

MEMORANDUM

TO: Institute for Free Speech

FROM: Robert Corn-Revere and Chelsea T. Kelly

DATE: April 9, 2019

RE: Iowa Legislature's Denial of Press Credentials to Laura Belin

The Institute for Free Speech has engaged the law firm of Davis Wright Tremaine LLP to produce a legal memorandum analyzing whether the Iowa Legislature's process for granting journalists access to the press gallery, as well as to official proceedings, including hearings and news conferences, violates the Constitution. Our analysis of the policies, both facially and as applied to Ms. Laura Belin, is set forth below.

I. Background

Laura Belin owns and operates a well-known community blog about Iowa politics, focusing particularly on campaigns, elections, state government, and social and environmental issues. Her blog, entitled *Bleeding Heartland*, generally covers issues affecting the traditionally Republican Iowa state government from a liberal perspective. Ms. Belin's blog is incorporated under Bleeding Heartland LLC. Ms. Belin is the sole member of that corporate entity and is entitled to any and all distributions and profits, including reader contributions. Ms. Belin has set up Patreon and PayPal pages through which her readers contribute financially to support the blog.¹

Ms. Belin devotes her full-time professional efforts to gathering, writing, and editing the news content and commentary in the blog—which, in 2018 alone, published more than 550 news articles and commentaries featuring the work of more than 100 authors. While the Iowa Legislature is in session, her blog typically gets 1,500 or more unique daily visitors, including lawmakers, staffers, and other insiders.² Ms. Belin has a strong reputation among Iowa journalists, and has been called “one of the best investigative reporters in the state” and an “astute observer of politics left and right” by Pulitzer Prize winning columnists. The Dubuque

¹ See <https://www.patreon.com/BleedingHeartland> and <https://www.paypal.me/bleedingheartlandia>. Patreon.com is a membership platform that makes it possible for writers and other creators to receive compensation for their work, while PayPal is an online payments system. Ms. Belin's use of these products allows her to receive compensation directly from her readership on a voluntary basis.

² Ryan J. Foley, “Iowa House Denying Press Credentials to Influential Blogger.” *Associated Press* (Jan. 25, 2019), available here: <https://www.apnews.com/df3c7ecdcf90431daf729a1fb7ac7fe4>.

Telegraph-Herald editors further recognized Ms. Belin as “one of Iowa’s top political journalists;” while the Des Moines Register described her as “a blogger and top-notch journalist who regularly breaks news.”

Despite her history as a respected journalist and her dedication to covering local Iowa politics, the Iowa State House of Representatives has this year repeatedly refused to issue press credentials to Ms. Belin. This substantially impedes her ability to report upon the Legislature. Ms. Belin is also unable to participate in the governor’s press conferences in Des Moines, as such participation requires both House and Senate credentials. While the Iowa State Senate had issued Ms. Belin press credentials, it altered its rules in the middle of the session to prevent her from working in the press gallery on the Senate floor.

The Iowa Legislature’s reasoning for denying or limiting Ms. Belin’s press credentials has shifted over the past several months. In a January 3, 2019 email, Chief Clerk Carmine Boal of the Iowa Legislature told Ms. Belin that “press credentials are not issued to members of the public.” Several weeks later, the Iowa House of Representatives issued its first-ever “Press Credentialing Policy,” which states that: “The Chief Clerk of the House shall limit membership in the press box to *bona fide correspondents of repute in their profession*. An applicant for press credentials must establish to the satisfaction of the Chief Clerk of the House that he or she is a *paid correspondent . . . [and is] employed by a news organization*”³ (emphasis added). On February 19, 2019, Chief Clerk Boal was quoted in a local news article as stating that Ms. Belin “is a ‘personal’ blogger not unlike any member of the public,” and that members of “news organizations issued credentials are more accountable because they answer to a news director, editor, or publisher.”⁴ However, Jack Hunt of the Iowa Legislative News Service is credentialed in the Iowa House and has been for many years. He is similarly situated to Ms. Belin, in that he is both the reporter for and the publisher/owner of a news source, which earns revenue from subscriptions. Like Ms. Belin, he also does not “answer to a news director, editor, or publisher.”

Despite Ms. Belin’s efforts to point out to Chief Clerk Boal that (1) she is a “paid” correspondent, as she receives reader contributions through her Patreon page; and (2) she is “employed by a news organization,” in that she works for a limited liability company whose sole function is to provide commentary to the public regarding state and local affairs, the Chief Clerk has still refused to issue Ms. Belin House credentials.

After Ms. Belin requested credentials from Secretary of the Senate Charlie Smithson on January 3, 2019, he immediately sent her an application for News Media Representatives, which she completed and returned the following day. The Senate has never formally indicated she has received credentials, nor does it publish a list of credentialed reporters. It appears that all

³ The Iowa House of Representatives’ Press Credentialing Policy is available here: <https://www.legis.iowa.gov/docs/publications/PCP/1037693.pdf>.

⁴ James Q. Lynch, “Iowa Blogger Critical of GOP Will Continue to Seek Access to House.” *Sioux City Journal* (Feb. 19, 2019), available here: https://siouxcityjournal.com/news/state-and-regional/iowa-blogger-critical-of-gop-will-continue-to-seek-access/article_2966b4d7-7445-5083-ab59-fa8efbb5ae4b.html.

reporters other than Ms. Belin who are credentialed by the Senate are given access to the press gallery, which is on the floor of the Senate chambers.

When Ms. Belin filled out the application, she did not request a permanent desk in the press gallery because she did not plan to be in the Iowa Senate Chamber on a daily basis. The staff member who processed applications indicated she could obtain day passes for the Senate press gallery. Despite repeated requests for day passes, Ms. Belin has yet to obtain one. On several occasions in early February 2019, she requested day passes to work in the Iowa Senate press gallery. Every time, the two seats in the press box allocated to single day visitors went unoccupied. Yet every time, she was told there were no available seats. In a conversation with a staff member for the Secretary of the Senate on February 18, 2019, she was told that the day pass seats have since been assigned and that it was no longer possible to assign a daily seat. Then on March 22, 2019 the Secretary of the Senate sent an email to undisclosed recipients, including her, that said in part: “In order to accommodate news media representative overflow, please find the attached document. As this was the first time in the last three years that members of the media requested single-day passes, it was necessary to create this document.” Yet every day there have been empty seats in the Senate press gallery. Additionally, the overflow space is in the “crow’s nest,” which is far removed from the Senate press gallery and further away from the action on the floor than the public gallery. In short, while she appears to have “press credentials” from the Senate, it appears that they are not providing her with the same accommodations and access given to other credentialed reporters.

Ms. Belin has also sought press credentials from the governor’s office. The governor’s public schedules always state that press conferences and other events are “open to credentialed members of the media.” Prior to Governor Kim Reynolds’s inauguration on January 18, 2019, Ms. Belin sent an email to the governor’s communications director after being unable to find an application for media credentials on the governor’s website. Ms. Belin sent five emails between January 23 and February 4 requesting clarification on the status of her requested credentials. On February 4, communications director Pat Garrett did not respond to her email but sent a new email that stated “the governor’s office does not credential members of the press. Our office relies on both the Iowa House and the Iowa Senate to determine who is credentialed.” Ms. Belin replied that she had credentials for the Iowa Senate, but Garrett replied that the governor’s office relies on credentials from both the House and the Senate. Numerous Iowa reporters indicate that being credentialed to cover the state legislature has never been a condition for covering Kim Reynolds, either as governor or during the over 6 years when she served as lieutenant governor. Additionally, the week prior to Garrett’s February 4 email, Governor Reynolds had toured the state and allowed access to journalists in many localities, none of whom are credentialed in the Iowa House or Senate. Finally, WOI-TV is not credentialed in the House this year, but has been granted access to the governor’s press conferences and events.

II. Analysis

a. Under the First Amendment, Bloggers Qualify as Members of the Media.

Denying press credentials on grounds that a journalist is a blogger is deeply at odds with the First Amendment. Constitutional protections for the press were conceived at a time when

pamphleteers—the bloggers of their day—were intended recipients of constitutional protection. *See, e.g., Eugene Volokh, Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PENN L. REV. 459, 479 (2012) (pamphleteers “were routinely understood to be covered by the ‘freedom of the press’”). As the United States District Court for the Southern District of Iowa observed in *Quad-City Community News Service, Inc. v. Jebens*, 334 F. Supp. 8, 17 (S.D. Iowa 1971):

The history of this nation and particularly of the development of many of the institutions of our complex federal system of government has been repeatedly jarred and reshaped by the continuing investigation, reporting and advocacy of independent journalists unaffiliated with major institutions and often with no resource except their wit, persistence, and the crudest of mechanisms for placing words on paper.

The constitutional concerns underlying this observation are all the more true as the means of communication have become more sophisticated. “What makes journalism journalism is not its format but its content.” *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993). In the recent years, numerous courts have recognized that the rise of the Internet and other technologies has necessitated a change in the way that we define traditional journalists. *See, e.g., Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (“The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.” (emphasis added)); *see also Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014) (“The protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others’ writings, or tried to get both sides of a story. As the Supreme Court has accurately warned, *a First Amendment distinction between the institutional press and other speakers is unworkable.*” (emphasis added)).

With this new technological landscape, many courts have adopted an “intent test” for determining whether a person qualifies as a member of the media for purposes of legal protections, such as reporter’s shield laws. The intent test simply requires that “the individual claiming the privilege must demonstrate, through competent evidence, the intent to use material—sought, gathered, or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process.” *VonBulow v. VonBulow*, 811 F.2d 136, 144 (2d Cir. 1987). Courts applying this analysis have held that bloggers, when disseminating information to the public, are entitled to the same protections that the legal system affords “traditional” journalists. *See, e.g., Comins v. Vanvoorhis*, 135 So. 3d 545, 559–60 (Fla. Dist. Ct. App. 2014) (“In employing the word ‘blog,’ we consider a site operated by a single individual or a small group that has primarily an informational purpose, most commonly in an area of special interest, knowledge or expertise of the blogger, and which usually provides for public impact or feedback. In that sense, it appears clear that many blogs and bloggers will fall

within the broad reach of ‘media,’ and, if accused of defamatory statements, will qualify as a ‘media defendant’ for purposes of Florida’s defamation law as discussed above.”).

Because bloggers are covered by the same legal protections as traditional journalists, denying them press credentials to cover state government institutions has clear First Amendment implications. *See, e.g., ABC, Inc. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977); *Telemundo of L.A. v. Los Angeles*, 283 F. Supp. 1095, 1102-03 (C.D. Cal. 2003); *Westinghouse Broad. Co. v. Dukakis*, 409 F. Supp. 895 (D. Mass. 1976); *Borreca v. Fasi*, 369 F. Supp. 906 (D. Haw. 1974); *Lewis v. Baxley*, 368 F. Supp. 768, 777 (M.D. Ala. 1973). In particular, courts have been skeptical of attempts to limit access only to “working media representatives” and to define that status arbitrarily. Thus, the reporter/editor of a monthly newsletter successfully challenged the denial of press credentials for access to the Miami-Dade Public Schools based on the rationale that she was not part of the “working media” as a representative of a “general circulation” newspaper. *United Teachers of Dade v. Stierheim*, 213 F. Supp. 2d 1368, 1372-73 (S.D. Fla. 2002). The court found that the guidelines used to exclude her violated her First Amendment rights. *See id.* at 1374-75. Closer to home, in *Quad-City Community News Service, Inc.*, the court enjoined the Police Department in Davenport, Iowa’s denial of press credentials to a bi-weekly “underground” newspaper based on the claim that the reporter did not work for a “legitimate” or “established” media outlet. 334 F. Supp. at 10-12. The court observed that public officials may not “funnel[] information to the public through only certain representatives who are considered more responsible because they ‘cooperate’ in presenting [ideas] the Department believes to be appropriate.” *Id.* at 14. To survive constitutional scrutiny, any credentialing policy must utilize “narrow and specific standards.” *Id.* at 17; *see also Times-Picayune Pub. Corp. v. Lee*, No. CIV.A. 88-1325, 1988 WL 36491, at *10 (E.D. La. Apr. 15, 1988) (“The selective denial of access to a governmental forum based on content is unconstitutional regardless of whether a public forum is involved unless the government can show a compelling state interest and is the least restrictive means available to achieve the asserted governmental purpose.”).

Applying this case law, it appears clear that Ms. Belin should receive the same access and accommodations to the Legislature or the governor as traditional journalists. She owns and operates a blog whose purpose is to disseminate information to the public regarding Iowa state politics. When the Iowa Legislature is in session, her blog typically gets 1,500 or more unique daily visitors, including lawmakers, staffers, and other insiders. As such, Ms. Belin speaks directly to the public on matters of governmental import. A policy that denies press credentials based on arbitrary distinctions, by classifying independent journalists as ineligible for direct access to state legislators, is inherently suspect under the First Amendment.

b. The Arbitrary Application of Press Credentialing Policies May Constitute Unconstitutional Viewpoint Discrimination.

Even if the Legislature’s press credentialing guidelines were constitutionally sound on their face, the denial of credentials to a particular journalist for arbitrary or discriminatory reasons also would violate the First Amendment. *See Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (“arbitrary or content-based criteria for press pass issuance are prohibited under the first amendment”). Further, shifting justifications for denying press credentials render such

credentialing guidelines suspect, especially where, as here, the content at issue contains the viewpoint of a political minority.

Erratic application of a credentialing policy implies that the government is engaging in impermissible viewpoint discrimination. “[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.” *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988). “This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.” *Id.* “[W]ithout standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.” *Roach v. Stouffer*, 560 F.3d 860, 869 (8th Cir. 2009) (quoting *Lakewood*, 486 U.S. at 763–64).

In cases like this, where the denial of press credentials is arguably focused on the nature of a publication, reviewing courts have found such decisions were content-based even when they lacked direct evidence of discriminatory motive. *See e.g., United Teachers of Dade*, 213 F. Supp. 2d at 1373. In *Quad-City Community News Service, Inc.*, for example, the court found that the denial of credentials to a bi-weekly newspaper’s reporters supported the conclusion that the decision was based on the paper’s combative reporting style as opposed to the content-neutral justifications that were offered. 334 F. Supp. at 12; *see also Chicago Reader v. Sheahan*, 141 F. Supp. 2d 1142, 1147 (N.D. Ill. 2001) (the government “may not deny [a reporter access] accorded other reporters because she did not include positive programs in her article.”). Such discrimination is presumptively unconstitutional. *Times-Picayune Pub. Corp.*, 1988 WL 36491, at *9 (“Discriminatory governmental action aimed at the communicative impact of expression is presumptively at odds with the First Amendment. Above all else, the First Amendment means that the government cannot restrict freedom of expression on the basis of its ideas, message or content.”).

Here, several facts could lead a court to conclude that viewpoint discrimination is at play. First, the Iowa House of Representatives implemented its first-ever “Press Credentialing Policy” just several weeks ago, suggesting the policy is a post-hoc attempt to rationalize the denial of Ms. Belin’s credentials. The Senate and gubernatorial policies also appear as if they may be post-hoc policies aimed at denying her access. Second, the fact that the Legislature has applied the policy in such a way that it permits “communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.” *Lakewood*, 486 U.S. at 763. Ms. Belin has been denied House credentials despite the fact that she appears to satisfy the requirements of the current policy, as (1) she is paid by receiving reader donations; and (2) she is a writer of “repute” in her profession, as numerous well-known publications and writers have praised her journalistic skills. She has been denied access to the Senate press gallery despite the daily availability of seats there. The Governor’s Office stated a credentialing policy to her in an email, but appears to apply it only to Ms. Belin so as to deny her access at press gaggles and events while access is granted to other reporters at these events.

Third, Ms. Belin’s blog generally covers issues affecting the traditionally Republican Iowa state government from a liberal perspective—thereby making the denial of credentials particularly susceptible to a viewpoint discrimination claim. *See MacQuigg v. Albuquerque Pub.*

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Sch. Bd. of Educ., No. CV 12-1137 MCA/SCY, 2015 WL 13650030, at *7 (D.N.M. Feb. 6, 2015) (“[A] reasonable jury could find that the justifications offered by Defendant for banning Plaintiff were pretexts masking viewpoint discrimination, and that Defendant targeted Plaintiff precisely ‘*because of*’ Plaintiff’s unwelcome criticism of the Board’s administration of APS and of Defendant, personally.” (internal footnote omitted; emphasis in original)).

III. Conclusion

Upon considering the relevant facts and law, this memorandum concludes that Ms. Belin qualifies as a member of the media, as her blog communicates important information to the public on matters of governmental affairs. As such, she is entitled to the same First Amendment protections as “traditional” journalists. The Press Credentialing Policies of the Iowa Legislature and Governor’s Office suffer from serious constitutional deficiencies to the extent they deny credentials to Ms. Belin based on her status as a blogger, and further to the extent that the Legislature arbitrarily applies the policy.