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Via E-Mail - Susan.Wagle@senate.ks.gov

The Honorable Susan Wagle
President, Kansas Senate
Kansas State Capitol
300 SW 10th Street
Topeka, KS 66612

RE: The First Amendment

Dear President Wagle:

On behalf of *The Kansas City Star*, *The Wichita Eagle*—and the more than 1 million readers of the two papers—I am writing to protest your unconstitutional action in threatening to revoke the press pass of any reporter who stayed on the Senate floor to cover the arrest of protestors during today's session of the Kansas Senate.

Your Chief of Staff, Harrison Hems, justified your decision by saying, "I'm just telling you it's a privilege to have a press pass, to be on the floor, to document." This statement by Mr. Hems (who said he was acting at your direction) reflects either an ignorance of—or a purposeful insult to—the First Amendment rights of the free press in this Country.

Repeated decisions have held the press have an absolute First Amendment right to photograph the actions of public officials on public property. See, e.g., *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) ("[A] citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment."); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999) (police lacked authority to prohibit citizen from recording commissioners in town hall "because [the citizen's] activities were peaceful, not performed in derogation of any law, and done in the exercise of his First Amendment rights").

Such activities are protected by the First Amendment because without the right to make a recording of an event, one would necessarily lose the right to show that recording to others.

The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary

of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected

Am. Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012); see also *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017) (“The First Amendment protects actual photos, videos, and recordings, and for this protection to have meaning the Amendment must also protect the act of creating that material.”).

Arrayed against this well-established First Amendment jurisprudence is the statement that “it’s a privilege to have a press pass.” It is also a privilege to have a Kansas driver’s license. See *State v. Bowie*, 268 Kan. 794, 800, 999 P.2d 947, 951 (2000) (“driving a motor vehicle in Kansas is not a natural right but a privilege”). But you can’t use that privilege to intentionally drive over someone because they are a person of color ... or are protesting your refusal to allow the Kansas Senate to vote on Medicaid expansion. Such an action on your part would patently violate the protestor’s constitutional rights to, in the former example, not be discriminated against because of the color of their skin, and, in the latter example, engage in a peaceful protest.

The same is true about your threat to revoke a reporter’s press pass because he or she is exercising their First Amendment right to record the arrest of protestors in the Kansas Senate. Your status as the Senate President gives you no more authority to violate the United States Constitution, than does your status as a licensed Kansas driver.

As such, your suggestion that your discretion to revoke a reporter’s press pass somehow immunizes from liability for your unconstitutional acts is wholly unfounded. See *Denson v. United States*, 574 F.3d 1318, 1337 (11th Cir. 2009) (“government officials lack discretion to violate constitutional rights”).

Moreover, to the extent the Senate Rules grant you unfettered discretion, the Rules are clearly unconstitutional. “[A] regulation that makes the peaceful enjoyment of First Amendment rights ‘contingent upon the uncontrolled will of an official ... is an unconstitutional censorship or prior restraint.’” *Spirit of Aloha Temple v. Cty. of Maui*, 322 F. Supp. 3d 1051, 1068 (D. Haw. 2018).

In closing, let me say that your actions today in censoring the Kansas press are not only unconstitutional, but beneath your office. Kansans deserve better.

Best regards,

Lathrop Gage LLP



By: _____
Bernard J. Rhodes

cc: Sen. James Denning (Jim.Denning@senate.ks.gov)
Sen. Anthony Hensley (Anthony.Hensely@senate.ks.gov)