that it was unconstitutional.

Is the court's order likely constitutional?

- A. No, because the Sixth Amendment right to an impartial jury does not apply to state criminal prosecutions.
- B. No, because there are less restrictive means to guarantee the defendant's right to an impartial jury.
- C. Yes, because the court has a compelling interest in protecting the defendant's right to an impartial jury.
- D. Yes, because the Tenth Amendment reserves to the states plenary authority over state criminal prosecutions.

Explanation:

The First Amendment **freedom of the press** generally prohibits the government from restricting the right to publish lawfully obtained, truthful information about matters of public significance. A government action that abridges this right is **presumptively unconstitutional** and must survive **strict scrutiny**. This requires the government to prove that its action was the **least restrictive means** (ie, narrowly tailored) to achieve a **compelling government interest**.

A gag order is a judicial order that prohibits the press from reporting about court proceedings, which abridges the freedom of the press. Here, the state court likely has a compelling interest in ensuring that the criminal defendant is afforded the [right to an impartial jury](#). However, the court has less restrictive means to achieve this interest—eg, changing the trial's venue, postponing the trial, or intensely questioning prospective jurors during voir dire (**Choice C**). Therefore, the court's order cannot survive strict scrutiny and is likely unconstitutional.

(Choice A) The Sixth Amendment guarantees the right to an impartial jury in federal criminal prosecutions *and* in state criminal prosecutions through the due process clause of the [Fourteenth Amendment](#).

(Choice D) The Tenth Amendment reserves to the states any power that the Constitution does not expressly grant to the federal government, including power over state criminal prosecutions. However, this power is not plenary (ie, absolute) because states must comply with other constitutional provisions.

Educational objective:

A government action that abridges the First Amendment freedom of the press (eg, a gag order) must survive strict scrutiny, which requires the government to prove that its action was the least restrictive means to achieve a compelling government interest.

References

- Neb. Press Ass'n v. Stuart, 427 U.S. 539, 563–64 (1976) (explaining that a court has other means short of a gag order to achieve its compelling government interest in ensuring a criminal defendant's right to a fair trial).