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April 13, 2020

VIA EMAIL

Jennifer A. Sink
Chief Legal Officer
City of Memphis
125 N. Main St. Room 336
Memphis, TN 38103

Re: City of Memphis Media Advisory List

Dear Ms. Sink:

On March 16, 2020, I wrote on behalf of my client MLK50: Justice Through Journalism (“MLK50”), a non-profit, award-winning, Memphis-based online news organization, regarding the City of Memphis’s (the “City”) refusal to include MLK50 on the City’s media advisory list. I have yet to receive a response. In the four weeks since my last letter, the City has continued its refusal to add MLK50 to its media advisory list. The City also has exacerbated the problem by refusing to add MLK50 to the list of journalists who are receiving emails with log-in information for the virtual press conferences being held by the Joint COVID-19 Task Force, despite a request from Shelby County (the “County”) that it do so. This ongoing course of action violates MLK50’s First Amendment rights, its rights under Article 1, Section 19 of the Tennessee Constitution, and the *Kendrick* Consent Decree. I urge you to remedy this situation, which is entirely in the City’s control, immediately.

The City’s conduct toward MLK50 is clearly motivated by a perception that the content of MLK50’s coverage is somehow unfair or “not objective.” Indeed, the City’s Chief Communications Officer, Ursula Madden, expressly told MLK50’s Wendi Thomas in an email that Ms. Thomas had purportedly “demonstrated, particularly on social media, that you are not objective when it comes to Mayor Strickland.” This is not a legal justification for excluding a reporter or news outlet from a press conference or press list. And the City’s recent course of conduct—including its failure to respond to my initial letter regarding its refusal to add MLK50 to the media advisory list, and its refusal of the County’s request to add MLK50 to the list of media given access to the Joint Task Force’s virtual daily press conferences—only reinforce the conclusion that the City is trying to punish MLK50 for the content of past coverage to which the City takes exception.

“Once there is a public function, public comment, and participation by *some* of the media, the First Amendment requires equal access to *all* of the media or the rights of the First Amendment would no longer be tenable.” *Am. Broad. Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (emphasis added); *accord Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986); *Getty Images News Servs. v. DOD*, 193 F. Supp. 2d 112, 122 (D.D.C. 2002). Thus, “when press access is granted to

some, others have a constitutional right to equal access,” and “particular journalists [may] not be singled out for exclusion but rather [are] entitled to access on the same terms as other journalists.” *Getty Images*, 193 F. Supp. 2d at 122; *Nicholas v. Bratton*, 376 F. Supp. 3d 232, 259 (S.D.N.Y. 2019) (“[W]henver an area is open to . . . some members of the press, the First Amendment restricts the government’s ability to selectively regulate the press’s access to that area.”); *see also Am. Broad. Cos.*, 570 F.2d at 1083 (once NBC and CBS were invited to cover a mayoral debate, ABC could not be excluded).

To be sure, the “right to equal access under the [F]irst [A]mendment is not absolute,” and “the interest to be served by the newsgathering activity at issue must be balanced against the [government’s] interest served by denial of that activity.” *Nicholas*, 376 F. Supp. 3d at 260. But the government has no legitimate interest in restricting access to media outlets based solely on the content or viewpoint of their reporting. *See Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (“[D]enial of a . . . press pass is violative of the first amendment . . . if it is based upon the content of the journalist’s speech or otherwise discriminates against a class of protected speech.”); *Borreca v. Fasi*, 369 F. Supp. 906, 907 (D. Haw. 1974) (enjoining mayor from barring journalist from press conferences where the mayor claimed the reporter “was irresponsible, biased, and malicious in reporting on the mayor and the city administration”); *Quad-City Cmty. News Serv., Inc. v. Jebens*, 334 F. Supp. 8, 13 (S.D. Iowa 1971) (citations omitted) (explaining that “public officials cannot impede the free exercise of speech or press simply because the content is insulting, disturbing or critical”); *cf. JB Pictures, Inc. v. DOD*, 86 F.3d 236, 239 (D.C. Cir. 1996) (rejecting claim that media access policy was “discriminatory” and “viewpoint-based” because it applied “in a uniform fashion to all members of the press and public, regardless of their views on war or the United States military”). Indeed, “[t]he danger in granting favorable treatment to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive,” which “is unquestionably at odds with the [F]irst [A]mendment.” *Anderson*, 805 F.2d at 9. Such content-based and viewpoint-based restrictions “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015).

Here, the City created the media advisory list to communicate with journalists regarding government conduct and issues affecting City residents. The list is now also being used to provide press access to the Joint COVID-19 Task Force’s daily virtual press conferences so that members of the press may ask questions during those important briefings. Despite the County’s request to add MLK50 to the media advisory list, the City has continued in its unjustified and unconstitutional viewpoint discrimination against MLK50.

The City’s refusal to add MLK50 to the media advisory list also violates the *Kendrick* Consent Decree. Paragraph (F)(1) of the *Kendrick* Consent Decree provides that “the City of Memphis shall not disrupt, discredit, interfere with or otherwise harass any person exercising First Amendment rights.” Similarly, Paragraph (F)(2) provides that “The City of Memphis shall not engage in any action for the purpose of, or reasonably having the effect of deterring any person from exercising First Amendment rights.” As outlined above, the City’s actions here interfere with MLK50’s exercise of its First Amendment rights, thus violating the *Kendrick* Consent Decree.

The City's ongoing, improper refusal to add MLK50 to its media advisory list ultimately harms City residents. Founded in 2017, MLK50 is part of ProPublica's Local Reporting Network, received the 2019 Best Practices Award from the National Association of Black Journalists, and was one of the first eleven recipients of grants from the American Journalism Project. MLK50's stories are not only carried on its website, but have also been published in *The Guardian*, on NPR, and in *The Commercial Appeal*, the latter of which has numerous journalists on the media advisory list. Both of the individual journalists MLK50 seeks to have included on the media advisory list are accomplished journalists in their own rights. Ms. Thomas has been a reporter or editor at several large daily newspapers, including *The Commercial Appeal*, was a 2016 fellow at the Nieman Foundation for Journalism, and won the 2020 Selden Ring Award for Investigative Reporting. Her colleague, Deborah Douglas, MLK50's managing editor, is likewise an accomplished journalist. Among other things, Ms. Douglas previously served as an editor for the *Chicago Sun-Times* and won the 2019 Studs Terkel Community Media Award. Simply put, by restricting MLK50's ability to engage in the kind of investigative reporting that has won it and its journalists awards and national recognition, the City's actions deprive City residents of important, in-depth reporting by MLK50 about the City.

The City's refusal to add MLK50 to the media advisory list violates MLK50's constitutional rights under both federal and state law and violates the *Kendrick* Consent Decree. MLK50 requests that three of its email addresses be added immediately to the City's media advisory list, including for the Joint Task Force: wendicthomas@mlk50.com, deb@mlk50.com and mlk50@mlk50.com. I request the professional courtesy of a response by Friday, April 17, 2020.

Best regards,

A handwritten signature in blue ink that reads "Paul R. McAdoo". The signature is written in a cursive, flowing style.

Paul R. McAdoo
Reporters Committee for
Freedom of the Press
Local Legal Initiative
Staff Attorney (Tennessee)
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