



INSTITUTE FOR FREE SPEECH

July 23, 2019

Director Greg McKay
Arizona Department of Child Safety
3003 N. Central Avenue
Phoenix, AZ 85012-2902

Dear Mr. McKay:

On behalf of the Institute for Free Speech,¹ I write in response to a recent *Arizona Republic* article that reports at least one instance where your office has instructed a parent to “avoid inviting people to attend DCS [Department of Child Safety] meetings, or court hearings that may have a connection with the media, such as any journalist, newspaper/news reporters, potential political gain, or anyone who may write derogatory statements in social media or elsewhere regarding DCS or the Judicial system.”²

If true,³ this demand raises serious First Amendment concerns. “The Supreme Court has long recognized a qualified right of access for the press and public to observe government activities.” *Leigh v. Salazar*, 677 F.3d 892, 898 (9th Cir. 2012). While that right is not absolute, it is strong and fundamental, and governments have great difficulty overcoming the presumption of open proceedings. See *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982) (holding unconstitutional a ban on public access to trial testimony of children who were victims of sex crimes).

Should this policy be challenged by litigation, then under the facts reported by *The Arizona Republic*, there is very little prospect of your office prevailing in court. Not only does the instruction bar public viewing of presumptively-public proceedings, it does so on the basis of viewpoint. As you doubtless know, viewpoint discrimination is “an egregious form of content discrimination,” and nearly always unconstitutional. *Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Viewpoint discrimination is bad enough, but where the government’s clear motivation is suppressing criticism, its behavior is not just technically unconstitutional. It is patently outrageous. As the Ninth Circuit has warned, “when wrongdoing is

¹ The Institute for Free Speech is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, press, assembly, and petition. Originally known as the Center for Competitive Politics, it was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Institute is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. Its attorneys have secured judgments in federal court striking down laws in Colorado, South Dakota, and Utah on First Amendment grounds. The Institute is currently involved in litigation against California, Connecticut, Massachusetts, Missouri, South Dakota, and Tennessee.

² Dianna M. Nández, Did Arizona Department of Child Safety try to bar parents from criticizing it?, *The Arizona Republic*. July 17, 2019. <https://www.azcentral.com/story/news/local/arizona-child-welfare/2019/07/16/arizona-department-of-child-safety-banning-criticism-child-welfare-agency-courts/1562382001/>.

³ The *Arizona Republic* withheld the relevant document due to concern that your office might retaliate against the parent who provided it to the press under the guise of violating confidentiality rules – a system some might call a prior restraint.

underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate.” *Leigh*, 677 F.3d at 900.

If *The Republic*'s reporting is mistaken, we urge you to swiftly and transparently explain the source of its error. The reporting appears credible, and we hope this is an isolated incident. I strongly encourage you to investigate whether or not this type of demand is common, rectify the situation, and ensure that your staff is adequately trained to respect First Amendment rights so as to prevent this from happening again.

If you have any questions about the foregoing, please contact our office at (703) 894-6800.

Sincerely,



David Keating
President
Institute for Free Speech

Cc: Mr. Shawn Fuller, General Counsel, Arizona Department of Child Safety
Ms. Angie Trevino, Rules Development and Policy Specialist, Arizona Department of Child Safety
Ms. Anni Lori Foster, General Counsel, Office of Arizona Governor Doug Ducey
The Honorable Kate Brophy McGee, Chair, Senate Health and Human Services Committee
The Honorable Nancy Barto, Chair, House Health and Human Services Committee
The Honorable John Allen, Member, Joint Legislative Oversight Committee on the Department of Child Safety
The Honorable David Bradley, Member, Joint Legislative Oversight Committee on the Department of Child Safety
Mr. Dennis Wells, Arizona Ombudsman-Citizens' Aide