UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ABDUL-HAKIM SHABAZZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:22-cv-268-JRS-MPB
	)	
TODD ROKITA, in his official capacity as Attorney General of the State of Indiana,	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

This Court should dismiss Plaintiff's complaint because Plaintiff is not being denied access to information open to the public, and there is no constitutional right to interact with a government official at a press conference. Plaintiff complains that he has not been permitted to receive the Attorney General's message in person, as opposed to via livestream. But the facts he pleads foreclose this case because they negate any legitimate basis for prospective relief (the only relief he seeks) and demonstrate no violation of the First Amendment. In short, Plaintiff pleads that all along he has had access to the same message and information as everyone else, which means that his claim can be understood as a demand for a right to hear a public official's message in person. The First Amendment protects no such right, so his claim must be dismissed.

Background

Under the facts alleged in the complaint, accepted as true for present purposes, on October 14, 2021, the Attorney General held a limited in-person press conference to announce a lawsuit that the Office of the Attorney General had filed to challenge robocalls made to Indiana residences. ECF 1, Compl. ¶ 24. The press conference was located in a conference room in the Office of the Attorney General at the Statehouse. Compl. ¶ 27. The Office of the Attorney General required the media to RSVP for its limited event. Compl. ¶ 25.

Plaintiff emailed the Office of the Attorney General indicating that he wished to attend the press conference, but received a reply from a staff member indicating that Plaintiff was "not credentialed for this event." Compl. ¶ 26, 32–33. Plaintiff nevertheless travelled to the Statehouse, but he was not permitted to attend the press conference. Compl. ¶ 29–31.

Nearly four months later, on February 7, 2022, Plaintiff filed suit against the Attorney General in his official capacity for injunctive and declaratory relief. ECF 1. Plaintiff alleges that he has been "banned" from the Attorney General's press events. Compl. ¶ 42, 45–46. But he also alleges that he was invited to the press conference "via live stream," Compl. ¶ 33, but protests that watching the livestream of the press conference "was not a viable option as it did not allow for questions or the informal interactions that frequently occur with officials prior to or after formal press conferences." Compl. ¶ 34.

Plaintiff asks this Court to declare that the Attorney General's "ban" violates his First Amendment rights, and enter a preliminary injunction "enjoining defendant to allow plaintiff to attend and participate in press conferences and similar events to which only credentialed press members are invited on an equal footing with the other credentialed members of the press." ECF 1 at 9.

Argument

The Court should dismiss Plaintiff's complaint for two reasons: First, his factual allegations demonstrate no First Amendment violation. The First Amendment does not grant Plaintiff a right to hear a government official deliver a message in person, as opposed to through a livestream. And relatedly, there is no right to interact with a government official at a press conference under the First Amendment. In fact, no federal court has ever ordered a public official to take and answer questions from a particular journalist or news commentator, or held that the First Amendment is implicated by a public official not taking questions from a particular journalist.

Second, Plaintiff's complaint affirmatively demonstrates that he lacks sufficient grounds to claim a likelihood of future injury that can justify federal jurisdiction to entertain his sole claim for relief—an injunction. Plaintiff's only basis for asserting future injury is the Attorney General's past conduct, not a concrete threat of future action. But past conduct can justify a claim for injunctive relief only where that past conduct was itself illegal. Here, that past conduct was not illegal

(again because the First Amendment does not safeguard a right to in-person access to public officials), so Plaintiff has no grounds for seeking forward-looking relief.

I. Plaintiff's complaint fails to state a First Amendment violation.

To survive a motion to dismiss under Federal Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiff's complaint should be dismissed because his factual allegations actually refute a violation of the First Amendment.

A. Plaintiff's complaint shows he has access to the same information as everyone else.

Plaintiff has access to the same real-time information as the public, and he is not entitled to anything more under the First Amendment. Courts have long held that "the First Amendment provides no special solicitude for members of the press." *Dah'strom v. Sun-Times Media, LLC*, 777 F.3d 937, 946 (7th Cir. 2015). The "right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). And though the Supreme Court has observed that "news gathering is not without its First Amendment protections," the Court "has repeatedly declined to confer on the media an expansive right to gather information, concluding that such an approach would 'present practical and conceptual difficulties of a high order.'" *Dah'strom*, 777 F.3d at 946 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 703–04 (1972)). So while the press has the freedom to communicate or publish information it receives, the press has no right of

special access to government information "beyond that open to the public generally." *Houchins v. KQED, Inc.*, 438 U.S. 1, 10 (1978) (plurality opinion).

Indeed, public officials are under no constitutional obligation to speak to the press or public at all. *Id.* at 14. Outside the context of certain judicial proceedings, there is no First Amendment right to gather "all sources of information within government control." *Id.* at 9–12; *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (recognizing some right of access in the realm of access to judicial proceedings). The "Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." *Houchins*, 438 U.S. at 14; *see also McBurney v. Young*, 569 U.S. 221, 232 (2013) ("This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws."). It would "require some straining of the text" to construe the First Amendment as "conferring upon each citizen a presumptive right of access to any government-held information which may interest him or her." *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1168 (3d Cir. 1986). At bottom, there is no recognized "right to know and concomitant governmental duty to disclose" under the First Amendment. *Id.*

And even when the government elects to share information—like the Attorney General did here—the press does not have an unrestrained right to gather it in the "particular form" they choose. *Putnam Pit Inc. v. City of Cookville, Tenn.*, 221 F.3d 834, 841 (6th Cir. 2000). In *Putnam Pit*, for instance, the Sixth Circuit held that government officials do not violate the First Amendment when they deny a reporter information in an electronic format, where the reporter has access to the

information in a hard copy. *Id.* at 840. Similarly, in *United States v. McDougal*, the Eighth Circuit held that the right of access to public information does not extend to a videotape of deposition testimony, when members of the public, including the press, were given access to the *information* contained in the videotape in the form of a transcript. 103 F.3d 651, 659 (8th Cir. 1996); *cf. Nixon v. Warner Communications, Inc.,* 435 U.S. 589 (1978) (holding that the press had no First Amendment right to copies of White House tapes, when it unquestionably had access to the contents of the tapes and when the public at large was not given physical access to copies).

Like the challengers in *Putnam Pit* and *McDougal*, Plaintiff's claim fails because he has access to the same information the government shared with the public, and the First Amendment does not require the information be produced to Plaintiff in the form he chooses. Plaintiff does not allege that the Attorney General is denying him the right to gather *information*, much less the right to publish or speak about the information shared by the Attorney General. Plaintiff's allegations establish only that he was denied physical access to the Office of Attorney General. But Plaintiff—like the public at large—had simultaneous access via livestream to the same information the Attorney General shared in the press conference. There is no meaningful distinction under the First Amendment between a person's ability to access the Attorney General's announcement in person or to hear the same government message via a livestream. And because the crux of the right to gather

rests on the access to *information*, and not the particular format of the information, Plaintiff fails to allege a violation of federal law.

Because Plaintiff undoubtedly had access to the information (in real-time), this is not a case where a reporter or member of the public has been altogether excluded from a press conference or otherwise denied access to information shared by the government. The Seventh Circuit has rejected the notion that "reporters are … cloaked with automatic 'strict scrutiny protection' merely because they are members of the press" and has held that total exclusion from access to the information shared in an invitation-only press conference (i.e., a nonpublic forum) does not necessarily violate the First Amendment. *John K. MacIver Inst. for Pub. Policy v. Evers*, 994 F.3d 602, 612 (7th Cir. 2021). And the Fourth Circuit has similarly rejected the idea that members of the press have "a constitutional right of equal or nondiscriminatory access" because it is incompatible with "the common and widely accepted practice among politicians of granting an exclusive interview to a particular reporter" and the Supreme Court's refusal to confer on the press "special First Amendment rights that exceed those of ordinary citizens." *Snyder v. Ringold*, 133 F.3d 917 (4th Cir. 1998) (unpublished), *cert. denied*, 525 U.S. 814 (1998).

Because the Attorney General provided Plaintiff with the same information available to those in attendance at the limited press conference through a livestream—in real time—no denial of "equal access" occurred or is threatened in the future. Plaintiff has the same access to the message conveyed and the

information disclosed by the Attorney General at the press conference as all other news media and members of the general public.

B. There is no First Amendment right to interact with a government official at a press conference.

Plaintiff's claim thus boils down to a complaint that he did not and will not have an opportunity to ask questions and informally interact with the Attorney General at an in-person press conference. The claim to a "right of interaction," however, has no constitutional footing.

Neither the press nor members of the general public have a constitutional right to interact with a government official at a press conference. The Supreme Court has never recognized a constitutional obligation for a government official to disclose government-held information, to respond to a particular reporter in a press conference, or to otherwise interact with the media. To the contrary, the Supreme Court has broadly rejected the idea that a government official has a constitutional obligation to divulge *any* information to the press, which would undoubtedly encompass the ability to refuse to answer a targeted question by the media without violating the First Amendment. *Houchins*, 438 U.S. at 11 (the right to gather news from any source by means within the law "affords no basis for the claim that the First Amendment compels others—private persons or governments—to supply information"); *see also McBurney*, 569 U.S. at 232.

The Supreme Court has also rejected the notion that members of the public have a right to force officers of the State acting in an official policymaking capacity to listen to their views, holding that "nothing in the First Amendment or in this

Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 286 (1984). Thus, with neither the obligation to listen nor respond to the press, Plaintiff's complaint that he was unable to "informally interact" with the Attorney General at the press conference, or that his assertion that he may be unable to do so in the future, fails to state a claim.

Not only has the Supreme Court refused to acknowledge a "right to interact," but lower federal courts have consistently rejected "right to interact" claims under the First Amendment. For example, in *Baltimore Sun Co. v. Erhlich*, the Fourth Circuit held that the Maryland governor and other officials did not violate the First Amendment by instructing public employees not to talk to a newspaper and two of its reporters because of plaintiffs' alleged lack of objectivity, which had resulted in officials' refusal to answer the reporters' questions and the exclusion of one reporter from a small press briefing. 437 F.3d 410, 415–16 (4th Cir. 2006). Likewise, a federal district court held that a city's mayor could exercise her right not to speak with certain reporters and decline to comment on behalf of the city to the media without violating the First Amendment. *Raycom Nat'l v. Campell*, 361 F.Supp.2d 679, 683–84 (N.D. Ohio 2004); *see also Danielson v. Huether*, 355 F.Supp.2d 849 (Dist. S.D. 2018) ("government officials have no First Amendment obligations to respond to a particular reporter"); *Alaska Landmine v. Dunleavy*, 514 F.Supp.3d

1123, 1133 (D. Alaska 2021) (holding that a right of interaction is not protected by the First Amendment).

Indeed, a right to interaction would intrude on the government's right and ability to convey *its* message, which the Supreme Court has repeatedly recognized, *see, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009); *Rust v. Sullivan*, 500 U.S. 173 (1991), and would be "inconsistent with the journalist's accepted role in the 'rough and tumble' political arena," *Baltimore Sun Co.*, 437 F.3d at 419. As the Fourth Circuit explained, public officials regularly choose among reporters when granting interviews or disclosing nonpublic information, and reporters are accustomed to ingratiating themselves with these officials. *Id.* at 417–19. Accordingly, the Court rejected the notion "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." *Id.* at 419. Not only is it a "common and widely accepted practice among politicians [to] grant an exclusive interview to a particular reporter" but it is an "equally widespread practice of public officials declining to speak to reporters whom they view as untrustworthy because the reporters have previously violated a promise of confidentiality or otherwise distorted their comments." *Snyder v. Ringgold*, 133 F.3d 917 (4th Cir. 1998) (unpublished).

II. Plaintiff lacks standing to seek injunctive relief.

Plaintiff lacks standing to seek injunctive relief because a past incident does not constitute the real and immediate threat of future injury necessary to make out a case or controversy justifying injunctive relief unless it featured unlawful conduct.

As the party invoking the Court's jurisdiction, Plaintiff has the burden to establish standing "for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

It is well-settled that a plaintiff cannot rely on past instances of allegedly unlawful conduct to establish standing to obtain injunctive or declaratory relief. Even past *illegal* conduct "does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974). Setting aside the legality of the Attorney General's past conduct, Plaintiff alleges no such "present, adverse effects" here. More fundamentally, a plaintiff who can point to no concrete threat of future injury (such as enforcement of an allegedly unconstitutional statute) can rely on past conduct to establish a likely future injury only where that past conduct was wrongful: "[P]ast *wrongs* are evidence bearing on whether there is a real and immediate threat of repeated injury." *Id.* Here, for the reasons demonstrated above, Plaintiff has plead facts demonstrating that no past wrongs occurred. Accordingly, Plaintiff has no grounds justifying federal court jurisdiction over a claim for injunctive relief. This jurisdictional defect is a separate basis for dismissing the complaint.

Conclusion

Plaintiff's suit should be dismissed because he has failed to allege a violation of the First Amendment and his allegations negate any legitimate basis for prospective relief.

Respectfully submitted,

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