

Model Brief on Access to the Executive Branch

October 6, 2017

PRACTICES Anti-SLAPP and First Amendment Rights, Media and Entertainment Litigation, Litigation, Media Entertainment and Sports

This Model Brief sets forth arguments and legal arguments meant to form the basis for a motion seeking media access to the executive branch. The Model Brief includes multiple **potential** constitutional arguments that could be made to obtain access to various activities of the executive branch. The authors do not anticipate that the media will use each of the sections set forth below in a single setting. Rather, attorneys using the brief must use their discretion to determine which potential constitutional argument should apply in the circumstances facing the media representative. In making the determination as to what parts of this Model Brief apply, the attorney will need to consider not only the specific right under attack but also the actor, as the authors drafted the Model Brief to be used to contest actions taken by both state actors, see 42 U.S.C. § 1983, and federal actors, see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The potential constitutional arguments and a brief description of each of the arguments set forth in the Model Brief include the following:

- **First Amendment Retaliation:** Retaliation claims are most useful where a media plaintiff can point to previous publications which are objectionable to the defendant(s), and a previously held means of access has subsequently been denied, such as a denial of entry or revocation of a press credential.
- **First Amendment Right of Access:** Right of access claims are useful where access has been denied and special permissions such as press credentials are irrelevant. For example, if all media involved have passes but access is selectively denied to the plaintiff, see *CNN, Inc. v. ABC, Inc.*, 518 F. Supp. 1238, 1242 (N.D. Ga. 1981), or if press credentials are unnecessary for access, such as to a public space. The qualified right may be asserted if there is a tradition of access (either by the public or press) to the event or activity, access is important, and it is not outweighed by other interests, such as safety or space requirements. Where press access has been denied to historically public forums, the affected party may also want to consider bringing a claim for a violation of their right of access. See e.g. *CNN, Inc. v. ABC, Inc.*, 518 F. Supp. 1238 (N.D. Ga. 1981) (television media representatives successfully obtained a preliminary injunction when the White House Press office excluded all television media representatives from covering certain White House and presidential events); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (newspaper successfully sued for right to access trial when a trial court closed the court room in a criminal case); *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977) (finding that denying a reporter a White House press pass without the articulating a meaningful standard governing the denial violated the First Amendment); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 (6th Cir. 2002) (finding broad ban on members of the press and public from alien removal proceedings violated the First Amendment).
- **Due Process pursuant to the Fifth or Fourteenth Amendment:** Due process claims are useful to media plaintiffs who possess an interest (typically a press credential) which is denied or revoked, without sufficient process. Whether or not the interest is already recognized

depends on your circuit, but *Sherill v Knight*, 569 F.2d 124, 128 (D.C. Cir. 1977), and *Nicholas v City of New York*, No. 15-CV-9592 (JPO), 2017 WL 766905 at *6, 2017 U.S. Dist. LEXIS 26995 at *18 (S.D.N.Y Feb. 27, 2017), note that a protected interest is especially likely to attach to a press credential given the First Amendment interests at stake. In addition to notice and opportunity to be heard, a final written decision may be required in your jurisdiction.

- **Equal Protection pursuant to the Fourteenth Amendment:** A claim for equal protection is useful to media plaintiffs who can point to disparate grants of access amongst journalists or organizations. The argument is strongest where information or access has been selectively denied to the plaintiff but is generally available (i.e. not discretionarily available.)

Given that the attorney will likely raise these issues while seeking injunctive relief, the authors have styled the Model Brief as one seeking injunctive relief. As a result, there is also law regarding the requirements to seek an injunction including the balance of the equities and the irreparable harm incurred upon a deprivation of a constitutional right.

This Model Brief is intended only as a starting point for practitioners preparing pleadings that address the issues described herein. Of course, an attorney making these arguments must tailor the arguments, authorities, and facts to the particular circumstances of the case being defended. Equally obviously, counsel must Shepardize/update the authorities in this Model Brief, as they are only valid and good law as of the date this Model Brief was published, in August 2017. The authors do not intend this Model Brief to constitute legal advice but rather provide this Model Brief as a resource for other attorneys to use as a framework for their own legal arguments.

Excerpted from the Media Law Resource Center.