IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE BALTIMORE SUN COMPANY, *et al.*,	*	
	*	
Plaintiffs,	*	
v.		**Case No. WDQ-04-CV-3822**
	*	
ROBERT L. EHRLICH, JR., *et al.*,	*	
	*	
Defendants.	*	
	*	

* * * * * * * * * * * * *

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendants Robert L. Ehrlich, Jr., Governor of the State of Maryland, Shareese DeLeaver, and Gregory Massoni (collectively, the "Governor"), through undersigned counsel, hereby submit this Memorandum in support of their Motion to Dismiss the plaintiffs' complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure.

INTRODUCTION

The United States Supreme Court has recognized that, in contrast to the right to *publish* the news, the right to *gather* the news enjoys only limited First Amendment protection. This case, brought by The Baltimore Sun Company, publisher of the *Baltimore Sun* newspaper, a Sun reporter, and a Sun columnist (collectively, "The Sun"), involves only the latter function. The Sun presents a First Amendment challenge to a November 18, 2004, memo issued by Governor Ehrlich's press office that The Sun claims infringes on its ability to gather the news. Specifically, two of The Sun's employees complain that, as a result of the memo, State employees who previously spoke to them

have refused to do so and have not returned their calls. The November 18 memo directs employees of the Governor's Office and "the Executive Department and Agencies" not to "speak with David Nitkin or Michael Olesker . . . [or] return calls or comply with any requests." (Complaint at ¶ 15, Exhibit A). The Sun filed a complaint in this Court on December 3, 2004. The complaint contains a single claim, brought pursuant to 42 U.S.C. § 1983, alleging a violation of the First Amendment to the United States Constitution and asking for injunctive and declaratory relief.

Nothing in the memo restricts communication with any other employee of The Sun, or any other media. Nor does it bar the two Sun employees from accessing information in any other way. In essence, The Sun's claim boils down to an assertion that two of its employees have a constitutional right to have State employees return telephone calls – a premise unsupported by any First Amendment jurisprudence. To the contrary, the Supreme Court has made clear that the press does not have a paramount right to obtain information from the government, but only a right equal to that of the general public. Moreover, the United States Court of Appeals for the Fourth Circuit and this Court have applied that principle to a case involving facts very similar to the ones at issue here and found no constitutional violation.

No member of the public would have a cause of action, constitutional or otherwise, if a State employee declined to return a phone call or to provide information over the telephone. Plaintiffs Nitkin and Olesker, like members of the public in general, have other means by which to gather information. *The Baltimore Sun* has an unrestricted ability to publish the news it gathers. Accordingly, the case here is distinguished from cases in which courts have found a violation of the First Amendment: no court has found that specific news reporters, unrestricted in their ability to

disseminate the news, have a constitutional right to access particular information from specific individuals in a specific fashion.

APPLICABLE LEGAL STANDARDS

To prevail on their claim brought pursuant to 42 U.S.C. § 1983, the plaintiffs must prove that: 1) the defendants deprived them of a right guaranteed by federal law or the United States Constitution; and 2) the defendants, in committing the deprivation, acted under color of State law. *See, e.g., Baker v. McCollan*, 443 U.S. 137, 140 (1979). If the allegations asserted in a complaint "fail to establish a constitutional claim, the defendant is entitled to dismissal . . . under Fed. R. Civ. P. 12(b)(6)." *American Civil Liberties Union v. Wicomico County, Md.*, 999 F.2d 780, 784 (4th Cir. 1993).

When reviewing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), this Court must accept as true all well-pleaded facts included in the complaint. *See Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). A court should grant a motion to dismiss when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Moreover, a plaintiff's use "of a few conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6)" when the facts alleged in the complaint do not support the plaintiff's legal conclusions. *Young v. City of Mt. Ranier*, 238 F.3d 567, 577 (4th Cir. 2001). Thus, this Court is not bound to accept The Sun's conclusion that its First Amendment rights were violated if the facts alleged in the complaint fail to demonstrate such a violation.

The Sun seeks injunctive relief.[1] Unless precluded by Congress, federal district courts may use their inherent authority to issue injunctive relief. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). A permanent injunction may be issued only after a determination of the issues on the merits. "An injunction should be carefully addressed to the circumstances of the case." *Kentuckians for Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 436 (4th Cir. 2003) (quoting *Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001). While an injunction should be designed to prevent a specific harm or injury, it should be no broader than is necessary to provide the relief requested. *Kentuckians for Commonwealth, Inc.*, 317 F.3d at 425 (citing *Hayes v. North Carolina State Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993)).

ARGUMENT

I. PLAINTIFFS ARE NOT ENTITLED TO PARTICULARIZED ACCESS TO INFORMATION FROM SPECIFIC GOVERNMENT OFFICIALS.

While news gathering is afforded First Amendment protection, the United States Supreme Court has made clear that the right to gather the news is not unlimited: the "right to speak and publish does not carry with it an unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965); *see also Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (distinguishing between "freedom of the media to *communicate* information once it is obtained" from the ability to "*compel[]* the government to provide the media with information or access to it on demand" (emphasis in original)). Nor does the First Amendment "guarantee the press a constitutional right

[1] Although ¶ 1 of the Complaint states that The Sun seeks declaratory relief, the request is not enumerated in the Prayer for Relief. (Complaint at p. 7).

of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972).

The Sun does not claim, nor could it, that it has been hindered in its ability to "speak and publish" the news. Thus, the First Amendment right alleged to be infringed in this case is indisputably one subject to limits. Any limits imposed by the November 18 memo on the ability of two reporters to gather the news in a particular way do not violate the First Amendment.

Both this Court and the United States Court of Appeals for the Fourth Circuit have previously addressed a journalist's complaint strikingly similar to the one presented here and found no constitutional violation. *See Snyder v. Ringgold*, No. 97-1358, 1998 WL 13528 (4th Cir. Jan. 15, 1998) (*per curiam*); *Snyder v. Ringgold*, 40 F. Supp. 2d 714 (1999). Terrie Snyder, a reporter with the *City Paper* and the WBFF television station, filed suit against Samuel Ringgold, the Director of the Public Affairs Division of the Baltimore City Police Department (the "police department"). Ringgold had grown increasingly frustrated by what he perceived to be Snyder's inaccuracies in reporting and her demands for information via a paging system to access the police department's public information officers. He thus imposed a ban on any "off the record" comments to Snyder, notified WBFF that a scheduled exclusive television interview with the police department's homicide division would be cancelled if Snyder was part of the television crew, and advised the *City Paper* that he would no longer talk to Snyder, though he would continue to talk to other journalists working for the *City Paper*. *Snyder*, 40 F. Supp. 2d at 716. In addition, Snyder was precluded from accessing information from the police department unless her requests were in writing. *Id.*

Snyder brought suit against Ringgold under 42 U.S.C. § 1983, contending that the restrictions placed on her access to information from the police department violated her rights under the First and Fourteenth Amendments.[2] This Court initially found that Ringgold did not have qualified immunity for the purported constitutional violations. The Fourth Circuit, in an unreported opinion, reversed, finding not only that Ringgold had qualified immunity,[3] but also that Snyder had failed to demonstrate any violation of established constitutional rights. *Snyder v. Ringgold*, 1998 WL 13528 at *4.

The Fourth Circuit rejected Snyder's argument that she had a constitutional right "to have equal access to public information sources . . . and to be treated the same as other journalists." *Id.* The Court recognized that Snyder's overly broad interpretation of her First Amendment rights would "presumably preclude the common and widely accepted practice among politicians of granting an exclusive interview to a particular reporter . . . [and] the equally widespread practice of public

---

[2] Plaintiffs have alleged only a violation of the First Amendment. It is, however, axiomatic that a First Amendment claim is cognizable against a State only through the Fourteenth Amendment. *See Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n*, 447 U.S. 530, 546 n.5 (1980) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 500 n.8 (1952)) ("the liberty of speech and of the press which the First Amendment guarantees against abridgment . . . is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action") .

[3] Because the Governor has not been sued in his individual capacity and The Sun does not seek monetary damages, this Court does not have to address the issue of qualified immunity, whereby a State official will not be held individually liable for civil damages if the conduct at issue does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Even if The Sun asserted such a claim, however, it would fail based on established judicial precedent in analogous cases. The Sun's claim for injunctive relief is permissible against the Governor in his official capacity only under a limited exception to principles of sovereign immunity embodied in the Eleventh Amendment. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997).

officials declining to speak to reporters whom they view as untrustworthy because the reporters have previously violated a promise of confidentiality or otherwise distorted their comments." *Id.* (footnote omitted).

The Fourth Circuit also rejected any notion that the First Amendment confers a privilege on members of the press that would create a right of access broader than that of the general public. *See id.* (citing *Branzburg,* 408 U.S. at 684-85). Although Snyder contended that the police department's access restrictions violated the First Amendment principle prohibiting content and viewpoint discrimination, the Court disagreed, stating:

> [I]t is a large analytical leap from holding that government may not regulate or prohibit private speech on the basis of content or viewpoint to holding that government may not make "content-based" distinctions between reporters in granting access to government information. Indeed, *the government can certainly control the content of its own speech* in ways it could never regulate or control the content of private speech.

Id. (citing *Rust v. Sullivan*, 500 U.S. 173 (1991)) (emphasis added).

This Court, on remand, noted that, "[n]o reporter has a right to access to a particular interview, exclusive story, or off the record statement," and concluded that granting the type of access sought by Snyder "would completely change the longstanding relationship and understandings between journalists and public officials." *Snyder v. Ringgold*, 40 F. Supp. 2d at 718. Thus, the police department policy, including Ringgold's policy not to speak to Snyder, "merely exercised Ringgold's right not to answer questions from or meet with particular representatives of the news media." *Id.* at 717.

The principle recognized in the decision of both the Fourth Circuit and this Court in *Ringgold* is not a novel one. More than a quarter century ago, the Supreme Court held that there is no Constitutional right of access by the media to government sources of information not made available to the public at large. *See Branzburg*, 408 U.S. at 684-85. That holding was echoed in *Saxbe v. The Washington Post Co.*, 417 U.S. 843, 850 (1974), and in *Houchins*, 438 U.S. at 15. Both *Saxbe* and *Houchins* involved First Amendment challenges to governmental restrictions on access to prison inmates, and in both cases the Supreme Court found no violation of the First Amendment. In *Saxbe*, the Court rejected the argument that the government had any "affirmative duty to make available to journalists sources of information not available to members of the public generally . . . ." *Saxbe*, 417 U.S. at 850.

Likewise, in *Houchins*, the Court recognized that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." *Houchins*, 438 U.S. at 15. In reaching that conclusion, the *Houchins* Court distinguished dissemination of the news from gathering the news. *Id.* at 8 (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)) (determination that government could not "restrain communication of whatever information the media acquire . . . did not remotely imply a constitutional right guaranteeing anyone access to government information beyond that open to the public generally.").

With regard to the latter function, the ability of the press to gather the news, the *Houchins* Court reiterated that there is "no basis for the claim that the First Amendment compels others – private persons or governments – to supply information. *Id.* at 11 (quoting *Branzburg v. Hayes*, 408 U.S. at 681-82). The Court soundly rejected the notion that the government had any affirmative duty to provide information to the press:

> There is no constitutional right to have access to particular government information or to require openness from the bureaucracy . . . The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.

Houchins, 438 U.S. at 14 (internal citations omitted). *See also, Radio & Television News Ass'n v. United States Dist. Ct. for the Cent. Dist. of Calif.*, 781 F.2d 1443, 1446 (9th Cir. 1986) (media have no right to interview a criminal defendant's counsel, so restraint on trial counsel from talking to media did not implicate First Amendment rights).

The November 18 memo does not violate the First Amendment because it does not deny The Sun access to sources of information available to members of the general public. The memo is directed to "Public Information Offices and Executive Department" and directs those individuals to rely the information to "department heads" in the Executive Branch. (Complaint, ¶ 15, Exhibit A). The prohibition is limited to two specific individuals, Mr. Nitkin, a Sun reporter, and Mr. Olesker, a Sun columnist. (*Id.*). Both are free to obtain information from other State officials, such as the Comptroller, the State Treasurer, or any member of the General Assembly, and their staff, as well as from any local government official or employees. Both individuals, like every other member

of the press and the public, have free access to public forums, including meetings of the Board of Public Works, legislative hearings, and other public meetings, and to the fount of information available, with only narrowly prescribed exceptions, under the State's Public Information Act, Md. State Gov't Code Ann. §§ 10-611 *et seq.* In short, Mr. Nitkin and Mr. Olesker find themselves squarely within a position identical to that of Ms. Snyder *vis a vis* the Baltimore City Police Department. *The Baltimore Sun* itself, of course, employs other reporters, all of whom may obtain information from any State official, including those to whom the November 18 memo was directed.

Members of the public do not have an unfettered right to receive phone calls from a State employee, and would not have any means of legal redress if a State employee failed to return a phone call. The Sun has no greater right than members of the public. *See, e.g., Branzburg*, 408 U.S. at 684-85. Accordingly, The Sun cannot demonstrate a First Amendment violation simply because Mr. Nitkin and Mr. Olesker might find it more difficult to obtain information from some government sources. *See Houchins*, 438 U.S. at 14 (the First Amendment is not a public records act and does not create a right for the press to obtain access to government information).

In short, there is no constitutional right to have one's telephone calls returned and no constitutional prohibition on State government employees refusing to speak to someone, even if they have spoken to that person in the past. Because The Sun is unable to demonstrate a constitutional violation, it has no viable claim under 42 U.S.C. § 1983 and its complaint must be dismissed.

II. THE FIRST AMENDMENT'S FUNDAMENTAL PURPOSE – TO ENSURE AN INFORMED CITIZENRY – IS NOT IMPAIRED BY THE INABILITY OF TWO REPORTERS TO OBTAIN SPECIFIC TYPES OF INFORMATION FROM PARTICULAR PUBLIC OFFICIALS AND EMPLOYEES.

The Sun's narrow complaint must also fail when viewed in the wider context of the policies and principles underlying the First Amendment. The Sun's argument is really two-fold: that two of its employees are being harmed because certain State employees have been told not to talk to them, and that the public is harmed by the potential inability of Mr. Nitkin and Mr. Olesker to mine particular sources of information.[4]

It is well-established that the core purpose of the First Amendment is to ensure uninhibited debate on public issues by an informed electorate. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Nevertheless, in *Houchins*, the Supreme Court rejected the idea that the particularized media access sought in that case was "essential for informed public debate." *Houchins*, 438 U.S. at 13-14. According to the *Houchins* Court, "that assumption finds no support

[4] Because this Court must accept as true all allegations in the complaint for purposes of deciding a motion to dismiss under Rule 12(b)(6), it must accept as true the bare allegations that "state government employees . . . who previously spoke to Mr. Nitkin . . . have refused to speak to him," (Complaint at ¶ 19), and "since the policy was adopted, numerous state government employees have not returned telephone calls from Mr. Nitkin and Mr. Olesker," (Complaint at ¶ 20), and that "[m]any of these employees have spoken to Mr. Nitkin and Mr. Olesker in the past, before the ban was imposed," (*Id.*). As noted by the Ninth Circuit in *Radio and Television News Ass'n*, 781 F.2d at 1446, and this Court in *Snyder*, 40 F. Supp. 2d at 717, individuals are free to refuse interviews or decline to answer questions posed by the press. Thus, it is a matter of speculation that Mr. Nitkin and Mr. Olesker would actually be able to glean the information they may seek from the putative sources they allege have been denied them.

in the decisions of this Court or the First Amendment." *Id.* at 14. Any similar argument asserted by The Sun in this case should also be rejected.

The *Houchins* Court recognized the importance of an "untrammeled press" in protecting the public's "entitlement to information." *Id.* at 10. That fundamental purpose of the First Amendment, however, is furthered not by an unrestrained ability of the press to gather the news, but through freedom to disseminate information obtained. As an illustration of the latter principle, the *Houchins* Court cited *Mills v. Alabama*, 384 U.S. 214 (1966), in which it had earlier struck down a statute making it a crime to publish an editorial on election issues on election day, in light of the fact that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Houchins*, 438 U.S. at 10 (quoting *Mills*, 384 U.S. at 218). *See also, Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (holding that tax imposed on newspapers was unconstitutional restraint that interfered with the newspaper's ability to communicate the news, in violation of First Amendment).

Restraints such as those at issue in *Grossjean* and *Mills* are in stark contrast to the events described in the complaint here. Certainly nothing suggests that Mr. Nitkin and Olesker have been unable to write and print what they desire, except insofar as their work is edited by their editors.[5]

---

[5] In fact, since the date of the memo, November 18, Mr. Nitkin and Mr. Olesker have continued to publish in *The Baltimore Sun*. *See* Exhibit 1. This Court can take judicial notice of the publication of Mr. Nitkin's byline in the December 27 edition of *The Baltimore Sun.* *See Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986) (district court can take judicial notice of (continued...)

Nor has any action by the Governor prevented *The Baltimore Sun* from distribution of its paper, dissemination of the news, or expression of any editorial opinion. Most importantly, however, the rights of an informed electorate to have access to news are not diminished by the actions complained of. Citizens obtain information from a variety of sources, including not only *The Baltimore Sun*, but a wide array of other print media, as well as radio, television, and, increasingly, the internet. That a Governor may decide not to convey information in a particular format to two individuals from one daily newspaper does not undermine the ability of any citizen to be fully informed.

The *Houchins* Court noted that members of the press in that case who sought individual interviews with prison inmates had other means by which to gather information to disseminate to the public, "albeit not as conveniently as they might prefer," such as receiving inmates' criticisms of jail officials and conditions through correspondence with inmates, through interviews with former inmates, attorneys for inmates, and individuals who visited the prison. *Houchins*, 438 U.S. at 15. Likewise, Mr. Nitkin and Mr. Olesker have alternate ways to gather the news, and *The Baltimore Sun* has an unrestricted ability to print what is gathered, in the form of news or opinion. The mere fact that it might not be as convenient for them to do so in light of the November 18 memo has little,

---

[5] (...continued)
information when reviewing the dismissal of a complaint under Rule 12(b). Under F. R. E. 201(b)(2), a district court may take judicial notice of information that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

if any, impact on the ability of the public to gain access to news essential for public debate by an informed electorate.

III. THIS CASE DOES NOT INVOLVE THE TYPES OF LIMITATIONS THAT OTHER COURTS HAVE FOUND UNCONSTITUTIONAL.

In *Ringgold*, this Court distinguished the ability of government officials to grant or deny the press particularized access to information from situations where the government selectively limits access to information otherwise available to the media in general or to the general public. *Ringgold*, 40 F. Supp. 2d at 718. Courts that have addressed the issue consistently hold that only the latter situation raises First Amendment concerns.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and *Globe Newspaper Co. v. Superior Court*, 464 U.S. 501 (1984), the Supreme Court recognized a right of the press to have access to public trial proceedings. In both cases, the Court pointed to the fact that criminal proceedings have historically been open to the public. *Richmond Newspapers*, 448 U.S. at 564; *Globe Newspaper*, 464 U.S. at 605. Neither case overruled *Houchins*, which held that the First Amendment does not mandate either a right of the press of access to government information or to a county jail, over and above that granted to the public. *Id.* at 10-12. Moreover, in both *Richmond* and *Globe*, the Court's focus was on a historical right of access, not governmental practice. Thus, the cases are distinguishable from the situation here, where, at most, The Sun contends that State employees who provided information orally to Mr. Nitkin and Mr. Olesker in the past will not do so now. (Complaint at ¶¶ 19, 20, 24).

In *Telemundo of Los Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095 (C.D. Cal. 2003), Telemundo, a Spanish-speaking broadcast network, challenged the City's practice of limiting access to the El Grito celebration, an annual commemoration of the beginning of the Mexican War of Independence. For 22 years, exclusive rights to broadcast the celebration had been given to KMEX-TV. *Id.* at 1097-98. Finding that Telemundo was likely to succeed on the merits of its § 1983 claim, the court issued a preliminary injunction that required the City to provide Telemundo with equal access to coverage of the public event. *Id.* at 1103. Underlying the conclusion that Telemundo had raised a valid First Amendment claim was the court's recognition that the El Grito ceremony, held on government property, was a limited public forum. *See id.* at 1102.

In *Radio and Television News Ass'n v. United States District Court*, 781 F.2d 1443 (9th Cir. 1986), the United States Court of Appeals for the Ninth Circuit examined the constitutionality of a judicial restraint prohibiting a criminal defendant's trial counsel from talking to the press about the case. Notably, the court found that the restraint placed on *trial counsel* was not a restraint *on the press*–and found a "fundamental difference" between the two. *Id.* at 1446. Despite the restraint on trial counsel, the press was free to gather and disseminate information about the trial to the public in the same way as members of the public could do, namely, by attending the public proceedings. *Id.* The press was even free to address questions to trial counsel, although the court's order prevented him from providing answers. *Id.* The Ninth Circuit observed that comments from trial counsel might have been useful to the press in developing a better understanding of the issues involved in the case, there was only a general right to *gather* information, just as the public could. *See id.* In short, the First Amendment rights of the press were not violated by the court's order

forbidding counsel from discussing the case any more than those rights would be violated if counsel, of his own accord, had chosen to reply, "no comment," in response to every press inquiry.

As this Court did in *Ringgold*, the Ninth Circuit recognized that government officials have the ability to control access to information, for instance, by "us[ing] the press for their own purposes through 'leaking' of information." *Radio & Television Ass'n*, 781 F.2d at 1447. Government attempts to restrain the press from *publishing* the leaked information implicate First Amendment rights. If, however, the government "order[ed] its officers not to engage in 'leaking,' the press would have no 'right' to challenge that practice." *Id.* (internal citations omitted).

An attempt to restrain dissemination of the news was also the issue before the court in *Rossignol v. Voorhaar*, 316 F.3d 516 (2003), the only other Fourth Circuit case that is even remotely similar to this one. *Rossignol* does not address the asserted right of access to information, but the quite different right to communicate information that has been gathered.[6] *Cf. Houchins*, 438 U.S. at 8 (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)) (distinguishing First Amendment right to disseminate news from minimal right to gather the news from a particular source).

---

[6] In *Rossignol*, a group of Sheriff's Deputies attempted, late on the night before election day, to "buy out the stock of [the election-day issue of] *St. Mary's Today* at vending locations throughout the county" when critical articles of the Sheriff and a political ally appeared in the newspaper. 316 F.3d at 520. The case did not involve the newspaper's ability to *gather* the news, the right claimed to be at issue here. Rather, the Fourth Circuit found a violation of the First Amendment in the defendants' interference with the *dissemination* of the newspaper, *i.e.* its "right to speak and publish" the news, *Zemel v. Rusk*, 381 U.S. at 16. As discussed above, the First Amendment protects the right to communicate information about the government; it does not guarantee access to information from the government.

The November 18 memo bears little resemblance to this category of cases. The directive here is neither a restraint aimed at preventing The Sun from publishing information it gathers, nor a limit on the ability of The Sun journalists to have the same access to public information that is afforded to members of the public and to the press generally. Instead, the directive limits only a form of access by Mr. Nitkin and Mr. Olesker; this limitation is akin to one instructing State employees to refrain from "leaking" information to them. As this Court observed in *Ringgold*, a government official may decide to grant preferential access to Barbara Walters or Diane Sawyer that would not be granted to a reporter for the *City Paper*. *See* 40 F. Supp. 2d at 718. Mr. Nitkin and Mr. Olesker remain free to attend and report on public events; they may gather the news from other individuals and public officials, they may access information through the Public Information Act, and they may attend press conferences and open meetings. In sum, limitations such as the one here do not violate the First Amendment. Thus, The Sun has failed to state a claim under 42 U.S.C. § 1983.

CONCLUSION

For the foregoing reasons, the plaintiffs' complaint fails to state a claim upon which relief can be granted and should therefore be dismissed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

/s/
MARGARET ANN NOLAN
CYNTHIA G. PELTZMAN
Assistant Attorneys General
Office of the Attorney General
200 St. Paul Place, 20th Floor

Baltimore, Maryland 21202
410-576-6324

Attorneys for Defendants