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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

New Jersey Second Amendment Society, a not for profit corporation of the State of New Jersey, and Alexander Roubian ***Plaintiffs,*** **vs.** **Philip Murphy, Governor of the State of New Jersey, et al.,** ***Defendants.***	**Civil Action No. _____**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF HIS APPLICATION FOR A PRELIMINARY INJUNCTION (*F.R.Civ.P.* 65 and *Local Rule* 65.1)

STATEMENT OF FACTS:

For purposes of this Memorandum of Law Plaintiffs shall rely upon the facts as contained in the Verified Complaint and Jury Demand with Exhibits and the Declaration of Plaintiff Alexander Roubian submitted herewith.

LEGAL ARGUMENT:

POINT I:
PLAINTIFF HAS ARTICLE III STANDING TO PURSUE THESE LEGAL CLAIMS:

As a threshold matter Plaintiffs have been punished and retaliated against by the State Government for exercising their fundamental *First* Amendment Constitutional rights, ironically and specifically for expressing their views and openly challenging State Government on first amendment speech issues relating to their fundamental *Second* Amendment rights. Plaintiffs are now being arbitrarily and retaliatory excluded and barred from admittance to Daily Public Press Briefings that they were previously granted admission to without issue denying them the right to freedom of speech and freedom of press. Such injury clearly constitutes a concrete, ascertainable "injury in fact" and therefore "standing" to pursue those claims within the meaning of the *Constitution's* Article III as interpreted by the United States Supreme Court in *Lujan v. Defenders of Wildlife,* 504 *U.S.* 555 (1992).

POINT II:
PLAINTIFFS HAS DEMONSTRATED THEIR RIGHT TO AN ORDER GRANTING THE REQUESTED PRELIMINARY INJUNCTIVE RELIEF:

Plaintiff moves before this Court seeking a Preliminary Injunction under *F.R.Civ.P.* 65 admitting them on equal footing as all other "Press" to the Defendant New Jersey Governor's Daily Public Press Briefings to all press conferences including those on measures being planned and implemented by the State of New Jersey to address and combat the dangers from the COVID-19 Virus.

> When deciding whether to issue a preliminary injunction, a district court must consider: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the

> movant will be irreparably injured by denial of the relief; (3) whether granting the preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

[*McTernan v. City of New York*, 577 *F.3d* 521, 526 (3d Cir pursue clues point to play resumes through the right order granting relief. 2009) (internal quotation marks omitted)].

A.) Plaintiff Has Demonstrated A "Reasonable Probability Of Success On The Merits":

There are many separate - but related - fundamental Constitutional Rights at issue in this case. In *Heller v. District of Columbia,* 554 *U.S.* 570 (2008) the United States Supreme Court ruled that the Second Amendment to the *United States Constitution*, made applicable to the States by virtue of the Fourteenth Amendment, protects an individual's ***fundamental constitutional right*** to possess a firearm unconnected with service in a militia, and to use that firearm for traditionally lawful purposes such as self defense within the home. As such, there can no longer be any reasonable ***legal question or dispute*** over whether the right to keep and bear arms conferred by the Second Amendment are indeed included among those rights recognized as "fundamental". Despite this LEGAL reality, the Plaintiffs maintain that the current Governor, Defendant Murphy, is ***politically predisposed*** against and ***politically prejudiced*** against and ***politically disagrees with*** the United States Supreme Court's legal pronouncement that the Second Amendment indeed confers ***fundamental*** constitutional rights. Plaintiff New Jersey Second Amendment Society therefore diligently monitors and reports on all actions taken by the Governor and New Jersey State Government that may impact on the Second Amendment rights of citizens. In this regard, Plaintiffs also enjoy a related fundamental general First Amendment right to obtain information from the State Government regarding any and all issues that may affect Second Amendment rights on an equal footing to others similarly situated, and to freely disseminate this information to the public and to express

related opinions and views - sometimes opposing views - without fear of or actual retaliation or persecution from the State Government. The First Amendment is not needed to protect the expression of opinions and views that most people agree with: It is needed precisely to protect unpopular views, or views not joined and concurred in by those in temporary power of State Government. Just as in time of insurrection, rebellion or outright war President Abraham Lincoln had no constitutional authority to unilaterally suspend the ***fundamental*** constitutional right of the citizens to seek a Writ of *Habeas Corpus* and the ***fundamental*** constitutional right to a non- military jury trial in the lower Federal Courts, *see Ex Parte Milligan,* 71 *U.S.* (4 *Wall.*) 2 (1866). Equally, Defendant Governor Murphy has no unilateral authority during time of temporary health crisis to take executive action that infringes on or abrogates or violates the fundamental Second Amendment rights of citizens.

1. It Is A *Per Se* Violation Of The First Amendment For The Government To Retaliate Against A Journalist Based On The Content Of His Or Her Reporting:

The First Amendment protects journalists from retaliation by government officials based on the content of their reporting. Content based retaliation has several negative effects: It chills - and in some cases precludes - free speech, sanitizes reporting, and compromises the public's right to receive accurate information about its government. This Court must not condone the clear retaliation against Plaintiffs.

2. Federal Courts Consistently Use 42 *U.S.C. sec.* 1983 As A Basis To Protect Journalists From Content-Based Government Retaliation Such As At Issue In This Case:

Federal courts across the country have consistently recognized that retaliation by government officials against journalists for the content of their speech violates the First Amendment. "Official reprisal for protected speech offends the Constitution [because] it

threatens to inhibit exercise of the protected right, and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 *U.S.* 250, 256 (2006) (citations and quotation marks omitted).

In *Rosenberger v. Rector*, 515 *U.S.* 819, 826-27 (1995), the United States Supreme Court even rejected State government viewpoint discrimination against ***student*** journalists. The University of Virginia denied financial support to the newspaper because it promoted or manifested religious beliefs. *Id.* The Supreme Court explained that the university impermissibly selected "*... for disfavored treatment those student journalistic efforts with religious editorial viewpoints.*" *Id.* at 831. The Court recognized that "... [v]ital First Amendment speech principles" were at stake, including the "... danger to liberty ... in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them..." and the "... chilling of individual thought and expression." *Id.* at 835. The government's selective denial of financial support was thus a denial of the "... right of free speech guaranteed by the First Amendment." *Id.* at 837.

In *Capital Cities Media, Inc. v. Chester*, 797 *F.2d* 1164, 1176 (3d Cir. 1986), the Third Circuit held that the government cannot "... discriminat[e] between news seekers, granting access to those favorably disposed to it while denying access to those whom it considers unfriendly." *See also Times-Picayune Pub'g Corp. v. Lee*, 15 *Med. L. Rptr.* 1713, 1720 (E.D. La. 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.").

The Fourth Circuit more specifically held that any Governmental conduct designed to eliminate criticism in the press violates the First Amendment. In *Rossignol v. Voorhaar*, 316 *F.3d* 516 (4th Cir. 2003), the Fourth Circuit addressed a situation where in Maryland on the night before a local election, six policemen drove around their county buying up all of the newspapers for sale at local stores, anticipating that a newspaper story would be critical of them and their favored candidates. The Fourth Circuit, reversing the district court's entry of summary judgment in favor of the defendants, held that, if the police acted under color of state law, such a seizure "... clearly contravened the most elemental tenets of First Amendment law ..." because the police acted with "... censorial motivation." *Id.* at 521, 523. The Fourth Circuit recognized that "... [i]f we were to sanction this conduct, we would point the way for other state officials to stifle public criticism of their policies and their performance." *Id.* at 528. In another case decided by the Fourth Circuit, *Trulock v. Freeh*, 275 *F.3d* 391 (4th Cir. 2001), the Court confronted a case where the author of a magazine article critical of the White House and FBI stated a claim for First Amendment retaliation when he alleged that, shortly after publication, the FBI conducted a warrantless search of his home. The Fourth Circuit vacated the district court's dismissal of the journalist's retaliation claim and rejected a qualified immunity argument asserted by the defendants, noting that "it was clearly established at the time of the search that the First Amendment prohibits an officer from retaliating against an individual for speaking critically of the government." *Id.* at 406. The court rejected the argument that a reasonable FBI agent "... could reasonably have believed that the magazine article did not enjoy First Amendment protection." *Id.*

In Chicago, county officials denied a newspaper reporter access to a jail only after she wrote a critical article about strip-search policies at the jail. *Chicago Reader v. Sheahan*, 141 *F.*

Supp. 2d 1142, 1143 (N.D. Ill. 2001). She sued the county officials, who argued that her access had been denied because she had deceived officials about her previous article. *Id.* at 1146. The district court found that denying access "could chill someone's speech" and rightly observed that although "... [r]eporters frequently do resort to alternate sources when first-hand observations are not possible, . . . that in no way negates that actually being there is optimal." *Id.* The district court denied the county officials' motion for summary judgment because the denial of access has "... exactly the type of chilling effect the First Amendment guards against." *Id.*

3. The Initial "Right Of Access" Is Not At Issue In This Case:

It must be emphasized that what is at issue in this case is the Governor's PUBLIC Press Briefings which are open to the "Press". Plaintiff is indeed "Press" and has always been treated as such in the past by the named Defendants. Again, it must be emphasized that Plaintiffs were routinely and without issue admitted to these PUBLIC Press events until such time as the Governor was beaten in Federal Court and embarrassed and in anger and retaliation wanted to silence Plaintiff's criticism and prevent any public questions and prevent attention being brought to the Federal Lawsuit, the conflicting Federal standards, and the almost immediate adding of Guns and Ammunition Stores to the list of "Essential Businesses." In this uncertain time, it is only Plaintiffs news coverage and reporting that is vigilant and watching and reporting to the public on government restrictions that infringe on or violate Second Amendment rights. Indeed, tehre is no question that without the persistence and action of Plaintiffs, Guns and Ammunition Stores would never have been added to the list of "Essential Businesses". Now, in retaliation, Plaintiffs are suddenly being excluded.

It is well understood that the First Amendment is not absolute and that there are indeed limited circumstances where and when the Government may restrict "access" to persons to be

physically present at the location and forum of a government event without violating the First Amendment. *See P.G. Publishing Co. v. Aichele,* (restriction on excluding reporters from entrance and presence in election polling locations upheld as not violating the First Amendment); *See also Branzburg v. Hayes*, 408 *U.S.* 665, 684 (1972) ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of ***special access to information not available to the public generally***." (Emphasis added).; *Pell v. Procunier*, 417 *U.S.* 817, 834 (1974) ("The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press ***special access to information not shared by members of the public generally***." (Emphasis added)).

Here, however, the threshold "Right of Access" of the Plaintiffs to be physically present at the Governors Daily Public Press Briefings is not legitimately at issue because Plaintiffs were previously routinely admitted without question or issue and allowed to film and to try to ask questions. It was only (1) after Plaintiffs publically questioned and challenged the Governor, arguing that because of the Second Amendment and the fundamental Constitutional rights it affords citizens that they believed that Gun and Ammunition Stores should be classified as and added to the list of "Essential Businesses" during this time of Public Health Emergency, (2) and after Plaintiffs sued the Governor in Federal Court to have Gun and Ammunition Stores added to the list of "Essential Businesses", (3) and after the Federal Government issued formal suggested guidelines which indicated that all States invoking a State of Emergency with "shut down" Orders should include Gun and Ammunition Stores on their list of "Essential Businesses" that could remain open, (4) and after the Defendant Superintendent of State Police, in response to the Federal Lawsuit and non-binding Federal Guidelines, in fact added Gun and Ammunition Stores

to New Jersey's list of "Essential Businesses". It was only after this, in sudden and clear retaliation, that Plaintiffs were suddenly excluded and barred from being allow entrance to attend the Governor's Daily Public Press Briefings on the "Press Credentials" pretext and from having access to the web site portal for the Governor's Internet Daily Public Appearance and Press Schedule, a web site portal that is ***open not only to the press but to all persons upon request***. *See Infra.* So in a sense, what is at issue is a CONTINUED Right of Access, because access was ordinally properly extended and conferred, and then wrongfully revoked and taken away in retaliation for Plaintiff's publically challenging the Governor on an issue, then suing the Governor and essentially immediately "winning" within 10 days, proving the Governor "wrong".

4. The "Press Credentials" Pretext Of Now Suddenly Denying Plaintiffs Access is Nonsense:

At the onset, the New Jersey Open Public Meetings Act does not limit "access" to public meetings and events to any specific category of people or professions, such as the so called "traditional press." *See N.J.S.A.* 10:4-12(a). Moreover, today it is impossible to define "traditional press", and the law does not step onto that "slippery slope" nor should it try. The inquiry is whether someone is entitled to First Amendment and / or Fourteenth Amendment protection. In this regard and as relates to the claims in this case, the law is clearly established that when public officials confer a right ***to some <u>persons</u>*** to appear and attend and participate in press conferences and press briefings, the First Amendment protection afforded news gathering under the first amendment guarantee of freedom of the press requires that this access not be denied arbitrarily or for less than compelling reasons ***to others.*** Moreover, if access is indeed granted to some but denied to others, due process requires that such persons denied access be given a written specification of reasons and there must be a right to appeal the denial based upon the specification of reasons for denial. *See Sherrill v. Knight, 569 F.2d* 124 (D.C. Cir. 1977); *see*

also Matthews v. Eldridge, 424 *U.S.* 319, 333 (1976) ("The fundamental 'requirement of due process is the opportunity to be hear at a meaningful time and in a meaningful manner .'" (internal citation omitted) . Indeed, the United States Supreme Court has recognized the necessity of providing such procedural protections to members of the media one access to government proceedings is given to some but is being denied to others. *See Gannett Company, Inc. v. DePasquale,* 443 *U.S.* 368, 401 (1979) (Powell, J., concurring) ("If the constitutional right of the press and public to access [public proceedings] is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion."); accord *Globe Newspaper Co. v. Superior Court*, 457 *U.S.* 596, 609, fn. 25 (1982) (quoting Justice Powell's concurrence in *Gannett*).

Here, Plaintiffs were routinely admitted, allowed to film, and allowed to ask questions at the daily Governor and CTF public briefings. However, once Plaintiff New Jersey Second Amendment Society sued the Governor in Federal Court for his unconstitutional failure to designate and include Gun and Ammunition shops on the list of "Essential Businesses" exempt from mandatory closure, Defendants immediately became hostile to Plaintiffs. Then, all of a sudden, on March 28, 2020, without warning, Plaintiffs were suddenly excluded and barred from the daily Governor and CTF public briefings and from having access to the web site portal for the Governor's Internet Daily Public Appearance and Press Schedule. While the pretext for the sudden exclusion was allegedly due to the fact that plaintiffs did not have "Press Credentials", the fact remains that Plaintiffs dutifully applied for any and all press credentials available and both times were arbitrarily denied without a written specification of reasons, without notice of a right to appeal the denial, and a forum within which to appeal the denial to. To the extent press credentials can be used as a basis to deny admission, both of the two separate systems for issuing

so called "Press Credentials" fail to comply with the basic mandatory procedures required by the federal Constitution and themselves are both unconstitutional. As the systems are unconstitutional they may not be used as a basis upon which to illegally exclude Plaintiffs.

5. Defendants Have Committed And Are Continuing With A Clear 14th Amendment Equal Protection Violation:

The Fourteenth Amendment dictates that a State may not "deny to any person within its jurisdiction the equal protection of the laws." United States Constitution, Amendment XIV. The purpose of this clause is "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute, regulation or policy or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 *U.S.* 562, 564 (2000) (quoting *Sioux City Bridge Co. v. Dakota County*., 260 *U.S.* 441, 445 (1923)). Where, such as here, a litigant asserts a so-called "class of one" Equal Protection challenge, alleging that the litigant itself, and not a particular group, was the subject of discriminatory treatment, the litigant is required to allege "that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Marcavage v. National Park Service*, 666 *F.3d* 856, 860 (3d Cir. 2012) (quoting *Village of Willowbrook*, 528 *U.S.* at 564).

Here, on information and belief, Plaintiffs represent the only organization and person to be denied "Press Credentials" or from having access to the web site portal for the Governor's Internet Daily Public Appearance and Press Schedule. As pointed out, supra, the system for considering applications for "Press Credentials" clearly violates Section 1 of the 14th amendment to the United States Constitution. Further access to the web site portal for the Governor's Internet Daily Public Appearance and Press Schedule is open to ***anyone*** who requests access. In sum, Plaintiffs have demonstrated more than " probability of success on the

merits": is submitted that plaintiffs have demonstrated a CERTAINTY of ultimate success on the merits.

B. Plaintiffs Will Be "Irreparably Injured" By Denial Of The Relief Requested:

The law is well settled that for injunctive relief purposes a Plaintiff satisfies the "irreparable harm" prong of the inquiry if they can demonstrate a constitutional injury. *See Elrod v. Burns,* 427 *U.S.* 347, 373 (1976). ('[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Here, Plaintiff clearly alleged and proves violations of the First, Second and Fourth Amendments, and thus satisfies the "irreparable injury" prong as a matter of law.

C. Granting The Preliminary Relief Requested Will Not Result In Even Greater Harm To The Non-Moving Parties:

Plaintiff cannot envision or fathom any legitimate argument that could be made that the non-moving parties

D. It Is In The Public's Interest To Grant The Preliminary Relief Requested:

Quite clearly it is always in the Public's Interest to ensure that the State be stopped from engaging in action and enforcing policies that violate the Federal and State Constitution.

CONCLUSION:

For the foregoing reasons and authorities cited in support thereof, it is respectfully requested that the Court grant the Preliminary Injunctive relief requested without necessity of posting any bond.

Respectfully submitted,

s/ Albert Rescinio

ALBERT J. RESCINIO, ESQ.