No. 19-50577

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EMPOWER TEXANS, INCORPORATED; BRANDON C. WALTENS; DESTIN R. SENSKY,

Plaintiffs – Appellants,

v.

CHARLIE L. GEREN, in his official capacity as Chairman of the Committee on House Administration of the Texas House of Representatives,

Defendant – Appellee

On Appeal from the United States District Court for the Western District of Texas, The Honorable Lee Yeakel
Case No. 1:19-CV-422

BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in Rules 28.2.1 and 29.2 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

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Dated: August 21, 2019
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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae is the Reporters Committee for Freedom of the Press (the "Reporters Committee"). As a representative of the news media, the Reporters Committee has an interest in this case. The Western Division of Texas District Court's failure to recognize that individual decisions about press credentials that go beyond the four corners of legislative rules are administrative, not legislative, decisions imperils the ability of reporters across the country to cover state and local legislative bodies. Additionally, courts have repeatedly recognized that, even if these decisions are legislative, some conduct—including the viewpoint discrimination alleged in this case—is so far beyond the constitutional pale that courts may intervene.

SOURCE OF AUTHORITY TO FILE

Amicus has moved for leave to file this brief in the accompanying motion pursuant to Federal Rule of Appellate Procedure 29(a)(3). Counsel for Plaintiffs-Appellants has consented to the filing of this brief. Counsel for Defendant-Appellee does not oppose the filing of this brief.

RULE 29(A)(4)(E) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* declare:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than *amicus*, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Legislative immunity serves the important function of preserving the independence of lawmakers, but it is not without limits. It applies only to "legislative," not "administrative," actions taken by legislators. *National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 629 (1st Cir. 1995). Legislative acts—such as voting and debating legislation—are based on "legislative facts" and result in broad policies applicable to many. *Hughes v. Tarrant Cty. Tex.*, 948 F.2d 918, 921 (1991). Conversely, administrative acts are based on specific facts and apply to a specific individual or entity. *Id*. at 921.

When a legislator simply applies a broad rule to an individual or entity, this is a legislative act, and legislative immunity applies. *See, e.g.*, *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1350–51 (D.C. Cir. 1975); *Bryan v. City of Madison, Miss.*, 213 F.3d 267, 274 (5th Cir. 2000). But when—as is alleged here—a legislator goes beyond the four corners of a rule of general applicability to make a decision about an individual, this is an administrative decision not subject to absolute immunity. *Harwood*, 69 F.3d at 631. Plaintiffs here have alleged that Defendant Charlie Geren, Chairman of the Committee on House Administration, went beyond the four corners of House Rule 5—an allegation which, if true, would remove his decision from the protection of

legislative immunity as more than a mere application of a legislative rule. Therefore, the district court erred in granting Geren's motion to dismiss.

Further, courts have recognized that even in cases involving legislative actions where absolute immunity would normally attach, if such actions are "wholly irresponsible and undemocratic," absolute immunity may not shield legislators from liability. *Bryan*, 213 F.3d at 274; *Harwood*, 69 F.3d at 634. Viewpoint discrimination, which "is censorship in its purest form" and "threatens the continued validity of 'free speech,'" is so egregious a constitutional violation that even "absolute" legislative immunity must yield. Here, because Plaintiffs made a colorable claim of viewpoint discrimination, the district court erred in dismissing this case, even if Geren's decision to withhold press credentials from Plaintiffs was "legislative" rather than "administrative."

For the reasons set forth herein, the Reporters Committee respectfully urges the Court to reverse the district court's order.

ARGUMENT

I. Press credential decisions not pursuant to a general, viewpoint-neutral policy are particularized decisions based upon individual facts, and are thus administrative acts to which absolute legislative immunity does not attach.

Promulgated in the Speech and Debate Clause of the U.S. Constitution for federal legislators, legislative immunity has a common law corollary that applies to members of state and local legislative bodies. *National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 629 (5th Cir. 1995). This immunity—meant to protect the independence of the legislative process by shielding legislators from liability for acts integral to the process of making law—is not without limit. *Id.* at 629–30; *Bryan v. City of Madison, Miss.*, 213 F.3d 267, 272–73 (5th Cir. 2000). Absolute legislative immunity "protects 'only purely legislative activities.'" *Harwood*, 69 F.3d at 630 (quoting *United States v. Brewster*, 408 U.S. 501, 507 (1972)); *U.S. v. Brewster*, 408 U.S. 501, 513–15 (1972) ("In no case has this Court ever treated the [Speech and Debate] Clause as protecting all conduct relating to the legislative process."). Absolute legislative immunity does not attach to mere administrative actions of legislators. *See Bryan*, 213 F.3d at 272–73.

An action is legislative "[i]f the underlying facts on which the decision is based are 'legislative facts,' such as 'generalizations concerning policy or state of affairs'" and "[i]f the action involves establishment of a general policy" rather than

"singl[ing] out specific individuals[.]" *Hughes v. Tarrant Cty. Tex.*, 948 F.2d 918, 921 (5th Cir. 1991); *see also Bryan*, 213 F.3d at 273. On the other hand, an action is administrative "[i]f the facts used in the decisionmaking are more specific, such as those that relate to particular individuals or situations" and where a specific individual is "single[d] out." *Hughes*, 948 F.2d at 921. Such administrative decisions include "enforcement" actions. *Bryan*, 213 F.3d at 273.

Courts have held that where a legislature creates a rule and a legislator acts simply to apply the rule to an individual or entity, this action is best seen as legislative. *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1350–51 (D.C. Cir. 1975). This is because such decisions are part and parcel "of a larger general plan." *Bryan*, 213 F.3d at 274. But where a legislator acts "not pursuant to rules validly enacted" by the applicable legislative body in making a decision about an individual or entity, those actions are no longer legislative, but administrative. *Consumers Union*, 515 F.2d at 1350. When a legislator goes beyond the strict confines of general policy and uses alternative means to make such a decision, the legislator is necessarily engaging in use of specific facts about an individual to make the decision and is no longer acting in a way that "d[oes] not place [the aggrieved party] in any less advantageous position than . . . the press generally[.]" *Cf. id*. at 1347 (finding that because application of

a press credentialing policy "w[as] based on distinctions applied to it as well as to others in similar situations," such application was covered by legislative immunity).

Where legislators and other decisionmakers faithfully follow a larger scheme set out by the legislative body in making particularized decisions, courts consistently find that these decisions are legislative, not administrative. In *Consumers Union*, the D.C. Circuit held that a decision by an association delegated by Congress to make determinations about who would receive congressional press credentials was a legislative act because it was made "pursuant to rules validly enacted by Congress." *Id*. at 1350. In so holding, the court prominently noted the parties' concession that the association in question had acted in good faith. *Id*. In other words, there was no allegation that the association had gone beyond the confines of the congressional rules regarding qualification for press passes. Similarly, in *Brown v. Crawford County, Ga.*, where a Board of Commissioners instituted a moratorium on mobile home permits that led to a land developer not being able to secure such permits to follow through with his planned development, the Eleventh Circuit held that the developer's inability to pursue his plans was an unfortunate result of a decision "of general application." 960 F.2d 1002, 1012

(11th Cir. 1992). Therefore, the decision was legislative and subject to legislative immunity. *Id.*

Similarly, in *Reeder v. Madigan*, Illinois legislative officials denied a journalist's request for press credentials pursuant to a general rule against credentialing press with ties to lobbying organizations. 780 F.3d 799, 801–02 (7th Cir. 2015). While Reeder argued the officials were mistaken about his ties to lobbyists, he did not argue that the officials had acted contrary to the rule. *Id.* Thus, the Seventh Circuit found that the officials' application of the general rule to Reeder was legislative because they only carried out the general rules of the legislative body. *Id.* at 805 (quoting *Harwood*, 69 F.3d at 631).

Finally, in *Harwood*, where the Rhode Island House of Representatives had promulgated a rule preventing lobbyists from accessing the floor of the House of Representatives, and the Speaker of the House and head doorkeeper had enforced this rule against plaintiffs, the First Circuit held that this was a legislative action. *Harwood*, 69 F.3d at 631. As the First Circuit explained, the actions at issue in *Harwood* were legislative because the defendants had "do[ne] no more than carry out the will of the body by enforcing the rule as part of their official duties." *Id.*

Harwood and *Consumers Union* suggest that where a legislator or other legislative employee does more than carry out a general rule promulgated by the

legislative body, such decisions are no longer legislative. And that is exactly how other courts—including this Court—have ruled: Where legislators and other decisionmakers make particularized decisions beyond the bounds of a larger legislative scheme, such decisions are administrative and not subject to absolute legislative immunity.

In *Bond v. Floyd*, the Supreme Court found jurisdiction to review a decision by the Georgia House of Representatives to exclude a representative because the majority of legislators felt that the representative could not sincerely take his required oath. 385 U.S. 116, 130 (1966). The *Bond* Court agreed that legislators could prevent a representative from sitting if he did not take the oath, pursuant to the United States and Georgia constitutions, but specified that going beyond these constitutional provisions to testing the sincerity by which a representative took the oath removed the action from those legislative decisions over which the courts have no jurisdiction. *Id*. at 131–32. This Court similarly held in *Bryan* that several decisions applicable to a particular individual and not made in accordance with a generalized policy were also not legislative acts. 213 F.3d at 273–74. First, the *Bryan* court found that a mayor's repeated vetoes of the determinations of a board of aldermen that the plaintiff's development plan accorded with local zoning were administrative acts because they did not relate to a general rule, such as an overall

zoning plan, but instead were particularized to the plaintiff. *Id*. at 273.[1] Second, the Court found that a mayor's delayed decision on the approval of plaintiff's plan was administrative, not legislative. *Id.* at 274. And, third, the Court found that a vote to apply for rezoning was also not legislative in nature, but was more "like ad hoc decisionmaking" versus "the formulation of a policy." *Id.*

Courts have also used this approach in determining when an employment decision is legislative and when it is administrative. In contexts in which an employee has been terminated pursuant to a larger plan, such as passing a new budget, these decisions are legislative and subject to absolute immunity. *See, e.g Rataree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988); *Almonte v. City of Long Beach*, 478 F.3d 100, 107–08 (2d Cir. 2007) (finding that "to the extent that Plaintiffs' §§ 1983, 1985, and 1986 claims relate to the legislative termination of the budget lines for their positions," legislative immunity applies); *see also Bogan v. Scott-Harris*, 523 U.S. 44, 55–56 (1998) (holding that voting on an ordinance that eliminated an entire department to be legislative). On the other hand, where

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[1] Importantly, this decision was not based on the mayor's status as an executive official, as the mayor was serving in a legislative function. *Bryan*, 213 F.3d at 272. In fact, the *Bryan* court noted that it had previously held that a mayor's veto of a general rezoning ordinance was protected by legislative immunity. *Id*. at 273; *see also Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981).

an employee has been terminated individually, not pursuant to a general plan, these decisions are administrative and legislative immunity does not apply. *See, e.g.*, *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1, 7–9 (1st Cir. 2000); *Fowler-Nash v. Democratic Caucus of Pa. House of Representatives*, 469 F.3d 328, 338–40 (3d Cir. 2006); *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1220–21 (9th Cir. 1996).

This Court should approach press credentialing decisions in a similar manner. When a legislature enacts a broad policy that seeks to limit lobbyists' physical access to legislative proceedings, and applies that policy consistently and in good faith, such applications are legislative decisions, subject to legislative immunity. *Harwood*, 69 F.3d at 629–30; *but see Bryan*, 213 F.3d at 274 (noting that "at some point, when a legislature acts in a wholly irresponsible and undemocratic manner" legislative immunity may "dissipate[]" even regarding legislative acts). Similarly, when a legislator or aide denies press credentials to a journalist because of ties to a lobbying organization, and does so pursuant to a general policy, acting within the confines of the rule, this is also a legislative act subject to legislative immunity. But where a legislator goes beyond general policies to deny press credentials not based on application of general rules, but based on facts specific to that journalist—such as the content of that journalist's

reporting—this is not a decision pursuant to the "determination of a policy" and thus is administrative, not legislative. *Bryan*, 213 F.3d at 273.

To approach issues of press credentialing differently would be to invite content-based or viewpoint discrimination against the press within legislative bodies across the country. Instances of news media being denied press passes because of critical, but important, reporting has been on the rise. *See, e.g.*, *Denial of Access*, U.S. Press Freedom Tracker, https://perma.cc/WL8T-R7JM (last visited Aug. 21, 2019) (collecting cases of reporters being denied access, including instances of denial or revocation of press passes); Paul Farhi, *White House imposes new rules on reporters' credentials, raising concerns about access*, Wash. Post (May 8, 2019), https://perma.cc/S5SC-ENUL; *Iowa House's Decision to Deny Influential Blogger Laura Belin a Press Pass a Disturbing Limitation on First Amendment Rights*, PEN America (Jan. 28, 2019), https://perma.cc/N7GT-96U4. A contrary rule would deny the news media any redress when reporters are denied access to legislatures, legislators, and the legislative process because of public interest reporting that officials perceive as critical. That would place the legislative branch above both the executive and judicial branches, where viewpoint-based denials of access would not be so immunized.

Here, Empower Texans alleges that Geren's decision to withhold press credentials from Brandon Waltens and Destin Sensky went beyond mere application of House Rule 5, and was in fact viewpoint discriminatory. Therefore, this matter is not, as the district court held, the simple manifestation of a general policy, which could be considered a legislative act. *Empower Texans*, No. 1:19-CV-422-LY, 2019 WL 2234793, at *7 (W.D. Texas, May 23, 2019). Rather, if Empower Texans' allegations are true and Geren went beyond the boundaries of House Rule 5, his actions should not be shielded by absolute legislative immunity. Therefore, because Empower Texans has stated a colorable claim to which, if true, legislative immunity would not apply, the district court erred in dismissing its suit on a Rule 12(b)(6) motion, and this Court should reverse.

II. Bad faith denials of press credentials are a form of viewpoint discrimination and are therefore particularly egregious First Amendment violations where even "absolute" legislative immunity must "dissipate"

As noted above, when they do so consistently and pursuant to a general policy, legislatures may take steps to insulate legislative deliberations from lobbying pressures, and may do so while enjoying absolute legislative immunity. But when legislators go beyond such a policy and retaliate against specific members of the press whom they perceive as critical, the denial of press credentials constitutes viewpoint discrimination, which is "an egregious form" of content

discrimination under the First Amendment. *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828-29 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting) ("Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'").

Courts, including this Court, have recognized that even in cases where legislative immunity attaches, a legislature may act in such "a wholly irresponsible and undemocratic manner" that legislative immunity "dissipates" because "it is no longer operating as a legislature, as we understand the term." *Bryan*, 213 F.3d at 274. Viewpoint discrimination is so egregious that, when it occurs, even with respect to "legislative acts," legislative immunity must indeed dissipate. A denial of press credentials because of the viewpoint of the relevant member of the news media is quintessential viewpoint discrimination. *See also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978) ("Especially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.").

Viewpoint discrimination by any branch of government is so disfavored that even speech belonging to the traditional categories that may be regulated based on their content, such as obscenity or fighting words, may not be regulated based on the viewpoint expressed. *United States v. Stevens*, 559 U.S. 460, 468–69 (2010). In *R.A.V. v. St. Paul*, for instance, the Supreme Court struck down the St. Paul Bias-Motivated Crime Ordinance, which created a misdemeanor for anyone who places on public or private property a symbol such as a burning cross, "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." 505 U.S. 377, 378-79 (1992). The Minnesota Supreme Court had earlier upheld the ordinance by construing it narrowly to apply only to "fighting words," that is, words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *See In re Welfare of S.L.J.*, 263 N.W.2d 412 (Minn. 1978) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

R.A.V. holds that even when a class of speech is proscribable—such as "fighting words"—the government may not constitutionally punish only one perspective or viewpoint. *R.A.V.*, 505 U.S. at 394 ("Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas."). The government may regulate fighting words, but it may not regulate

only fighting words that provoke violence "on the basis of race, color, creed, religion or gender." *Id.* at 391. The allegations of bad faith in this case—that is, an attempt to disadvantage one particular disfavored news outlet through the denial of press credentials—raise similar concerns.

It would be perverse for the legislative branch to be able to blatantly engage in viewpoint discrimination when fulfilling its legislative function when analogous conduct by the executive or judicial branches is subject to constitutional review. Indeed, even indirect attempts by other branches of government to suppress a news outlet in retaliation for perceived negative coverage have been found to violate the First Amendment. In *Rossignol v. Voohar*, for instance, the Fourth Circuit found that a plan among sheriff's deputies to purchase every copy of an election-day newspaper, which included unflattering coverage of the deputies, supported a claim under 42 U.S.C. § 1983 for First Amendment retaliation. 316 F.3d 516, 523 (4th Cir. 2003) ("The defendants' scheme was thus a classic example of the kind of suppression of political criticism which the First Amendment was intended to prohibit.").

Importantly, the Supreme Court has consistently recognized that the Speech and Debate Clause exists to promote legislative independence, not to enshrine legislative supremacy or to permit the legislature to violate other, core

constitutional precepts such as the prohibition on viewpoint discrimination. *See Brewster*, 408 U.S. at 508 ("Our speech or debate privilege was designed to preserve legislative independence, not supremacy."). In *Powell v. McCormack*, for instance, the Supreme Court held that the House of Representatives could not refuse to seat a member who had been duly elected and who was not ineligible to serve under any provision of the Constitution. 395 U.S. 486, 489 (1969). The Court expressly discussed the application of the Speech and Debate Clause to the underlying legislative act. The Court wrote: "Legislative immunity does not, of course, bar all judicial review of legislative acts." *Id.* at 503. Similarly, in the earlier exclusion case discussed above, *Bond v. Floyd*, the Supreme Court did not even address whether the Speech and Debate Clause limited its ability to find that the Georgia House of Representatives had violated the First Amendment in excluding a member in retaliation for comments made on issues of public concern. 385 U.S. 116 (1966).

Even courts that acknowledge the broad sweep of legislative immunity recognize that some actions by a legislature may be so beyond the constitutional pale that the judiciary may intervene. "The Court has explicitly recognized that there may be some conduct, even within the legislative sphere, that is so flagrantly violative of fundamental constitutional protections that traditional notions of

legislative immunity would not deter judicial intervention." *See Harwood*, 69 F.3d at 634; *see also Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) ("It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible.").

The allegations of bad faith in this case, if true, would constitute viewpoint discrimination, which the First Amendment prohibits. Legislators who enforce policies in a viewpoint discriminatory manner are using the levers of government power to skew public opinion in their favor, and such conduct therefore poses an immediate threat to democratic governance. As such, the denial of press credentials based not on the application of a generally applicable anti-lobbying rule, but in retaliation for disfavored reporting by the member of the news media, would be so egregious a constitutional violation that even "absolute" legislative immunity must yield. Accordingly, although this Court should hold that such decisions are "administrative," as discussed in Part I of this brief, irrespective of whether this was a "legislative" or "administrative" act, the district court erred in dismissing this case on a motion under Rule 12(b)(6).

CONCLUSION

For the foregoing reasons, *amicus curiae* urge this Court to reverse the district court's order granting Defendant's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Bruce D. Brown, do hereby certify that the foregoing brief of *amici curiae*:

1) Complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 3,576 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Local Rule 32.2, as calculated by the word-processing system used to prepare the brief; and
2) Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Local Rule 32.1 and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point, Times New Roman font.

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Dated: August 21, 2019
Washington, D.C.

CERTIFICATE OF SERVICE

I, Bruce D. Brown, do hereby certify that I have filed the foregoing electronically with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system on August 21, 2019.

I certify that on this 21st day of August 2019, a copy of the foregoing has been served upon counsel for all parties to this proceeding as identified below through the court's electronic filing system as follows:

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