

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

THE ARKANSAS TIMES, INC.;
NORTHWEST ARKANSAS
CHAPTER OF THE SOCIETY OF
PROFESSIONAL JOURNALISTS;
and MAX BRANTLEY

PLAINTIFFS

v.

No. 5:07-CV-195 SWW

LARRY B. NORRIS, DIRECTOR,
ARKANSAS DEPARTMENT OF
CORRECTION

DEFENDANT

BRIEF IN SUPPORT OF THE DEFENDANT'S MOTION TO DISMISS

I. Introduction

This is a First Amendment lawsuit brought pursuant to 42 U.S.C. § 1983 by a newspaper, its editor, and a group of journalists seeking access to activities surrounding Arkansas executions from the time the condemned inmate enters the execution chamber until he or she is declared dead. The Arkansas Department of Correction (“ADC”) is responsible for executing felons who have been sentenced to death by the courts of this State. Ark. Code Ann. §§ 5-4-617 & 12-28-102. Arkansas administers the death penalty by lethal injection, Ark. Code Ann. § 5-4-617(a)(1), in an execution chamber located in one of the ADC’s penitentiaries, Ark. Code Ann. § 12-28-102. As the director of the ADC, Defendant Larry B. Norris is its “executive, administrative, budgetary, and fiscal officer,” and supervises the administration of its institutions, facilities, and services. Ark. Code Ann. § 12-27-107. Arkansas law requires him to determine the procedures used during executions. Ark. Code Ann. § 5-4-617(a)(2). The gist of the Plaintiffs’ Complaint is that Mr. Norris unconstitutionally denies them access to the ADC’s execution chamber

by keeping a window curtain between the chamber and an adjoining witness room closed until IV lines are established and the execution is ready to begin. (Complaint, ¶16.C)

Plaintiffs Arkansas Times, Inc., and the Northwest Chapter of the Society of Professional Journalists assert that they have a First Amendment right of access to the ADC's execution chamber "to inform the public and to report the news." (Complaint, ¶¶ 4 & 5) Plaintiff Max Brantley is a newspaper editor who asserts that he too has a right to inform the public and report the news. (Complaint, ¶ 6) Mr. Brantley further asserts that he is a citizen who has a right "to receive information about an execution through the access provided to the press." (Complaint, ¶6)

The United States Supreme Court has held that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (state prisons); *see also Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (federal prisons). Thus, any First Amendment right of access to information within prison walls is the same for the press and the public. There is no difference between any right of access to the ADC's execution chamber possessed by Mr. Brantley as a citizen on one hand and any such right possessed by both Mr. Brantley as a newspaper editor and the Northwest Chapter of the Society of Professional Journalists on the other. As demonstrated below, the United States Supreme Court has already rejected the contention put forward by Plaintiffs here that the Constitution guarantees prison access. Accordingly, Defendant respectfully submits that the Complaint should be dismissed.

II. Standard of Review

Federal Rule of Civil Procedure 8(a)(2) requires a plaintiff to submit a statement of his claim “showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests[.]” *Bell Atlantic Corporation v. Twombly*, 127 S.Ct. 1955, 1964 (2007) (citation and internal punctuation marks omitted). Absent such a showing by the plaintiff, his complaint must be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. A plaintiff’s obligation to provide the grounds of his entitlement to relief “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action” will not satisfy Rule 12(b)(6). *Id.* at 1964-65. “In considering a motion to dismiss, courts accept the plaintiff’s factual allegations as true, but reject conclusory allegations of law and unwarranted inferences.” *Silver v. H&R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997). “At the very least . . . the complaint must contain facts which state a claim as a matter of law and must not be conclusory.” *Briehl v. General Motors Corp.*, 172 F.3d 623, 627 (8th Cir. 1999). Because the present Complaint does not meet these requirements it should be dismissed.

III. The Plaintiffs have failed to state any claim against Mr. Norris in his individual capacity.

Plaintiffs’ Complaint names “Larry B. Norris, Director, Arkansas Department of Correction” as the Defendant (Complaint, p. 1), but the Complaint does not indicate whether Mr. Norris is sued in his official or individual capacity. In *Nix v. Norman*, the Eighth Circuit made clear that, if a complaint fails to specify the capacity in which an official is sued, it will be interpreted by the courts as suing the official only in his official capacity. *Id.*, 879 F.2d 429, 431 (8th Cir. 1989) (complaint naming “Bobby Norman,

Arkansas Commission on Law Enforcement Standards” was held to be a suit against Mr. Norman in his official capacity only); *see also Egerdahl v. Hibbing Community College*, 72 F.3d 615, 619 (8th Cir. 1995) (same). Likewise, Plaintiffs’ Complaint must be interpreted as suing Mr. Norris only in his official capacity.

IV. In his official capacity, Mr. Norris has sovereign immunity from suit for damages, including nominal damages, pursuant to the Eleventh Amendment, and he is not amenable to suit for damages under 42 U.S.C. § 1983.

Plaintiffs’ prayer for money damages against Mr. Norris in his official capacity is plainly barred by sovereign immunity under the Eleventh Amendment and must be dismissed. *See, e.g., Thomas v. Gunter*, 32 F. 3d 1258, 1261 (8th Cir. 1994). In addition to the well-established bar of sovereign immunity under the Constitution, the United States Supreme Court has also long held that the statute itself, 42 U.S.C. § 1983, precludes suits for damages, including nominal damages, against a public official in his official capacity. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 68-69 (1997); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 & n.10 (1989). Because Plaintiffs’ claim for damages is barred – by both statute and Constitution – it should be dismissed under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction and under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

V. The Plaintiffs have failed to state a cognizable claim for “viewpoint discrimination.”

Whether Defendant Norris is sued in his official or his individual capacity, Plaintiffs’ complaint in either event fails on the merits to state a cognizable First Amendment claim for “viewpoint discrimination.” Plaintiffs’ assertion that “[p]reventing [them] from viewing executions from beginning to end, or having the execution thus

viewed, is unconstitutional viewpoint discrimination in that it allows people to view the death penalty in only one certain way” does not state a valid legal claim upon which relief can be granted. (Complaint, ¶31) Federal courts have repeatedly held that a claim of “viewpoint discrimination” is a narrow one. The only relevant inquiry in a viewpoint discrimination suit is whether a speaker is prohibited from expressing his viewpoint in a government-owned forum. *See e.g., Good News/Good Sports Club v. School Dist.*, 28 F.3d 1501, 1507 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995). The Plaintiffs have not alleged (nor could they) that they have been prohibited from expressing any particular viewpoint whatsoever. The Plaintiffs also have not alleged (nor could they) that Mr. Norris determines how much access an individual may have to an execution based on the individual’s beliefs about the death penalty.

Plaintiffs’ Complaint rests in large measure on one case from another federal circuit court, but even that lone decision does not remotely support Plaintiffs’ claim of viewpoint discrimination. *California First Amend. Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002). Having failed to allege any facts upon which they could be entitled to relief on a theory of viewpoint discrimination, that claim should be dismissed. Fed.R.Civ.P. 12(b)(6).

VI. The Plaintiffs fail to state a First Amendment claim for denial of access to executions conducted in an Arkansas penitentiary.

In order to state a claim under the First Amendment for alleged denial of access to executions conducted inside a prison, Plaintiffs must establish that they have a recognized First Amendment right to such access. *Rice v. Kempker*, 374 F.3d 675, 680-81 (8th Cir. 2004) (holding that neither the public nor press has First Amendment right to take photographs, make videotapes, or make audiotapes of executions conducted inside a

prison). Under clearly established law, Plaintiffs have no such right, and their First Amendment claim should be dismissed.

It is undisputed that Arkansas carries out its executions inside a prison. *See* Ark. Code Ann. § 12-28-102. Indeed, the Plaintiffs themselves couch their claim in terms of prison access, alleging that prohibiting them from “viewing the execution from beginning to end” violates their “First Amendment right of access to prisons[.]” (Complaint, ¶ 21) The Plaintiffs’ allegation, however, is based on a false premise, i.e. that such a First Amendment right of access exists.

The Supreme Court has squarely rejected the proposition that the First Amendment provides such a right of prison access. *Houchins v. KQED, Inc.*, 432 U.S. 1, 14 (1978) (plurality opinion). In *Houchins*, the Court explained that the First Amendment itself does not mandate a right of access either to facilities or to information within the control of a governmental entity. *Id.*, 432 U.S. at 15-16. The Court left no doubt about this point:

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.

Id., 432 U.S. at 14.

Statutory law may open certain records to public access, but the First Amendment itself simply does not compel governmental entities, such as prisons, to supply access or information. *Id.*, 432 U.S. at 11. The General Assembly could make a policy decision to prohibit access to executions without violating the First Amendment. *Cf. Los Angeles*

Police Department v. United Reporting Publishing Corporation, 528 U.S. 32, 40 (1999) (“California could decide not to give out arrestee information at all without violating the First Amendment.”) Under the Supreme Court’s precedents, the State and its officials, including the Defendant, are free to open or close the curtain, limit entry to the witness room, and even to ban access to prison facilities.

Plaintiffs whole complaint rests upon a single, non-binding decision by a federal court in a California case, *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002), which misinterpreted and misapplied the Supreme Court’s holdings. In that California case, the Ninth Circuit mistakenly created from whole cloth a right of access to executions by concluding that access to prison executions was analogous to access to the criminal courtroom. *California First Amendment Coalition*, 299 F.3d at 877-78 (discussing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“*Press-Enterprise II*) and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).

Defendant respectfully submits that the Ninth Circuit’s analysis was fatally flawed. The Ninth Circuit first erred by applying a standard articulated by the United States Supreme Court in the quite different context of access to the criminal courtroom. In *Press-Enterprise II* the Supreme court reasoned that the public should be allowed access to criminal judicial proceedings held in places that “historically [have] been open to the press and general public[,]” if “public access plays a significant positive role in the functioning of the particular process in question.” *Id.*, 478 U.S. 8-9. In reaching its conclusion the Supreme Court noted several earlier decisions concerning public access to criminal judicial proceedings: *Richmond Newspapers*, 448 U.S. at 567 (“Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the

public”); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 611 n.27 (1982) (holding “that a rule of mandatory closure respecting the testimony of minor sex victims is constitutionally infirm”); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510-511 (1984) (“*Press-Enterprise I*”) (voir dire in a criminal case must be open to press and public unless trial court makes specific findings that an open proceeding would threaten the defendant’s right to a fair trial and the prospective jurors’ right to privacy and considers whether alternatives to closure are available to protect those interests). *Press Enterprise II*, 478 U.S. at 8-9.

The Ninth Circuit erred in extending the standard applied in *Press Enterprise II* and *Richmond Newspapers* from the criminal courtroom to the prison, which the Supreme Court had already many times noted was unique. As other federal courts have held, this test applies only in the context of criminal judicial proceedings. *See, e.g., Flynt v. Rumsfeld*, 355 F.3d 697, 703-04 (D.C. Cir. 2004). In *Flynt*, the United States Court of Appeals for the District of Columbia Circuit noted that the reasoning of *Richmond Newspapers* does not extend beyond criminal courtroom proceedings, holding that *Richmond Newspapers* did not guarantee press access in other contexts, such as military maneuvers. The *Flynt* court explained that the Supreme Court’s decision in *Houchins*, not its criminal courtroom cases, established the general standard for press and public access. As the D. C. Circuit noted, the general rule set forth by the Supreme Court in *Houchins* was that the First Amendment does *not* provide a right of access either to information or sources of information within the government’s control and that the only limited exception to this rule concerns access to criminal judicial proceedings. *Id.* at 704. Thus, the Ninth Circuit plainly erred in disregarding the Supreme Court’s holding in

Houchins that the press does not have a First Amendment right of access to information in the government's control, particularly information within a prison.

Mr. Norris respectfully submits that the Ninth Circuit compounded its error in ripping the *Press-Enterprise II* analysis from its proper context (in-court proceedings) by then misapplying that analysis. First, the Ninth Circuit disregarded essential facts making prisons unlike the courtroom. Prisons, as repeatedly noted by the Supreme Court, are neither open nor public places. *Richmond Newspapers*, 448 U.S. at 577 n.11; *see also Adderley v. Florida*, 385 U.S. 39, 41 (1966) (“Jails, built for security purposes, are not” open to the public). *See, also*, Ark. Code Ann. § 12-28-101(a)(1) (requiring Department of Correction to provide facilities for incarceration of offenders); Ark. Code Ann. § 12-28-106 (authorizing installation of electric fences at medium and maximum security prisons).

In addition, as the Ninth Circuit conceded, executions are not public events like a trial. “California abolished public executions in 1858, moving them within prison walls, and the last ‘town square’ execution in the United States took place in 1937.” *California First Amendment Coalition*, 299 F.3d at 875. The Supreme Court of Washington has held that the public does not have a right under that State’s constitution to attend executions conducted inside a prison. *Halquist v. Department of Corrections*, 113 Wn.2d 818, 820, 783 P.2d 1065, 1066 (1989). Likewise, the Arkansas General Assembly has decreed that “No execution of any person convicted in this state of a capital offense shall be public; but it shall be private.” Ark. Code Ann. § 16-90-502. This has been the law in Arkansas since 1887. Ark. Act No. 24 (1887) (executions “shall take place within an inclosure sufficient to prohibit the same from public observation.”) Since 1913, Arkansas

law has required executions to be conducted inside prison walls. Ark. Act No. 55 (1913). The Supreme Court has left no doubt that a State legislature, “in its wisdom, and for the public good,” may prohibit public access to executions. *Holden v. Minnesota*, 137 U.S. 483, 491 (1890) (holding that Minnesota’s restriction of access to executions did not violate the ex post facto clause). Prisons are not public, and executions conducted within them certainly are not.

Second, the Ninth Circuit also misapplied *Press-Enterprise II* on the role of the public in the executions. Plaintiffs themselves refer to common law executions as “spectacles.” (Complaint, ¶12) Indeed, the Ninth Circuit describes a 40,000 member crowd at an 1807 English execution as “disorderly.” *California First Amendment Coalition*, 299 F.3d at 875. It is difficult to imagine any benefit that could have resulted from having mobs attend executions. Arkansas has prevented executions from becoming “spectacles” by moving them inside a prison.

Plaintiffs allege that granting them access to particular procedures would provide them with information that would foster public debate about the death penalty and how it is carried out. True or not, that allegation completely fails to state a First Amendment claim. “First Amendment rights to ‘freedom of speech, [and] of the press’ do not create any per se right of access to government property or activities simply because such access might lead to more thorough or better reporting.” *JB Pictures, Inc. v. Department of Defense*, 86 F.3d 236, 238 (D.C. Cir. 1996) (holding that Department of Defense policy of allowing families of soldiers killed abroad to prevent the press from attending the return of soldiers’ bodies to the United States is consistent with the First Amendment). “The right to speak and publish does not carry with it the unrestrained right to gather

information.” *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) (holding that the secretary of state’s refusal to validate plaintiff’s passport for travel to Cuba for purported purpose of acquainting himself with the effects of the government’s policies regarding that country did not violate the First Amendment). “[There] are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.” *Id.*, 381 U.S. at 16-17. “For example, the prohibition of unauthorized entry into the White House diminishes the citizen’s opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right.” *Id.*, 381 U.S. at 17. Neither is entry into an Arkansas prison for the purpose of witnessing an execution.

The fostering of debate about an issue of public concern may be a laudable goal, but it does not create a First Amendment right of access where none otherwise exists. “Unarticulated but implicit in the assertion that media access to the jail is essential for informed public debate on jail conditions is the assumption that media personnel are the best qualified persons for the task of discovering malfeasance in public institutions.” *Houchins*, 432 U.S. at 13-14. “But that assumption finds no support in the decisions of this Court or the First Amendment.” *Id.*, 432 U.S. at 14. Even if it were a good idea to keep the curtain open for the viewing of certain events, the First Amendment would not require Defendant to do so. “We must not confuse what is ‘good,’ ‘desirable,’ or ‘expedient’ with what is constitutionally commanded by the First Amendment.” *Id.*, 432 U.S. at 12. “To do so is to trivialize constitutional adjudication.” *Id.*

The Ninth Circuit misapplied both prongs of the *Press-Enterprise II* test. No other court has ever held that the First Amendment compels public or media access to

prison procedures. Lacking substantial support in the United States Supreme Court's long history of First Amendment decisions, Plaintiffs' Complaint should be dismissed for failure to state a claim. Fed.R.Civ.P. 12(b)(6).

VII. Conclusion

Whether Arkansas should keep the curtain open from the time a condemned prisoner enters the execution chamber is a question of policy for the Arkansas General Assembly and state officials and not a question governed by the First Amendment. *Houchins*, 432 U.S. at 12 (“Whether the government should open penal institutions in the manner sought by respondents is a question of policy which a legislative body might appropriately resolve one way or the other.”) Having failed to state facts that would entitle them to relief under the law, Plaintiffs' suit should be dismissed for each of the reasons set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, C. Joseph Cordi, Jr., certify that on August 17, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to:

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