

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

NEXSTAR MEDIA, INC. d/b/a KFOR-
TV, et al.,

Plaintiffs,

v.

RYAN WALTERS, et al.,

Defendants.

Case No. 24-CV-00980-J

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING
ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

This case presents a time-sensitive emergency, requiring interim relief prior to the September 26 meeting of the Oklahoma State Board of Education. Over the past several months, KFOR-TV and its reporters have been continuously denied access to the board's meetings as well as press conferences held by Defendant Superintendent of Public Instruction Ryan Walters ("Walters"). And the only reason that Defendants have given KFOR-TV for this deprivation of access is that Defendants have arbitrarily determined that KFOR-TV is not "a legitimate news organization." This is despite KFOR-TV possessing two press credentials from the Department of Legislative Services, the credentialing agency for the Capitol Complex where the meetings occur.

The next State Board of Education meeting and Superintendent's press conference is scheduled to occur on Thursday, September 26, 2024. Accordingly, Plaintiffs seek a TRO and preliminary and permanent injunctions granting them full, equal access to the State Board of Education meetings and Walters' press conferences, as well as the use of video, still photography, and audio recording equipment, as is afforded to every other member of the media. The Court is not asked to make new law. The request is that the Court apply unambiguous existing First Amendment law to these

simple facts.

STATEMENT OF FACTS

KFOR-TV

Plaintiff Nexstar Media, Inc., owns KFOR-TV, a television station (channel 4) and news website in Oklahoma City, affiliated with NBC. Hughes Decl. ¶ 2. KFOR-TV is Oklahoma's first television station and has been keeping Oklahomans informed of the news since June 1949. *Id.* ¶ 3. KFOR-TV produces 11 newscasts every weekday. *Id.* ¶ 4. According to Nielsen data, KFOR-TV had 105,878 viewers during one week (Monday to Friday) between 6:00 a.m. and 6:00 p.m. in July 2024. *Id.* This makes KFOR-TV one of the strongest NBC affiliates in the country. *Id.* Among the market's local television newscasts, KFOR-TV has consistently placed first or second for the past four decades. *Id.*

KFOR.com and KFOR's social media presence are dominant in the Oklahoma City area as well. *Id.* ¶ 5. KFOR.com gets over 44,000 daily website-visitors and has over 519,000 Facebook followers, 126,000 X followers and 52,000 Instagram followers. *Id.* KFOR.com stories are frequently linked to by other major news media websites such as CNN, ABC, MSNBC and FOX. *Id.*

KFOR-TV has received widespread recognition for its excellence in

journalism and reporting over the years. *Id.* ¶ 6. It has won three national Emmys and dozens of regional Emmys for its transformational journalism. *Id.* It has also won several Edward R. Murrow awards, given to those who demonstrate journalistic ethics and technical expertise as well as exemplify the importance and impact of journalism as a service to the community. *Id.*

In 1995, KFOR-TV won the Peabody Award (one of the highest honors in journalism) for its coverage of the Oklahoma City Bombing that same year. *Id.* ¶ 7. KFOR-TV was nominated for another Peabody Award for its coverage of the wrongful conviction of a man who spent 48 years in an Oklahoma prison. *Id.* KFOR's coverage of his case helped lead to his exoneration. *Id.* He is now a free man and is the longest serving exoneree in America. *Id.* Additionally, earlier this summer, the State of Oklahoma awarded KFOR-TV a citation of recognition in appreciation of the station's journalism and community over the past 75 years. *Id.* ¶ 8.

KFOR-TV's Reporting on the OSDE and Superintendent Walters

KFOR-TV reports both national and local news stories. *Id.* ¶ 9. As part of its local coverage, KFOR-TV reports on the Oklahoma State Department of Education ("OSDE") and Superintendent Walters. *Id.* ¶ 10. To do so, KFOR-TV reporters attend monthly State Board of Education meetings. *Id.*; Brown Decl. ¶ 4. Following the board meetings, Walters will hold press conferences

in which he will discuss recent OSDE events and take questions from reporters. KFOR-TV reporters attend those as well. Hughes Decl. ¶ 11; Brown Decl. ¶ 5.

These board meetings and press conferences occur in Oklahoma City in the Oliver Hodge Building or State Capitol (collectively “Capitol Complex”). Brown Decl. ¶ 6. KFOR-TV has received Capitol press credentials each year since the Legislative Services Bureau began issuing the credentials in 2022. Hughes Decl. ¶ 15; Brown Decl. ¶ 8. The station holds two such credentials, which can be used by any KFOR-TV employees to cover stories within the Capitol complex. Hughes Decl. ¶ 16; Brown Decl. ¶ 9.

Despite having press credentials, KFOR-TV has been repeatedly denied the ability to access and report on State Board of Education meetings and participate in Walters’ press conferences. Hughes Decl. ¶ 17; Brown Decl. ¶ 10-12. Although other members of the media are permitted in the room where the board meetings occur, KFOR-TV reporters are required to sit in an “overflow” room and watch the meeting via video feed. Hughes Decl. ¶ 177; Brown Decl. ¶ 11. Defendants do not deny other members of the media access to the meeting room. Hughes Decl. ¶ 17; Brown Decl. ¶ 11.

Defendants have placed KFOR-TV reporters in the “overflow” room for the board meetings that occurred this year on March 28th, June 27th, July

31st, and August 22nd. Hughes Decl. ¶ 18; Brown Decl. ¶ 11. As for Walters’ press conferences, which occurred on those same days, Walters and OSDE Press Secretary Dan Isett (“Isett”) denied access to KFOR-TV reporters to those as well. Hughes Decl. ¶ 19; Brown Decl. ¶ 12.

Neither Walters nor Isett have provided Plaintiffs with notice of the reasons behind these denials discussed above. Hughes Decl. ¶ 20-21; Brown Decl. ¶ 31. Nor have they articulated or published explicit and meaningful standards that govern the denial of live access to board meetings or any access to Walters’ press conferences by reporters. Hughes Decl. ¶ 21.

The most recent interactions in which Defendants denied Plaintiffs the ability to news gather and access news areas occurred between July 31, 2024 and August 22, 2024.

July 31, 2024

KFOR-TV’s “Capitol Bureau” reporter Dylan Brown and photojournalist Kevin Josefy attempted to attend the July 31, 2024 State Board of Education meeting. Brown Decl. ¶ 14. Defendants admitted other members of the media into the room where the board meeting was being held, which had room to accommodate Brown and Josefy. *Id.* Instead, Defendants sent Brown and Josefy to the overflow room to watch a livestream of the meeting. *Id.* Defendants did not place any other members of the media in the

overflow room for that board meeting. *Id.* ¶ 15.

Walters held a press conference after the board meeting. *Id.* ¶ 16.

Josefy and Brown also attempted to attend the press conference but, prior to reaching the doorway to where the press conference was being held, were stopped by Isett. *Id.* The following interaction ensued:

Brown: “So we can’t ask questions?”
Isett: “No”
Brown: “We can’t ask him questions?”
Isett: “No....that’s a privilege for press.”
Brown: “We are press.”
Isett: “You’re not...your station isn’t.”
Josefy: “You’re saying we aren’t a legitimate news organization? Is that what you are trying to say?”
Isett: “Yes.”
Josefy: “You’re saying that KFOR, that’s been here for 75 years...”
Isett: “That’s exactly what I’m saying.”
Josefy: “...serving the public...”
Isett: “Dylan already knows this.”
Brown: “Can I...”
Josefy: “...helping people...”
Isett: “...you can ask him from outside.”
Josefy: “We’re not legitimate news?”
Brown: “We’re not?”
Isett: “I didn’t say you weren’t legitimate news. I didn’t say you had a credential for this.”
Isett’s Assistant: “I have an urgent thing I need you for.”
Josefy: “So you are showing favoritism to all of the other news stations and denying us access to a public official? Is that what you are doing? You are denying us access to a public official? For public business?”
Isett: “You are in all the public spaces.”
Josefy: “Then we can go down there in a public space.”
Brown: “Isn’t that...is that not a public space?”
Josefy: “That room is a public space.”

Isett walks away.

Id. ¶ 18. The exchange was captured on video and is attached herein as **Exhibit A**. The video can also be found at: <https://bit.ly/4guiK65>.

August 16, 2024

On August 16, 2024, Superintendent Walters and Isett were walking through the hallways of the State Capitol Complex. *Id.* ¶ 21. Brown and photojournalist, Gage Shaw, who were also present in the hallway, approached Walters. While holding his KFOR-TV microphone, Brown identified himself to Defendants as “Dylan Brown with KFOR.” *Id.* ¶ 21-22. As soon as Brown identified himself, Walters responded, “Oh no, no, no, no, no” and walked away. *Id.* ¶ 22. Simultaneously, Isett approached Brown and Shaw and, placing his hands on Brown, again, stated “No.” *Id.* ¶ 23. Isett then followed Walters. *Id.*

Brown attempted to finish the question he had approached Walters with, stating “You guys have left us out [of the press conferences]?” *Id.* ¶ 24. To which Isett immediately turned and, while pointing his finger at Brown, responded “There’s a reason for that.” *Id.* Brown persisted. “We have valid reports, why are you leaving KFOR out of everything?” *Id.*

Again, Isett placed his hands on Brown, preventing him from moving down the hallway any further. *Id.* ¶ 25. As he did so, Isett stated “We’re done.

You got your answers, you asked three questions, you're good." *Id.* Having been denied another opportunity at press access, Brown and Shaw turned and left. *Id.* A video of the interaction between Isett, Brown and Shaw is attached herein as **Exhibit B**. The video can also be found at:

<https://bit.ly/4d8pjbN>.

August 22, 2024

On August 22, 2024, Brown and Josefy attempted to attend another State Board of Education meeting. *Id.* ¶ 27. Again, Defendants allowed other members of the media into the room where the board meeting was being held. *Id.* Brown and Josefy, however, were sent back to the overflow room to watch a livestream of the meeting. *Id.* Defendants did not send any other members of the media to the overflow room. *Id.*

Brown and Josefy also attempted to attend Walters' press conference following the August 22nd State Board of Education meeting. *Id.* ¶ 28. As soon as Brown and Josefy attempted to enter the room where the press conference was being held, Isett, again, approached them. *Id.* Isett, once again, placed his hands on Dylan and blocked his progression into the room. *Id.* The following interaction took place:

Isett: "No."
Brown: "Can you give me a reason why?"
Isett: "No."

Brown: “I want a good solid reason why. I want a good solid reason why, sir. I want you to give me a reason why.”

Isett: “We’ll see you later.”

Isett begins to close the door.

Brown: “I’m asking you a legitimate question. If you close that door on me you’re restricting my First Amendment rights of access to a public official, sir. That’s what you’re doing. Oh you’re going to leave it open? So can I come in? I can’t come in.”

Door closes.

Id. Thus, again, Brown and Josefy were denied access to Walters’s press conference. *Id.* ¶ 29. A video of the interaction between Isett, Brown and Josefy is attached herein as **Exhibit C**. A copy of the video can also be found at: <https://bit.ly/4e5Xv94>.

A photojournalist for the Tulsa World Newspaper, Mike Simons, was present during the August 22nd incident and captured several photographs. His photographs depict Isett approaching Brown and Josefy and placing his hands on Brown to block Brown’s entry into the press conference area.



Simons discussed the incident on X the same day that it happened. In his post, Simons stated that he had asked Isett why the KFOR-TV reporters were denied access to the press conference. In response, Isett told Simons “I

don't think they're a legitimate news organization.”¹

The Society of Professional Journalists (“SPJ”) weighed in the next day. In an August, 23, 2024 article, the SPJ stated that it “strongly condemns the Oklahoma State Department of Education’s decision to deny KFOR-TV journalists access to a news conference with State Superintendent Ryan Walters in Oklahoma City.”² The SJP reported that, when it reached out to Isett for a comment on his denial of KFOR-TV’s access, Isett responded “Our office works with hundreds of journalists across the state and around the country to keep the public informed about the success Oklahoma students are seeing under Superintendent Walters. We will not work with tabloids who consistently editorialize and report false information rather than inform the public.”

Upcoming Board Meetings and Superintendent Press Conferences

The State Board of Education meets once a month and, historically, Superintendent Walters always holds a press conference immediately thereafter. Hughes Decl. ¶ 22; Brown Decl. ¶ 32. Four board meetings remain scheduled in 2024, with the next meeting set to occur on September 26, 2024.

¹ *Mark Simons X Post*, <https://perma.cc/XWS3-XUGR>.

² Blaize-Hopkins, Ashanti, *SPJ strongly condemns Oklahoma Dept. of Ed. for denying journalists access to news conference*, Society of Professional Journalists (Aug. 23, 2024), <https://perma.cc/2FKJ-73XR>.

2024 Regular Meeting Calendar, Oklahoma State Board of Education, <https://perma.cc/GS6A-AQNC>. As of the date of this filing, it is unlikely that Defendants will permit Plaintiffs to attend these events, alongside other credentialed members of the media, without immediate Court intervention. Hughes Decl. ¶ 23-25; Brown Decl. ¶ 33.

ARGUMENT

“The requirements for issuance of a TRO are essentially the same as those for a preliminary injunction.” *Offolter v. Horseracing Integrity & Safety Auth.*, No. CIV-24-749-D, 2024 U.S. Dist. LEXIS 141046, at *4-5 (W.D. Okla. Aug. 8, 2024). Thus, when deciding whether to grant a TRO or a preliminary injunction, a Court must consider whether “(1) the movant will suffer irreparable injury unless the injunction issues; (2) the threatened injury . . . outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood of success on the merits.” *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). The final two factors “merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. Plaintiffs have a First Amendment right to news gather.

The First Amendment provides Plaintiffs with a right to news gather. *Branzburg v. Hayes*, 408 U.S. 665, 728 (1972). News gathering is “entitled to First Amendment protection because [it is] an important stage of the speech process that ends with the dissemination of information about a public controversy.” *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021) (citation omitted). Without “protection for seeking out the news, freedom of the press could be eviscerated.” *Branzburg*, 408 U.S. at 681.

The government may not exclude a publication because of its viewpoint or because it does not like how reporters choose to report on a story. *See Quad-City Cmty News Serv. v. Jebens*, 334 F. Supp. 8, 17 (S.D. Iowa 1971) (stating “any classification which serves to penalize or restrain the exercise of a First Amendment right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional”). “[O]nce 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). Thus, any effort by the government to dictate what a news organization is must fail.

To the extent the critique is even valid, Defendants are not permitted to deny Plaintiffs access to media areas for the State Board of Education meetings and press conferences on the basis that KFOR-TV is “not a legitimate news organization.” *Mark Simons X Post*, <https://perma.cc/XWS3-XUGR>. The targeted exclusion of journalists from board meetings and press conferences otherwise generally available to the news media violates the right of equal access inherent in the freedom of the press. *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (emphasis in the original) (“White House press facilities having been made publicly available as a source of information for newsmen, the protection afforded newsgathering under the first amendment guarantee of freedom of the press requires that this *access not be denied* arbitrarily or for less than compelling reasons.”).

Moreover, reporters do not have any less right to news gather because they report on behalf of a publication that a government official does not respect or consider “legitimate” media. In *Consumers Union v. Periodical Correspondents’ Assoc.*, the court held it was unconstitutional for the government to discriminate against Consumer Reports because it was “owned and operated” by a “self-proclaimed advocate of consumer interests.” 365 F. Supp. 18, 22-23 (D.D.C. 1973), *rev’d on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975). It also explained that “[a] free press is undermined if the access of

certain reporters to facts relating to the public's business is limited merely because they advocate a particular viewpoint." *Id.* at 25.

The availability of alternative methods for a resourceful reporter – such as watching a livestream of the board meetings – is of no consequence. *Consumers Union*, 365 F. Supp. at 25-26 (citations omitted) (“the elimination of some reporters from an area which has been voluntarily opened to other reporters for the purpose of news gathering presents a wholly different situation. Access to news, if unreasonably or arbitrarily denied ..., constitutes a direct limitation upon the content of news.”). Second-class treatment doesn't work. Reporters should “not only be given equal access, but within reasonable limits, access with equal convenience to official news sources.” *Westinghouse Broad. Co. Inc. v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1976). The government simply cannot pick and choose which reporters are in their favor based on how positive the coverage is.

Segregating media seating or press briefings into “preferred” and “unpreferred” viewing sections is not equal access and is unconstitutional. *See TGP Comms., Ltd. Liab. Co. v. Sellers*, No. 22-16826, 2022 U.S. App. LEXIS 33641, at *15 (9th Cir. Dec. 5, 2022). This is because the “granting favorable treatment to certain members of the media. . . allows the government to influence the type of substantive media coverage that public

events will receive.” *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986).

As the Supreme Court has recognized, “[t]he newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity, and, since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.” *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). When a reporter asks Superintendent Walters a question, that reporter asks not only for himself or herself but for the public—the vast majority of whom lack the basis for formulating the most effective questions and the opportunity to put those questions to our most senior officials.

B. Defendants’ denial of Plaintiffs’ access to the board meetings and Walters’ press conferences is content- and viewpoint-based discrimination.

Plaintiffs will succeed on their First Amendment claims because Defendants have engaged in content and viewpoint discrimination to deny them access to the board meetings and Walters’ press conferences.

“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.” *Tex. v. Johnson*, 491

U.S. 397, 414 (1989). The Free Speech Clause thus prohibits suppressing speech ‘because of its message.’” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-29 (1995). Content-based restrictions are subject to strict scrutiny, which “requires a state to show that its law is narrowly tailored to serve a compelling interest.” *Rodgers v. Bryant*, 942 F.3d 451, 456 (8th Cir. 2019).

“And the First Amendment provides even stronger protection against viewpoint discrimination, which is an egregious form of content discrimination and occurs when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction on speech.” *TGP Communs., Ltd. Liab. Co.*, 2022 U.S. App. LEXIS 33641 at *10 (internal quotation marks omitted); *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018). The government cannot “den[y] access to a speaker solely to suppress the point of view [s]he espouses.” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (quotation and citation omitted).

It is not only in traditional public forums where restrictions based on content must satisfy strict scrutiny and those based on viewpoint are prohibited. *Mansky*, 138 S. Ct. at 1885. Even in limited public forums where the government opens a traditionally private place for speech on limited

topics, such as a board meeting or press conference, the First Amendment’s protections against content-based and viewpoint-based restrictions remain robust. *See Rosenberger*, 515 U.S. at 829. “Once it has opened a limited forum, . . . the State must respect the lawful boundaries it has itself set” and “may [not] discriminate against speech on the basis of its viewpoint.” *Id.*

The indication that a government official’s inconsistent application of a policy is discriminatory is reinforced where the policy leaves the determination of “who may speak and who may not . . . to the unbridled discretion of a government official.” *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 763 (1988). The government “must not only have some criteria to guide its determinations[]” as to who receives limited available press access, but it also “must have a reasonable way of assessing whether the criteria are met.” *Getty Images News Servs. Corp. v. Dep’t of Def.*, 193 F. Supp. 2d 112, 121 (D.D.C. 2002). When there is no policy and, hence, no discernible “standards governing the exercise of discretion,” government officials have free reign to choose which reporters gain access “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)).

Additionally, the government’s focus on the nature of the publication is an additional indicator of a discriminatory motive. *Quad-City Community*

News Service, Inc., for example, held a police department never “defin[ed] what constitutes or qualifies one to be a member of the ‘established’ press.” 334 F. Supp. at 12. In that case, the policy had not been applied uniformly to other reporters; instead, the Department was “funneling information to the public through only certain representatives who are considered more responsible because they ‘cooperate’ in presenting what the Department believes to be appropriate.” *Id.* at 14. This was unconstitutional.

Here, the facts surrounding Defendants’ denial of Plaintiffs access to board meetings and Walters’ press conferences points to clear viewpoint discrimination and, at minimum, content discrimination. Defendants have no articulated or written policy about how they determine which news organizations are granted access to the board meetings or press conferences. Hughes Decl. ¶ 21; Brown Decl. ¶ 31. When asked why Plaintiffs were denied access, Isett only stated that he did not consider Plaintiffs to be a “legitimate news organization” and that he views them as a “tabloid[] who consistently editorialize[s] and report[s] false information rather than inform the public.” *Mark Simons X Post*, <https://perma.cc/XWS3-XUGR>; Blaize-Hopkins, Ashanti, *SPJ strongly condemns Oklahoma Dept. of Ed. for denying journalists access to news conference*, Society of Professional Journalists (Aug. 23, 2024), <https://perma.cc/2FKJ-73XR>. This is a clear admission of viewpoint

discrimination. Defendants did not like KFOR-TV's reporting in its prior coverage of the OSDE and are punishing Plaintiffs as a result. Other than Isett's insisting Plaintiffs are not "legitimate news," none of the Defendants have responded to Plaintiffs' direct requests for more specific reasons they were denied access despite possessing State-issued press credentials to attend events at the Capitol Complex. Hughes Decl. ¶ 20; Brown Decl. ¶ 31

Defendants have not treated any other news media in this way. They allow all other credentialled media to attend the board meetings in person. Hughes Decl. ¶ 17; Brown Decl. ¶ 11. And Walters and Isett permit those same media members to participate in Walters' press conferences. Brown Decl. ¶¶ 5, 29. Thus, Defendants' erratic, unsupportable denial of only Plaintiffs from access to these events, as well as the obvious viewpoint-based labeling of KFOR-TV as "not a legitimate news organization" and no more than a "tabloid," establishes that Defendants deny Plaintiffs the ability to news gather for content- and viewpoint-based reasons. A TRO, and a preliminary injunction, should issue.

In addition, because Defendant Isett has been recorded repeatedly physically blocking and laying hands on KFOR-TV personnel (Brown Decl. ¶¶ 17, 23, 25, 28), Plaintiffs request the TRO address the berth Defendant Isett should afford KFOR-TV personnel so that he does not physically obstruct,

touch, or impede Plaintiffs' reporting in the future, either by his direct physical contact or by shutting doors on KFOR-TV personnel.

II. PLAINTIFFS HAVE SUFFERED AND WILL SUFFER IRREPARABLE HARM IF DEFENDANTS ARE PERMITTED TO CONTINUE TO DENY THEM PRESS ACCESS AND NEWSGATHERING ABILITIES.

Plaintiffs have been, and will continue to be, irreparably harmed by Defendants' arbitrary and discriminatory denial of access to the board meetings and Walters's press conferences. Defendants repeatedly denied Plaintiffs' access to these events on March 28th, June 27th, July 31st and August 22nd. Hughes Decl. ¶¶ 18-19; Brown Decl. ¶¶ 11-12. Numerous other reporters, besides Plaintiffs, were able to attend and report on what occurred. Hughes Decl. ¶ 17; Brown Decl. ¶ 11 The next board meeting and press conference takes place in just four days on the morning of September 26, 2024. Hughes Decl. ¶ 22; Brown Decl. ¶ 32. There is no reason to believe Plaintiffs will be permitted to access the board meeting in person or Walters's press conferences without Court intervention. Hughes Decl. ¶¶ 23-25; Brown Decl. ¶ 33.

If this Court does not act immediately, Plaintiffs are likely to be deprived of the ability to news gather in a manner equal to that afforded to other news reporters for an indeterminable time into the future. Each day that Defendants deny KFOR-TV and its reporters equal access is a day its

audience is denied access to comprehensive news coverage. Hughes Decl. ¶ 26; Brown Decl. ¶ 34. Additionally, Defendant Isett's physical handling of KFOR-TV staff will likely increase. Thus, Plaintiffs and the public will continue to be harmed every day that preliminary relief is not granted.

This Court cannot grant access retrospectively. This viewpoint discrimination as to in-person access to such areas designated for the news media is not a de minimis injury. *TGP Communs., Ltd. Liab. Co.*, 2022 U.S. App. LEXIS 33641, at *16. In fact, “[i]t is well-settled that a ‘loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.’” *Isbell v. City of Okla. City*, No. CIV-11-1423-D, 2011 U.S. Dist. LEXIS 139578, at *6 (W.D. Okla. Dec. 2, 2011) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)).

As Plaintiffs have explained, *supra*, their First Amendment rights of free speech, free press and news gathering are violated by Defendants' denial of their access to the board meetings and Walters' press conferences.

III. THE PUBLIC INTEREST AND BALANCE OF EQUITIES FAVOR PLAINTIFFS

The balance of equities and public interest factors “merge when the Government is the opposing party.” *Nken*, 556 U.S. at 435. Defendants cannot prove any harm to the OSDE or the public if they are enjoined from engaging in unconstitutional practices and policies meant to deny Plaintiffs

access pending the outcome of this litigation. The only result from Plaintiffs' motion being granted is that Plaintiffs will be allowed to access the board meetings and Walters' press conferences, and news gather in a manner equal to what other media is already afforded, which they should already be entitled to by the issuance of press credentials. Defendants cannot demonstrate that allowing Plaintiffs to do what they already permit other reporters to do will cause Defendants harm of any kind. Rather, the public is harmed when Plaintiffs are denied equal access.

Nor will the public be harmed by allowing Plaintiffs to news gather. It is "[n]ot only newsmen and the publications for which they write, but also the public at large [that] have an interest protected by the [F]irst [A]mendment in assuring that restrictions on newsgathering be no more arduous than necessary, and that individual newsmen not be arbitrarily excluded from sources of information." *Sherrill*, 569 F.2d at 129-30. Moreover, "it is always in the public interest to protect constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), overruled on other grounds by *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012).

IV. A TEMPORARY RESTRAINING ORDER PRESERVES THE STATUS QUO.

The purpose of a TRO is to preserve the status quo between the parties and prevent irreparable harm pending an evidentiary hearing regarding

whether injunctive relief should be ordered. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 439 (1974). The “status quo” is the last peaceable or uncontested status between the parties prior to the conflict at issue. *Schrier v. University of Colorado*, 427 F.3d 1253, 1260 (10th Cir. 2005).

Here, the last uncontested status between the parties before Defendants chose to start denying them access equal to that of other news media is that Plaintiffs were permitted to attend live board meetings and press conferences by the Superintendent as their press credentials permit. Hughes Decl. ¶¶ 14-15; Brown Decl. ¶¶ 7-8. Additionally, granting the TRO prevents additional irreparable harm as previously discussed. Therefore, this Court should issue a TRO to allow the status quo to be restored.

V. THIS COURT SHOULD FOREGO THE BOND REQUIREMENT

Under Fed. R. Civ. P. 65(c), “the trial judge has wide discretion in the matter of requiring security and if there is an absence of proof showing a likelihood of harm, certainly no bond is necessary.” *Cont’l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 782 (10th Cir. 1964). In fact, the court need not issue a bond at all “in a case where issues of overriding public concern or important federal rights are involved.” *Entm’t Merchs. Ass’n v. Henry*, No. CIV-06-675-C, 2006 U.S. Dist. LEXIS 74186, at *9 (W.D. Okla. Oct. 11, 2006).

A bond requirement would negatively impact Plaintiffs' rights by requiring them to pay a fee to engage in free speech and free press. It would also negatively impact the rights of the public to be free from government enforcement of unconstitutional policies. And an injunction requiring Defendants to respect the First Amendment would not harm them. Thus, no bond should be required here.

CONCLUSION

This Court should grant Plaintiffs' motion for a temporary restraining order. Following notice to Defendants, and the opportunity for Defendants to be heard, this Court should also grant Plaintiffs' motion for preliminary injunction immediately ordering Defendants grants Plaintiffs access to the State Board of Education meetings and Walters' press conferences on equal terms with every other credentialed member of the press corps.

Respectfully submitted.

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