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for purposes of identification.*

April 29, 2021

Office of Governor Pete Ricketts

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VIA EMAIL

Re: Media credentialing process and access to press briefings for NOISE

Dear Mr. Gage:

The Reporters Committee for Freedom of the Press and the 13 undersigned media organizations and journalism professor write to express concern about your decision barring the news outlet known as North Omaha Information Support Everyone (NOISE) from the governor's press briefings due to your belief that it is "an advocacy organization funded by liberal donors" and not a mainstream news outlet,¹ and your subsequent adoption of a media credentialing application process. We hope this new process will not be used as a pretext to exclude NOISE and other news outlets based on their perceived viewpoints. We also write to encourage you to consider adopting a less onerous credentialing process with a view towards providing access to all bona fide journalists and news outlets, including NOISE.

The Reporters Committee is a nonprofit association 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 and the undersigned media organizations and professor have a strong interest in ensuring that government officials do not deny news outlets, like NOISE, access to press briefings for arbitrary reasons or due to the perceived viewpoint of their reporting. Decisions affecting such access have broad ramifications for all members of the news media and the public they serve.

As an initial matter, we respectfully note that the perception that NOISE might be an "advocacy organization" as opposed to a bona fide news outlet is mistaken. NOISE is a nonprofit news outlet dedicated to informing North

¹ Paul Hammel, *Denial of media credentials for North Omaha website raises questions*, Omaha World-Herald (Apr. 3, 2021), https://omaha.com/news/state-and-regional/govt-and-politics/denial-of-media-credentials-for-north-omaha-website-raises-questions/article_a91bef10-93e7-11eb-b7b8-db16ec2715a1.html.

Omaha residents about matters that affect them, providing “in-depth coverage of municipal, state, and federal government,” among other things.² NOISE adheres to the membership standards of the Institute for Nonprofit News (“INN”),³ which sets high journalistic standards and requires “editorial and organizational independence”:

INN members *do not advocate* or operate in a way that promotes any legislation, policies, government action or outcomes . . . Members avoid conflicts of interest that could compromise the integrity of the work. They lobby only for freedom of information and freedom of press issues.⁴

In any event, the First Amendment prohibits government officials from attempting to suppress a news outlet’s expression because of its viewpoint—or perceived viewpoint—and denying access to press conferences on these grounds is thus unconstitutional. *See, e.g., John K. MacIver Inst. for Pub. Pol’y, Inc. v. Evers*, No. 20-1814, 2021 WL 1324386, at *4–5, – F.3d – (7th Cir. Apr. 9, 2021) (upholding Wisconsin governor’s media access criteria after concluding they were reasonable and there was no evidence of viewpoint discrimination); *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (stressing that government restrictions must not aim to “suppress expression merely because public officials oppose the speaker’s view”). At a minimum, restrictions on media access to press conferences must be based on criteria that are “viewpoint neutral” and “reasonable in light of the purpose” of such conferences. *Evers*, 2021 WL 1324386, at *4 (quoting *Cornelius*, 473 U.S. at 806); *see also Johnson v. Malcolm*, No. 20-cv-1275, 2020 WL 3491711, at *6 (D. Minn. June 26, 2020) (finding that plaintiff had sufficiently alleged that government officials had revoked his press access due to his conservative “viewpoint or the content of his questions” and encouraging the parties to settle the matter).

Courts have also held that government officials may not deny journalists press credentials for “arbitrary” reasons or for the content of their reporting. *See, e.g., Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977). As one federal court of appeals explained:

The 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. Such a practice is unquestionably at odds with the [F]irst [A]mendment. Neither the courts nor any other branch of the government can be allowed to affect the content or tenor of the news by choreographing which news organizations have access to relevant information.

Anderson v. Cryovac, Inc., 805 F.2d 1, 9 (1st Cir. 1986).

² About NOISE, <https://www.noiseomaha.com/about>.

³ *Id.*

⁴ INN Membership Standards, <https://inn.org/for-members/membership-standards/> (emphasis added).

Accordingly, denying NOISE press credentials based on a belief that it has “liberal” funders and thus a “liberal” viewpoint unquestionably violates the First Amendment.

After publicity surrounding your denial of NOISE’s request for press credentials, we understand the governor adopted a new application process for media credentials citing “operational limits” and “security reasons.”⁵ While these reasons appear reasonable, members of the news media have understandably raised concerns, pointing out that questions in the application—such as whether the outlet is “entirely funded by advertising and/or subscription revenue”—bear no relationship to those stated reasons and are unduly invasive.⁶ Likewise, it is unclear why it might be relevant that the applicant is “a member of trade associations” or “engage[s] in editorial writing.” These questions go beyond the neutral criteria upheld as “reasonable” by the Seventh Circuit Court of Appeals in *Evers*, as well as rules adopted by the press galleries for the U.S. Congress (on which the *Evers* criteria were based in part).⁷ The need for the applicant to produce a notarized letter from its publisher and examples of the outlet’s work is similarly unusual and burdensome.

It is also unclear how credentialing decisions will be made based on a news outlet’s answers to these questions and whether such criteria will be applied consistently. Given the reasons you previously asserted for denying NOISE press credentials, we are concerned that this new application process may be used as a pretext to exclude NOISE and others whose perceived viewpoints are disfavored under the guise of “neutral” factors. Indeed, a number of these questions appear to target NOISE in particular, since unlike many traditional news outlets that rely on advertising or subscription revenue, NOISE is a nonprofit that relies on charitable contributions, and as an online-only outlet, it is not a member of the Nebraska Press Association. “The existence of reasonable grounds for limiting access . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination.” *Cornelius*, 473 U.S. at 811.

Nor should NOISE be excluded merely because it publishes exclusively online, as this would be arbitrary and unreasonable in the modern world, where news outlets increasingly eschew print editions and publish online to save money.⁸ The function a news outlet serves—providing news and commentary about pressing issues to the public—is plainly more important than the medium it uses. Excluding such news outlets

⁵ Governor’s Office Media Credentialing Application, <https://www.dropbox.com/s/bunsevb2esq4wg3/Governor%27s%20Office%20Credentialing%20Application.pdf>.

⁶ Letter from Media of Nebraska, Nebraska Broadcasters Association, & Nebraska Press Association to Taylor Gage (Apr. 16, 2021), <https://twitter.com/ChrisDunkerLJS/status/1383091411680120841/photo/1>.

⁷ Gallery Rules and Guidelines, U.S. Senate Press Gallery, https://www.dailypress.senate.gov/?page_id=70; *John K. MacIver Inst. for Pub. Pol’y v. Evers*, No. 19-cv-649, 2020 WL 1531637, at *3 (W.D. Wis. Mar. 31, 2020) (listing criteria adopted by the governor’s office and noting that they were apparently drawn from “press-access standards used by the Wisconsin Capitol Correspondents Board and the United States Congress”).

⁸ Lauren Harris, *Will changes to print outlast the pandemic?*, Columbia Journalism Review (July 22, 2020), https://www.cjr.org/business_of_news/will-changes-to-print-outlast-the-pandemic.php.

would limit the scope and breadth of the information available to the public, particularly those who rely on digital-only news sites, like NOISE’s readership.

Decisions restricting press access must not be taken lightly, for the ability of journalists to gather information about government activity and report this news is of vital importance to the public. Courts have repeatedly recognized the “fundamental role” that newsgathering plays “in allowing citizens ‘to see, examine, and be informed of their government,’ not just for its own sake but so as to enable citizens to form their own judgments on matters of public concern and choose qualified representatives.” *Evers*, 2021 WL 1324386, at *7; *see also Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (recognizing First Amendment protection for newsgathering because “without some protection for seeking out the news, freedom of the press could be eviscerated”). As the Supreme Court of the United States has repeatedly held in “a variety of contexts,” “[f]ree speech carries with it some freedom to listen” and “receive information and ideas.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–76 (1980) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)). The public has a “First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern.” *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 380 (1984).

These interests are particularly compelling here. NOISE was founded in 2018 to report on news and community events that impact North Omaha and other minority communities in Omaha that have traditionally received less attention from mainstream news outlets.⁹ Granting NOISE press credentials will help it do the vital work of informing its readers—the governor’s constituents—about the workings of their government.

Accordingly, we urge you to reconsider your media credentialing process with the aim of providing access to all bona fide journalists and news outlets, including NOISE. Thank you for your attention to this matter. Please contact RCFP Executive Director Bruce Brown with any questions at bbrown@rcfp.org.

Sincerely,

The Reporters Committee for Freedom
of the Press
American Journalism Project
The Associated Press
The E.W. Scripps Company
El Perico
Institute for Nonprofit News
Kansas Reflector

Lincoln Journal Star
News Channel Nebraska
Omaha World-Herald
Online News Association
The Reader
Society of Professional Journalists
Carol Zuegner, Ph.D.
Associate Professor of Journalism
Creighton University

⁹ About NOISE, <https://www.noiseomaha.com/about>.