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**UNITED STATES DISTRICT COURT**
**DISTRICT OF UTAH**

UTAH POLITICAL WATCH, INC., and BRYAN SCHOTT,

Plaintiffs,

v.

ALEXA MUSSELMAN, Utah House of Representatives Communications Director and Media Liaison Designee; AUNDREA PETERSON, Utah Senate Deputy Chief of Staff and Media Liaison Designee; ABBY OSBORNE, Utah House of Representatives Chief of Staff; and MARK THOMAS, Utah Senate Chief of Staff, in their official and individual capacities;

Defendants.

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS (DKT. 53)**

Case No. 2:25-cv-00050-RJS-CMR

Hon. Robert J. Shelby

Hon. Cecilia M. Romero

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## INTRODUCTION

It is no wonder Defendants recently won the "Black Hole Award" from the Society of Professional Journalists for "government institutions that exhibit blatant disregard for the public's right to know."[1] Defendants blatantly deny the right to equal treatment in media-specific spaces that the government voluntarily created. None of Defendants' arguments meet their burden to show that Plaintiffs' alleged facts – taken as true – fail to state First Amendment claims. Defendants' Motion must be dismissed.

## STATEMENT OF FACTS

*Bryan Schott's Reporting and Commentary*

Plaintiff Bryan Schott owns and operates Utah Political Watch (UPW), a subscription-based digital newsletter covering Utah politics, and hosts its podcast, Special Session. Dkt. 36 (First Amended Complaint) ¶16. With over 25 years as a Utah political reporter, Schott founded UPW in October 2024. *Id*. ¶16. Previously, he was a Political Correspondent for the Salt Lake Tribune, Utah's largest daily newspaper, writing 1,201 stories on politics from 2020 to 2024. *Id*. ¶15. For over a decade before that, he served as managing editor of UtahPolicy.com, where he held press credentials for the Utah legislature. *Id*. ¶¶12-13. Schott is a member of the Society of Professional Journalists and follows its ethics code. *Id*. ¶11.

Since its launch, UPW has grown in readership, offering free daily newsletters and paid content. *Id*. ¶¶16, 21-24. It has 1,200 subscribers, 25% of which pay for extra content, with the website attracting tens of thousands of monthly pageviews and top stories earning 4,000–5,000 views. *Id*. ¶¶21-22. The podcast averages 250–300 downloads per episode, and Schott's TikTok,

[1] Bear, Jodi, *Utah State Legislature named 2025 Black Hole Award recipient during Sunshine Week*, Society of Professional Journalists (Mar. 21, 2025) https://www.spj.org/utah-state-legislature-named-2025-black-hole-award-recipient-during-sunshine-week/

with 12,000 followers, garners 4,500–10,000 views per Utah politics video, totaling over 214,000 views in the last 60 days. *Id*. ¶¶23-24. Plaintiffs also produce an affiliated podcast, Special Session with Bryan Schott, where Schott talks about events that occur during the Utah Legislative Session as well as other relevant Utah political news. *Id*. ¶20.

UPW holds a $2 million Media Liability policy. Its staff consists of Schott as the main reporter and publisher and Malissa Morrell as editor. *Id*. ¶¶17-18. Morrell has edited Schott's work since 2015, assisting with story selection, grammar, clarity, and headlines, and has been integral to UPW since its inception. *Id*. ¶18

Schott has earned multiple awards, including Utah Broadcasters Association Awards for Best Feature Story, News Reporting Series, and the 2022 Utah Society of Professional Journalists' Best Newspaper Reporter. *Id*. ¶25. In 2024, he was among 34 journalists awarded the National Press Foundation's Elections Journalism Fellowship. *Id*.

*Defendants' Media Credentialing Policy*

Since 2018, Defendants have maintained a written media credentialing policy. *Id*. ¶26. From 2019 to 2024, bloggers and independent media could receive credentials after additional scrutiny. *Id*. ¶27. The 2019 policy allowed "a blog site owner or organization not bound by a code of ethics" to gain credentials by agreeing to an ethics code. *Id*. ¶28. Schott received credentials as a blog representative in 2018 and 2019. *Id*. ¶13. The 2020 policy omitted mention of bloggers or independent media. *Id*. ¶29. In 2021, the policy permitted "[b]loggers representing a legitimate independent news organization" to be credentialed under some circumstances. *Id*. ¶30. This language persisted in 2022. *Id*. In 2023, "some circumstances" changed to "limited, rare circumstances." *Id*. ¶31. It remained unchanged in 2024. *Id*.

In November 2024, after Schott established UPW, Defendants revised the "Utah Capitol Media Access and Credentialing Policy" to bar blogs and independent media from receiving press credentials entirely. *Id*. ¶32. The 2025 policy also added a brand-new preamble, which emphasized providing access to professional journalists from "reputable news organizations" to ensure informed reporting. *Id*. ¶33. It also stated that credentials were for media primarily covering Capitol news, with no guarantee of issuance, even for previously credentialed individuals. *Id*. Defendants have the discretion to limit how many credentials an organization receives. *Id*.

Also for the first time, the 2025 Policy completely barred "[b]logs, independent media or other freelance media" from credentialing. *Id*. ¶34. It lacks definitions for "blog," "independent media" or "reputable news organization." Defendants cited an "uptick in nontraditional, independent media" as the reason for exclusion. *Id*. ¶36 (citing Peterson Decl. ¶32). The policy requires journalists to satisfy five credentialing criteria: (1) complete an online application; (2) be a professional journalist regularly covering the Capitol, affiliated with a reputable news organization; (3) provide an annual background check; (4) adhere to a professional ethics code; and (5) complete yearly harassment prevention training. *Id*. ¶37; Dkt. 36-8 (Exh. 8). Applicants may need to submit a letter of introduction verifying employment and need. *Id*. ¶38.

Credentialed press gain access to secure Capitol areas, media workspaces, designated areas in the Senate and House (including set up for videographers/photographers), media availabilities, designated parking, the press room with internet and audio feeds, and Committee Rooms. *Id*. ¶39. Defendants also limit legislative press release distribution to credentialed press. *Id*. ¶40. The access afforded to the credentialed media is important and significant to journalists and their audiences. *Id*. ¶41. Attending events in person and live affords opportunities to

newsgather and report that those watching or listening remotely and/or on a delayed feed do not have. *Id*. ¶42.

*Schott's Years of Press-Credentialed Access to the Utah Legislature*

Since 1999, Schott has covered the Utah Legislature for various Utah media outlets. *Id*. ¶43. He received press credentials annually. *Id*. ¶45. The application process typically required a criminal background check by the Utah Highway Patrol and approval from a House or Senate staffer. *Id*. ¶44 After founding UPW in September 2024, Schott expected to receive press credentials based on past practice. *Id*. ¶45. He notified Defendants of his UPW reporting, requested credential application details, and asked to join the legislative press release list. *Id*. Defendants did not respond initially but later clarified that press releases are exclusive to credentialed media. *Id*.

*Schott's Reporting Angers Defendants*

In 2024, Schott often reported critically on the Utah legislature and Defendants. *Id*. ¶46. On January 10, Schott posted a humorous X.com comment about legislative staffers struggling with a backdrop. *Id*. ¶50. Defendant Osborn replied on X.com, calling Schott a "dick" for mocking staff and labeling his actions "#classless." *Id*. The backdrop was for a House Republican press conference outlining 2024 priorities. *Id*. ¶47. When KUTV asked about banning DEI at state colleges, Rep. Katy Hall was present, but Schultz blocked her from responding. *Id*. Schott's next-day article noted Schultz's evasion. *Id*. ¶48. Schultz sent Schott angry messages accusing him of bias, one stating, "You used to be the best reporter in the Legislature. It's sad how far you've fallen." *Id*. ¶49.

On December 12, 2024, Schott reported for UPW that a nonprofit accused Senate President Stuart Adams of violating campaign disclosure laws. *Id*. ¶51. Adams responded on

X.com, calling Schott a "former media member" and his story "neglectful journalism." *Id.* ¶52. Defendant Peterson, Adams' Deputy Chief of Staff, also criticized Schott for the same story and for not waiting for her to provide a comment on her own timeline. *Id*. ¶53 (citing Exh 9). Peterson dismissively referred to Plaintiff Schott as "someone who claims to be a journalist," and Plaintiff UPW as a "blog," accused Schott of a "lack of professionalism," "lack of journalistic integrity," having "disregard for accurate reporting and ethical standards." *Id*. She chided him for "fail[ing] to obtain information from the Lieutenant Governor's Office," and told him "You aren't a journalist" when he asked which ethical standards she claimed he had not met. *Id*. Schott clarified he had sought comment from the office multiple times and, learning of the complaint that day, rushed to report breaking news. Exh. 9. He offered to update the story and asked if Peterson's criticism would affect his press credential application. *Id*. Over five hours later, Peterson finally provided the same comment she had already given to another outlet, which Schott had already seen, and called UPW a "blog" while accusing Schott of lacking ethics. Dkt. 36 ¶54; Exh. 9. When asked what standards Schott violated, Peterson replied, "If you have to be told, you aren't a journalist," and on his credential application only said, "We will follow our policy." Exh. 9.

*Defendants Deny Plaintiffs Press Credentials Application*

Five days later, on December 17, 2024, Schott applied for a press credential, passed the background check, and contacted House Communications Director Alexa Musselman. *Id*. ¶56. Musselman said she needed to review the application and would follow up. *Id*. Schott had never faced additional scrutiny before. *Id*. ¶57. Nonetheless, he waited for a decision. *Id*. When he asked if Utah News Dispatch faced similar scrutiny, Musselman claimed they'd had

"conversations" but then noted she was on leave during their process. *Id*. Other applicants received quick approvals. *Id*. ¶58.

After waiting 90 minutes, Schott texted Musselman, who, with Senate Deputy Chief of Staff Aundrea Peterson, emailed that his application was denied because "Utah Capitol media credentials are not issued to blogs, independent, or freelance journalists." *Id*. ¶59-60. Schott appealed, but on December 26, 2024, Abby Osborne and Mark Thomas upheld the denial not only because UPW was a "blog" or "independent" media but also because they did not believe Schott was "a professional member of the media associated with an established, reputable news organization or publication." *Id*. ¶62; Exh. 10.

The denial email and appeal letter did not specify why UPW was deemed a non-reputable "blog" or "independent media outlet." *Id*. ¶63; Exh. 10. It was only after suit was filed, that Defendants provided further explanation that those terms meant the publication lacked an "editor," used a "stream of consciousness" writing style and was missing "any institutional framework or a sufficiently established track record." *Id*. ¶¶19, 74-79. Prior to denial, Defendants never asked whether UPW had an editor, nor did they inquire into UPW's institutional framework or Schott's "stream of consciousness" writing style. *Id*. ¶19, 80-83.

Defendants issued credentials to numerous journalists and organizations, including Building Salt Lake, a self-described "independent media" and "Top-100 Urban Planning Blog." Dkt. 36 ¶66-70; Exh. 13. Credentials were also issued to independent outlets like Gephardt Daily, The Salt Lake Tribune, Utah Policy, and Utah News Dispatch. Dkt. 36 ¶71; Exh. 13. Becky Ginos, the self-edited sole staff of Davis Journal, and Holly Richardson, the self-edited sole employee of Utah Policy, a news aggregator, also received credentials. Dkt. 36 ¶88-90.

*Schott's Lack of Access During the 2025 Legislative Session*

The 2025 Utah Legislative Session lasted from January 21, 2025, to March 7, 2025, and Defendants denied Schott access to legislative areas and press-exclusive events equal to that of other press members. *Id*. ¶94-101. Schott missed, and will continue to miss, press conferences, press releases, media availabilities and press briefings that other members of the press are able to attend. *Id*. ¶¶95-102. Unlike Schott, other reporters cover meetings, press conferences, and legislative actions in media-only areas, obtaining videos, photos, and audio Schott cannot. *Id*. ¶98. They interact with legislators, witness actions closely, receive materials, and attend impromptu briefings, while Schott cannot. *Id*. ¶99. Schott will also be denied access to likely special sessions. *Id*. ¶102. No other applicant like Schott has been denied 2025 credentials. *Id*. ¶65; Exh. 13. Schott's harm, and that to his audience, is ongoing. *Id*. ¶41-42, 94-101.

## ARGUMENT

### I. DEFENDANTS DENY PLAINTIFFS THE RIGHT TO EQUAL, NON-ARBITRARY, NON-VIEWPOINT-BASED ACCESS TO NEWSGATHERING OPPORTUNITIES.

Contrary to Defendants' argument, Plaintiffs do not seek an "unrestrained," "sweeping" right to gather news. *See* Dkt. 36 ¶¶103-120. Plaintiffs want Defendants to have a media credential policy that is not discriminatory, arbitrary, or retaliatory. *Id*. ¶¶103-139. Defendants created a limited public forum. Dkt. 53 at 32. "Within this limited public forum, Plaintiffs have the First Amendment right to gather and report information from the media-designated areas within the Utah State Capitol *equal to the rights of other credentialed media representatives* and to exercise editorial judgment over their work." Dkt. 36 at 20 (Count I) (emphasis added).

Plaintiffs do not seek special access above what other media receive. This case is about the "elimination of some reporters from an area which has been voluntarily opened to other reporters for the purpose of news gathering." *Consumers Union v. Periodical Correspondents'*

*Assoc.*, 365 F. Supp. 18, 25-26 (D.D.C. 1973), *rev'd on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975) (citations omitted). This scenario "presents a wholly different situation", and "[a]ccess to news, if unreasonably or arbitrarily denied" violates the First Amendment. *Id.*; *see also AP v. Budowich*, No. 1:25-cv-00532, 2025 U.S. Dist. LEXIS 66994, at *44 (D.D.C. Apr. 8, 2025) ("[T]he Government has chosen to open the doors of nonpublic spaces for some journalists. The Government thus cannot exclude the AP from access based on its viewpoint."); *see also Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (finding journalist access may not be denied arbitrarily or for less than compelling reasons where "the White House has voluntarily decided to establish press facilities for correspondents who need to report therefrom.").

The right to be free from unequal treatment in the government's media-specific spaces is well-established. Defendants cannot argue otherwise. So, they shift to argue that there is no harm because Plaintiffs have found less-effective alternatives to gathering some of the news. *See* Dkt. 53 at 20 (citing two examples). This argument fails.

Employing alternative reporting methods does not cure the denial of access violation. *See, e.g., TGP Communs., Ltd. Liab. Co. v. Sellers*, No. 22-16826, 2022 U.S. App. LEXIS 33641, at *15 (9th Cir. Dec. 5, 2022) ("the availability of live streams . . . [does not] sufficiently allay the irreparable harm from a likely constitutional violation."). The 2025 Policy clearly dictates the numerous benefits that credentialed media members obtain that non-credentialled media members – i.e., Plaintiffs – do not. The 2025 Policy provides that credentialed press are granted access to (1) "secure areas of the Capitol;" (2) "designated media workspaces;" (3) "set up in the Senate and House galleries for credentialed videographers and photographers;" (4) "media availabilities and other press events with elected officials;" (5) "designated media parking;" (6) "the Capitol press room;" (7) "designated areas in the galleries of the Senate and

House;" and (8) "Committee Rooms." Dkt. 36-8 at 2-3. Because Plaintiffs lack credentials, they cannot access these areas or benefits, which has caused Plaintiffs to miss numerous reporting events and opportunities. Dkt. 36 ¶¶41-42, 95-102. These allegations must be taken as true.

The D.C. District Court recently explained the harm Plaintiffs suffer:

> [R]eporting through secondhand sources simply does not allow for the "same level of completeness" in their reporting as if they had "been there in person." They cannot look around the room and use all five senses to craft a unique message for publication. And . . . reporters "don't know what [they're] not there to see." Finally, and obviously, they cannot ask questions from outside a closed door.

*AP*, 2025 U.S. Dist. LEXIS 66994, at *54. Plaintiffs are being forced to report on events that happen behind closed doors or at media availabilities that Plaintiffs must then wait minutes, hours, or days before learning about it—or never learn at all. Dkt. 36 ¶¶41-42, 95-99. "To state the obvious, if [Plaintiffs] are not in the room when news happens, they can hardly be the first to break the news." *AP*, 2025 U.S. Dist. LEXIS 66994, at *54. Plaintiffs' lack of access places them on a delay that other media does not have to contend with. Dkt. 36 ¶41-42; *AP*, 2025 U.S. Dist. LEXIS 66994, at *54 (holding that reporting stories "a minute," "three minutes" and "40 minutes behind competitors" was evidence of harm). And, Plaintiffs forever miss the opportunity to report on events unreported by others.

Defendants' argument begs the question: If media credentials did not provide any significantly greater access or benefit to members of the media, then why do Defendants have a credentialing policy at all? Defendants cannot argue that their policy is designed to foster media responsibility and credibility while simultaneously arguing the access granted by the policy is meaningless. Defendants' policy, and how they apply it, provides *preferred* media with greater access to the Capitol generally not available to others. Defendants' advantaging of favorable media violates the First Amendment.

Defendants rely on two inapposite cases. Dkt. 53 at 20-21 (citing *Snyder v. Ringgold*, 133 F.3d 917, 1998 U.S. App. LEXIS 562 (4th Cir. 1998) and *The Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006)). Both involved a denial of journalists' access to exclusive interviews or conversations with specific government officials. *Snyder*, 133 F. 3d at *3-4; *Baltimore Sun*, 437 F. 3d at 413-14. Neither case involved a media credential policy. Neither case engaged in forum analysis. Neither case concerned access to events and facilities open generally to the entire press. Thus, neither case discussed what is issue here: a government's unreasonable, retaliatory and viewpoint-based application of a credentialing policy against a journalist to deny equal access to the physical forums other press uses for newsgathering.

Access to individual comments and off-the-record statements is privileged access to information not generally made available to entire press or the public. Even the district court in *Snyder* noted "[i]f, of course, [a city official] holds a general press conference or opens certain files or records to members of the media, then whether it can exclude [a member of the press] presents an entirely different question." *Snyder v. Ringgold*, 40 F. Supp. 2d 714, 718 (D. Md. 1999); *see also, e.g., Westinghouse Broadcasting Co. v. Dukakis*, 409 F.Supp. 895 (D. Mass. 1976) ("opportunities to cover official news sources must be the same for all accredited news gatherers."); *see also Am. Broad. Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) ("[O]nce there is . . . participation by some of the media, the First Amendment requires equal access to all of the media.").

Defendants' arguments ignore this critical distinction. Like the recent *AP* case, what matters here is that Plaintiffs are being denied access to "event[s] [that] would happen whether any particular outlet had a reporter there or not." *AP*, 2025 U.S. Dist. LEXIS 66994, at *41.

## II. THE ALLEGED FACTS DEMONSTRATE THAT THE CREDENTIALING POLICY IS NEITHER REASONABLE NOR VIEWPOINT-NEUTRAL

"To determine when and to what extent the Government may properly limit expressive activity on its property, the Supreme Court has adopted a range of constitutional protections that varies depending on the nature of the government property, or forum." *Verlo v. Martinez*, 820 F.3d 1113, 1129 (10th Cir. 2016). "The Supreme Court has sorted government property into the following categories: traditional public forums, designated public forums, limited public forums, and nonpublic forums." *Pollak v. Wilson*, No. 22-8017, 2022 WL 17958787, at *1 (10th Cir. Dec. 27, 2022) (unpublished) (brackets and internal quotation marks omitted). To be sure, Plaintiffs' primary expression occurs online, but that expression emerges from the statehouse, often "live" or nearly live. This ability to report contemporaneously all that can fully be seen, heard, and gathered in person is what has been restricted.

A limited public forum "exists where a government has reserved a forum for certain groups or for the discussion of certain topics." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215 (2015). When a forum is "generally available for the discussion of certain topics" and open to the public, "it is a limited public forum." *Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 145 (2d Cir. 2004).

The media spaces at issue in this case are limited public fora.[2] Plaintiffs state a claim against Defendants where facts allege that the denial of access is unreasonable considering the forum's purpose or is not viewpoint-neutral. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

[2] Defendants appear to agree, although they seem to suggest the spaces could also be nonpublic. That is incorrect. Nonpublic forums exist "[w]here the government is acting as a proprietor, managing its internal operations." *Walker*, 576 U.S. at 216. Here the Utah Legislature is opening its meetings, committee hearings, workspaces, and press room for comment on a specific subject matter by the public, including the press.

**A. The facts alleged demonstrate the policy is not reasonable.**

The reasonableness of a restriction "must be assessed in light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. "Reasonableness" is typically a mixed question of fact and law inappropriate for disposition by a 12(b) motion. To short circuit this process, Defendants argue four meritless points.

Defendants first assert that Court has already held – when considering an emergency temporary restraining order − that the restriction is reasonable. But this Court has not made a 12(b)(6) ruling on Plaintiffs' alleged facts nor has it reached the merits of any of Plaintiffs' claims. *See* Hrg. Tr. 78:15-16 (making finding "at least on the limited record before us at this stage"). In fact, the Court made clear that it wanted to hear additional evidence and argument and could ultimately rule in Plaintiffs' favor. *Id*. 94:2-19.

Defendants next claim that their policy "reasonably ensures professional journalists and established media maintain sufficient access." Dkt. 53 at 24. To the contrary, Plaintiffs allege: "Defendants do not have space or security concerns that justify denying independent journalists or bloggers credentials or determining that they are not professional members of the media for a reputable news station." Dkt. 36 ¶113. And the evidence shows – indeed, Defendants admit − Defendants *only* stated reasons for denying Plaintiffs credentials was because "media credentials are currently not issued to blogs, independent, or other freelance journalists." Dkt. 53 at 12 (citing Dkt. 36 ¶60). Under the amended complaint, Defendants post hoc arguments are, at best, pretext.

Defendants continue to lean heavily on *John K. Maciver Inst. for Pub. Policy, Inc. v. Evers*, 994 F.3d 602 (7th Cir. 2021). However, *Evers* does not square here. In *Evers*, there was no written policy. *Id*. The *Evers* forum was a closed door, invitation only, *off-the-record*

meetings the Governor held with selected reporters. *Id*. at 610. The Seventh Circuit panel deemed them to be nonpublic based on their off-the-record nature. *Id*. This case is not about private meetings, rendering *Evers* inapposite.

Defendants also claim that their policy is reasonable because it "eliminate[s] any discretion in credentialing decisions." *Id*. at 25. This factual argument is also contrary to the amended complaint. Plaintiffs allege that Defendants exercise full discretion when applying their policy, demonstrated by the fact they apply different standards than those contained in policy. It was only during litigation that Defendants, provided a post hoc explanation that "independent" media was defined as an organization without an "editor," and/or one devoid of "any institutional framework or a sufficiently established track record," and defined "blog" as a publication containing articles written in a "stream of consciousness"—whatever that means. Dkt. 36 ¶¶19, 74-79.

The amended complaint alleges that this post hoc reasoning did not appear to have been employed either because Defendants did not ask Plaintiffs if UPW had an editor prior to denial. *Id*. ¶80. Defendants have never explained what they perceive to be "stream of consciousness" reporting. *Id*. ¶82 Defendants have never provided the specific threshold a journalist or publication must meet to have "institutional framework" or an "established track record." *Id*.

Defendants cannot have an ever-changing, amorphous, unwritten list of reasons to deny someone for being "independent" or a "blog" and simultaneously claim that their policy rids them of discretion. Defendants' use of prior policies to explain themselves shows that 2025 Policy doesn't eliminate discretion.

The rest of the 2025 Policy – "the surrounding circumstances" (*Cornelius*, 473 U.S. at 809) – reflects Defendants are unconcerned with lacking discretion. As a brand-new addition to

the policy in 2025, Defendants made sure to "reserve the right to limit the number of credentials allocated to any media organization" in their Policy. Dkt. 36-8 at 2. Defendants also continued to provide themselves the sole discretion to determine who is a "professional member of the media" or "established reputable news organization." *Id*. They can even force a media credential applicant to further "submit a letter of introduction" for subjective review. *Id*. Defendants also make clear that "credentials may be denied or revoked for *any* reason" that they deem appropriate. *Id*. at 4. Thus, the 2025 Policy affords ample discretion that would not exist if eliminating discretion were a genuine concern.

That Plaintiffs continue to do their work using various work arounds and second-best solutions does not demonstrate the reasonableness of Defendants' policy or decision under the First Amendment. It is only "when access barriers are *viewpoint neutral*" that the Supreme Court has "counted it significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those barriers." *CLS v. Martinez*, 561 U.S. 661, 690 (2010). Where "restrictions on access to a limited public forum are viewpoint discriminatory, *the ability of a group to exist outside the forum would not cure the constitutional shortcoming*." *Id*. (emphasis added). As further explained below, Defendants' Policy is not viewpoint-neutral in writing or application.

**B. Defendants' policy is not viewpoint-neutral**

The government cannot "den[y] access to a speaker solely to suppress the point of view he espouses." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384, 393 (1993) (quotation and citation omitted). Defendants' viewpoint-based motives for denying Plaintiffs' credentials are evident. The legislative leadership's animus towards Schott because of his reporting is publicly voiced. Echoing leadership, Defendant Peterson sent messages to Schott

calling him a "former journalist" and criticizing the way he writes his stories. Defendants' complaints about Plaintiffs' lack of a separate editor and "stream of consciousness" reporting show they denied credentials based on Plaintiffs' journalistic and editorial choices. *See* Dkt. 36 ¶¶74-83. Journalists exercise discretion to communicate in various styles. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994). Defendants' policies are admittedly intended to bar Plaintiffs from communicating their views to their audiences in Plaintiffs' desired style.

"[T]he term 'viewpoint' discrimination [is used] in a broad sense." *Matal v. Tam*, 582 U.S. 218, 243 (2017). Defendants attack the viewpoint of "stream of consciousness" reporting not subjected to third-party control. The First Amendment "protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses." *Id.* at 249 (Kennedy, J., concurring). It is this right that Defendants attempt to punish by demanding reporting happen through certain corporate structures where the journalist is subject to reprimand and termination. "[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers," including the apparently especially sensitive ears of the Utah legislature. *Id*. at 244.

What's more, Defendants made no efforts to determine whether the factors they claim to have used were present *before* denying Schott's application. Dkt. 36 ¶¶74-82. UPW had an editor and Schott's in-depth reporting process involved multiple sources and days or weeks of work—which is not "stream of consciousness" reporting. *Id*. ¶¶18-19, 80-83. This failure suggests Defendants' written and unwritten policies were mere pretext for viewpoint discrimination.

Other facts support this. Five days before Schott's application, Senate President Adams criticized him as a "former media member" undermining journalism's integrity, and Defendant Peterson echoed this, calling UPW a "blog" and stating Schott is "not a journalist." *Id*. ¶¶51-55;

Dkt. 36-9 (Exh. 9). Five days later, Defendants denied Schott's credentials, citing post-litigation reasons not in the 2025 Policy, despite his 25 years of journalism and prior credentials. Dkt. 36 ¶¶56-63, 74-82; Dkt. 36-10 (Exh. 10).

Defendants' hostility and refusal to explain the denial or offer remedies further indicate viewpoint discrimination. Dkt. 36 ¶¶56-63, 74-82; Dkt. 36-10 (Exh. 10). So too does Defendants' inconsistent application of their standards. Defendants gave credentials to Utah News Dispatch, Utah Policy, and Davis Journal, despite similar or lesser institutional frameworks. Dkt. 36 ¶¶71, 88-89, 92; Dkt. 36-12 (Exh. 12); Dkt. 36-13 (Exh. 13). Building Salt Lake − a self-identified "blog" − was credentialed, which shows an arbitrary application of what constitutes a "blog." Dkt. 36 ¶88-89. Defendants do not question the journalistic repute or the track record of other publications. And it stands to reason, that *if* Defendants' metrics were consistently applied, Schott's 25 years of experience and decade as a legislative press credential holder would also not have been questioned.

Defendants argue that their prior credentialing of journalists critical of the legislature in the past demonstrates a lack of viewpoint discrimination. Dkt. 53 at 29. But other than citing articles written by Schott – who is *not* credentialed – Defendants do not cite to any factual allegations or evidence in the amended complaint that supports this claim. Moreover, it is not notable, much less proof of anything, that Defendants have not openly violated the First Amendment by routinely revoking the credentials of any journalist that writes critically of them. Viewpoint discrimination is not forgiven so long as government officials don't discriminate against every person whose views they do not like. *See, e.g., Sellers*, 2022 U.S. App. LEXIS 33641, at *11.

## III. COUNT II IS PROPERLY PLED TO PRESERVE THE ALTERNATIVE STANDARD OFTEN EMPLOYED BY COURTS

Defendants' Motion barely challenges Count II of the amended complaint, claiming it uses the "wrong legal standard" without elaboration. Dkt. 53 at 32. This ignores the judicial split on the forum doctrine. There are several cases where courts consider the denial of reporters from government-created spaces without ever discussing what forum the reporters are in. *See Sherrill*, 569 F.2d at 124; *see also Balt. Sun Co.*, 437 F.3d at 414.

As numerous cases explain, forum analysis is used to assess the constitutionality of limitations on *expressive* activities. *Price v. Garland*, 45 F.4th 1059, 1068 (D.C. Cir. 2022) (finding forum analysis); *Reed v. Bernard*, 976 F.3d 302, 324 n.13 (3d Cir. 2020) ("right-of-access jurisprudence does not map neatly onto the forum analysis required by the Free Speech Clause"), *vacated due to subsequent dismissal*, No. 20-1632, 2021 WL 1897359 (3d Cir. May 4, 2021). The D.C. District Court recently struggled with the same consideration in the context of press access, ultimately arriving at the conclusion that forum analysis applied only after determining that, based on the specific facts, "AP journalists are 'speaking' from inside the Oval Office." *AP*, 2025 U.S. Dist. LEXIS 66994, at *37.

A blanket application of the forum doctrine to every First Amendment activity Defendants deny Plaintiffs from engaging in would ignore the Supreme Court's caution against "mechanical" extensions of the forum doctrine. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672-73 (1998). To heed that warning, Plaintiffs have brought Count II to ensure that each of Defendants' denials of access are properly found to have violated the First Amendment under the correct standard. Because Defendants spend no time addressing the merits of Plaintiffs' claims that their actions cannot meet strict scrutiny, any argument to that effect is waived and Count II should remain.

## IV. PLAINTIFFS HAVE STATED A CLAIM FOR RETALIATION

The Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Further, "[a]n ordinarily permissible exercise of discretion may become a constitutional deprivation if performed in retaliation for the exercise of a First Amendment right." *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002) (cleaned up).

Unconstitutional retaliation occurs when a plaintiff shows: (1) he or she engaged in conduct protected under the First Amendment; (2) the defendant took some retaliatory action sufficient to deter a person of ordinary firmness in plaintiff's position from speaking again; and (3) a causal link between the exercise of a constitutional right and the adverse action taken against him or her. *Ateba v. Jean-Pierre*, 706 F. Supp. 3d 63, 86 n.10 (D.D.C. 2023) (cleaned up). Defendants dispute the last two factors, (Dkt. 53 at 33), by ignoring the allegations in the amended complaint.

### A. Defendants' actions sufficiently chilled and adversely impacted Plaintiffs.

Defendants' retaliation against Plaintiffs would chill or adversely affect a similarly situated person of ordinary firmness. An organization alleging retaliation must show that the government responded to its protected activity with conduct or speech that would chill or adversely affect that activity. *Baltimore Sun*, 437 F.3d at 416. This is an objective standard. A plaintiff's own chilling is relevant but not dispositive. *Id.* A violation can exist where a particular plaintiff was not chilled. *Id.* at 416, 419.

Defendants argue that Plaintiffs' continued reporting on the Legislature negates this factor. Defendants would require Schott to abandon his journalism, business, and life's work to prove harm. But Schott's persistence in the face of the government's unconstitutional actions

does not negate a finding of chilled speech, and certainly does not disprove adverse impact. *see AP*, 2025 U.S. Dist. LEXIS 66994 (finding chilled speech despite the AP continuing to report on White House matters and refer to the "Gulf of Mexico"). By barring Plaintiffs from access to press areas and events for daring to report in a manner critical of them as an independent publication, Defendants actions would chill and adversely affect any person of ordinary firmness from exercising their First Amendment speech rights, satisfying the objective standard. Dkt. 36 ¶136.

Plaintiffs *have* been actually chilled and adversely impacted. As discussed above, Plaintiffs are unable to report on in-the-room context and publish breaking news in real time. Dkt. 36 ¶¶97-101; *see*, *supra*, Section I; *see AP*, 2025 U.S. Dist. LEXIS 66994, at *52 (explaining "the obvious": if "reporters are not in the room when news happens, they can hardly be the first to break the news. Instead, they are forced to wait and pick up whatever scraps of verifiable information they can find as they watch their competitors break the story first."). Plaintiffs are unable to provide videos, photographs, and audio recordings that other media can obtain of newsworthy events. Dkt. 36 ¶¶97-98. Plaintiffs will never be able to be the first to report on events from which they are excluded. Defendants' unconstitutional policy and application thereof erodes of the quality, capacity and timeliness of Plaintiffs' reporting.

**B. Defendants acted in response to Plaintiffs' press activities**

Defendants incorrectly assert the "entire basis of Plaintiffs' claim" of retaliatory motive is that "Schott's reporting in 2024 'drew the ire' of Defendants." Dkt. 53 at 33. Had Defendants read the entirety of the amended complaint, they would have seen retaliatory motive is factually alleged in several ways beyond just temporal proximity to Schott's critical reporting.

*First*, Defendants had allowed independent media and bloggers to have credentials *for at least 10 years prior* to their alteration of the 2025 policy. Dkt. 36 ¶13, 44-45. Even Schott had credentials during the time he was a journalist for the independent media site, Utah Policy Watch. *Id*. ¶13. The only thing that changed after 10 years, and particularly in 2024, is that (1) Schott's reporting had increasingly angered Defendants (*Id*. ¶¶46-54); and (2) Defendants, and their superiors, signaled their increasing anger by criticizing Schott for his reporting. *See id.* ¶50 (Defendant Osborne telling Schott "you are a dick!" in response to his reporting); ¶52 (Adams calls Schott a "former media member" and his story "part of a troubling pattern of neglectful journalism that undermines the profession's integrity."); ¶53 (Peterson stating UPW is a "blog" and stating Schott is "someone who claims to be a journalist," has a "lack of professionalism," "lack of journalistic integrity," and "disregard for accurate reporting and ethical standards.").

*Second*, despite this increasing anger, Schott was shielded from having his credentials revoked while he reported for SLT. *Id*. ¶16, 126. But, the moment that shield disappeared, Defendants immediately revoked his credentials even though the 2024 Policy was still in effect, which allowed "independent" and "blog" media access. *Id*. ¶126. Defendants then quickly changed their policy, for the first time ever, to ensure the complete elimination of the types of journalists and media that Schott and UPW just so happened to be. *Id*. ¶32, 126. Defendants also added the brand-new line of caution: "Having been previously credentialed does not guarantee that a credential will be granted in the future," *Id*. ¶33, evidencing the targeting of Schott.

*Third*, the facts surrounding Defendants' denial of Schott's application show retaliatory motive in several ways. Defendants only denied Schott's application after an "additional level of scrutiny" that Schott "had never received" before. *Id*. ¶57. And Defendants only stated, at the time, that Plaintiffs credentials were denied because UPW was a "blog" and "independent"

media and Schott, despite the prior decade of opposite findings, was no longer "a professional member of the media." *Id*. ¶¶60, 62. It was only after suit was filed that Defendants provided post hoc justifications that Plaintiffs lacked an "editor," and "any institutional framework or a sufficiently established track record," and used a "stream of consciousness" writing style. *Id*. ¶¶19, 74-79. Prior to denial, Defendants never asked whether UPW had an editor, nor did they inquire into UPW's institutional framework or Schott's "stream of consciousness" writing style, showing Schott was targeted *because* of his track record. *Id*. ¶19, 80-83.

*Fourth*, and as explained previously, Defendants have not applied their policy consistently. UPW is not credentialed for being a "blog" but Building Salt Lake – the "Top-100 Urban Planning Blog" – is. *Id*. ¶69. UPW is not credentialed for being "independent" but Gephardt Daily, The Salt Lake Tribune, Utah Policy, and Utah News Dispatch – all of which call themselves "independent" – are. *Id*. ¶71. UPW supposedly has an "[in]sufficiently established track record." *Id*. ¶82. Yet, in 2024, Defendants issued press credentials to reporters with organizations that had been in business for less time than UPW. *Id*. ¶¶91-92. Schott is supposedly not credentialed because he does not have an editor – except he does. *See id*. ¶¶17-18. But neither does Becky Ginos of the Davis Journal, or Holly Richardson of Utah Policy, who are credentialed. *Id*. ¶88-90. Schott is not credentialed because he supposedly writes in a "stream of consciousness," but Defendants have not revoked anyone's credential for the same writing style in their publications or via live feed reporting on websites or through social media, such as X or Threads. *Id*. ¶87.

The factual allegations in this case – taken as true – more than support a finding that Plaintiffs have stated a claim for retaliation.

## V. PLAINTIFFS HAVE STATED A CLAIM FOR PRIOR RESTRAINT

Defendants' Motion ignores the legal standard for prior restraint, instead choosing to focus on the meritless arguments that the Court has already ruled against Plaintiffs on this claim, and that Plaintiffs' have not been prohibited from reporting on the legislature (they have, *see, supra*, Section I).

The correct analysis for this Court to engage in is whether Plaintiffs have stated a claim that Defendants' policy "vests unbridled discretion in a government official over whether to permit or deny expressive activity[.]" *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 755-56 (1988). To prove unbridled discretion, the facts must show the policy (1) "ha[s] a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks" (*Id*. at 759); and (2) lacks "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969).

The facts alleged satisfy both elements. It is undeniable that the legislative press credential has a "nexus to expression" given that, the lack of a credential has impacted Plaintiffs' ability to engage in expressive activities protected under the First Amendment when they news gather and exercise editorial discretion. *See, supra*, Sections I & II. Moreover, neither the credential policy itself, nor Defendants' application of it, contains narrow, objective, and definite standards.

Credentials will only be given to a reporter whom the legislature deems a "professional member of the media" who "is part of an established reputable news organization or publication." Dkt. 36-8 (Exh. 8). The policy does not explain how "professionalism" is measured and how to determine the validity of one's "repute." *Id*. The policy demands applicants meet other subjective, undefined standards like not being a "blog," or "independent," and "adher[ing]

to a professional code of ethics." *Id*. In sum, there are no "express standards" that Defendants must employ, which makes it "difficult to distinguish" between a "legitimate" denial of a press credential and the "illegitimate abuse of censorial power." *Lakewood*, 486 U.S. at 758.

These arbitrary standards leave Defendants with unbridled discretion. What's more, Defendants do not follow the written policy. Pre-litigation, the only reasons Defendants gave Plaintiffs for denying their press credentials was that they were not "a professional member of the media associated with an established, reputable news organization or publication" and they were a "blog" or "independent media." Dkt. 36 ¶¶60, 62. Post litigation, they now claim the problem lies with Plaintiffs engage in "stream of consciousness" reporting, lack an additional editor and are missing an "institutional framework or a sufficiently established track record." *Id*. ¶¶19, 74-79.

As explained above, Defendants do not apply those post-hoc standards uniformly to all applicants. *See, supra*, Section I. In other words, Defendants' authority to enforce the policy is so untethered by any standards within the policy that, even if those standards were narrow and definite, they obviously do not base their decision to deny a press application on them. Defendants' self-created, secret criteria make it too easy for them to deny applications for impermissible reasons and, thus, their policy constitutes a prior restraint. *Lakewood*, 486 U.S. at 758.

## VI. PLAINTIFFS HAVE STATED A VOID-FOR-VAGUENESS CLAIM.

Defendants cite a case in which the void-for-vagueness doctrine was applied to criminal immigration statute and then argue that it stands to reason their credential policy, which is not a criminal law, cannot be found to be vague. Dkt. 35-36.

This is incorrect. A very quick search reveals many cases in which government policies are analyzed under the void-for-vagueness doctrine. *See, e.g., Taylor v. Roswell Indep. Sch.*

*Dist.*, 713 F.3d 25, 50 (10th Cir. 2013) (internal citation omitted) (explaining when "a policy may be 'impermissibly vague"); *see also Faustin v. City & Cty. of Denver*, 423 F.3d 1192, 1202 (10th Cir. 2005) (ruling on merits of claim that City's "unwritten policy" was vague).

With that red herring resolved, Defendants remaining arguments can also be dismissed. "[A] policy may be 'impermissibly vague' for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.'" *Taylor*, 713 F.3d at 50. Lack of notice and arbitrary enforcement are concerns because of the "obvious chilling effect on speech" they create. *Reno v. ACLU*, 521 U.S. 844, 872 (1997).

Plaintiffs have previously explained the ways in which Defendants' policy is impermissibly vague and incorporate those explanations herein for the sake of brevity. Dkt. 36 ¶¶145-153; Dkt. 37 at 39-40. Plaintiffs have also discussed, above, how the 2025 policy encourages arbitrary and discriminatory enforcement. *See* Section II. The facts, taken as true, demonstrate Defendants have a purposefully open-ended and undefined policy that allows them to engage in placing speech restriction on journalists they disfavor. *See Sherrill*, 569 F.2d at 130 (finding First Amendment violation where government did not "inform the public or other potential applicants of the basis for exclusion of journalists from the White House press facilities" and the "standard for denial of a press pass ha[d] never been formally articulated or published" making it "unnecessarily vague and subject to ambiguous interpretation."). As such, Plaintiffs have stated a claim for vagueness.

## CONCLUSION

This Court should deny Defendants' Motion to Dismiss.

DATED: April 29, 2025.

**INSTITUTE FOR FREE SPEECH**
*/s/ Charles Miller*
Charles Miller (admitted *pro hac vice*)

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**CERTIFICATE OF WORD LIMIT COMPLIANCE**

I hereby certify that the foregoing, including footnotes, but exclusive of caption, signature block, certificate of service, and word-count certification, contains 7,262 words, as tracked by Microsoft Word and is in compliance with local rule 7-1(a)(4)(A)(i) limiting response memoranda to motions to dismiss to 25 pages or 7,750 words.

*/s/ Charles Miller*
Charles Miller