Tyler Green, Utah Bar No. 10660
Consovoy McCarthy PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
(703) 243-9423
tyler@consovoymccarthy.com
Counsel for Defendants Alexa Musselman, Aundrea Peterson, Abby Osborne, and Mark Thomas

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH - CENTRAL DIVISION

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.*	Case No. 2:25-cv-00050-RJS-CMR Hon. Robert J. Shelby Hon. Cecilia M. Romero

Reply in Support of Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint

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INTRODUCTION

The crux of Plaintiffs' argument is that because Schott is a reporter, he has a right of access "*equal to the rights of other credentialed media representatives*." Opp.7. That reasoning would invalidate *any* attempt to credential some media but not others. Courts have rejected Plaintiffs' theory as unworkable, and for good reason: Every self-proclaimed journalist or reporter—from blog-site owners to TikTokers—would have the same right of access as established, reputable news organizations. That is not the law.

A government's distinctions among members of the press in a limited or non-public forum are constitutional so long as they are reasonable and viewpoint neutral. The Legislature's policy clears those thresholds. It ensures that established media maintain sufficient access while maintaining substantial alternative channels for news gathering. Plaintiffs' assertion that the Legislature denied Schott a credential because it disapproved of his speech is conclusory and ignores that the Legislature has repeatedly credentialed journalists with varying viewpoints despite their personal (or their organizations') past critical coverage—*including* Schott, when he wrote for the *Tribune*.

Plaintiffs' retaliation, prior restraint, and vagueness claims are similarly deficient. Schott became ineligible for a credential because he departed the *Tribune*, not because of any protected speech. The credentialing policy is not a prior restraint because it does not restrict Schott's ability to speak about the Legislature. And even if the policy were subject to a void-for-vagueness challenge, it is not unconstitutionally vague because it

uses words commonly understood in the English language. The amended complaint should be dismissed with prejudice.

ARGUMENT

I. Plaintiffs fail to plausibly plead a First Amendment violation under public forum doctrine (Counts I, II).

A. Plaintiffs base their First Amendment claim entirely on not having the same access as other media. Opp.7-10. But as Defendants explained (Mot.13-14), Plaintiffs' asserted "right of 'equal access'" would require "conferring a privileged First Amendment status on the press" beyond the general public, contrary to Supreme Court precedent. *Snyder v. Ringgold*, 133 F.3d 917, 1998 WL 13528, at *4 (4th Cir.) (citing *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972)). The Seventh Circuit squarely rejected this same "equal access" theory. *John K. MacIver Inst. for Pub. Pol'y v. Evers*, 994 F.3d 602, 612-14 (7th Cir. 2021). This Court should too.

Plaintiffs do not have a constitutional right to access information unavailable to the public. Mot.9-13; *see Youngstown Publ'g Co. v. McKelvey*, 2005 WL 1153996, at *6 (N.D. Ohio May 16) ("No constitutional right of access applies, however, to instances in which the press seeks a special privilege of access over and above that of the general public."), *vacated on mootness grounds*, 189 F. App'x 402 (6th Cir. 2006). While caselaw recognizes "a limited constitutional right of access … where comments by government officials are offered in a forum effectively open to all members of the press," *id.*, Schott's lack of a credential does not inhibit his access to events or spaces that *all* media can

access. No blogger or independent media can access private media events or the designated media spaces in the Capitol.

Plaintiffs do not dispute that they maintain access to all government information available to the public. Mot.9-13; *see C1.G ex rel. C.G. v. Siegfried*, 38 F.4th 1270, 1282 (10th Cir. 2022) (affirming that plaintiff abandoned claim "by not addressing it in his response to Defendants' motion to dismiss"). Instead, they argue that "[e]mploying alternative reporting methods does not cure the denial of access violation." Opp.8-9. Plaintiffs' cited authorities are inapposite. *TGP Communications v. Sellers* said that the availability of live streams did not "mitigate[]" irreparable "constitutional harm of viewpoint discrimination" *after* determining that the government likely "engaged in viewpoint discrimination." 2022 WL 17484331, at *5-6 (9th Cir. Dec. 5). That reasoning did not pertain to the *merits* of the First Amendment argument. Likewise, *Associated Press v. Budowich* found that the Associated Press was "likely to succeed on its claims of viewpoint discrimination." 2025 WL 1039572, at *14 (D.D.C. Apr. 8).

Plaintiffs try to distinguish *Snyder* and *Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006), claiming "[b]oth involved a denial of journalists' access to exclusive interviews or conversations with specific government officials." Opp.10. But that's what Schott wants—access to exclusive media availabilities with the House Speaker and Senate President reserved for established media with credentials. Plaintiffs also argue that "[n]either case concerned access to events and facilities open generally to the entire

press." Opp.10. But the "events and facilities" that Plaintiffs seek access to are not open to the entire press—only to established, credentialed media. Nor does *ABC v. Cuomo*, 570 F.2d 1080 (2d Cir. 1977), support Plaintiffs' "equal access" theory. *Contra* Opp.10. As *Evers* explained, that case "predate[d] modern forum analysis." 994 F.3d at 612-13. It also involved "far afield" facts: "one of three undisputedly equivalent broadcasting companies was excluded from coverage without any neutral criteria guiding the decision to exclude it." *Id.* Here, UPW is not "equivalent" to established media organizations whose journalists possess credentials, and the Legislature *does* have "neutral criteria guiding" credentialing decisions—criteria that Plaintiffs did not satisfy.

Because Plaintiffs have not plausibly alleged a cognizable burden on their ability to gather news, their First Amendment claims fail at step one of the forum analysis.

B. Even if Plaintiffs cleared step one of the forum analysis, the credentialing policy is reasonable and viewpoint neutral. Mot.15-25.

1. Plaintiffs assert, without citation, that "'[r]easonableness' is typically a mixed question of fact and law inappropriate for disposition by a 12(b) motion." Opp.12. But courts routinely grant Rule 12(b)(6) motions to dismiss where the complaint fails to plausibly allege that an access restriction is unreasonable. *See, e.g.*, *Tyler v. City of Kingston*, 74 F.4th 57, 63-66 (2d Cir. 2023) (affirming dismissal where "the Complaint itself and common sense offer a satisfactory rationale … , which undermines Plaintiffs' assertions of unreasonableness"); *Judson v. Bd. of Supervisors of Mathews Cnty.*, 436 F. Supp. 3d 852,

868 (E.D. Va.) (granting motion to dismiss on reasonableness because "even when all facts are construed in favor of Plaintiff, the inescapable conclusion is that the speech restrictions were reasonable given … the clear purpose of the [forum]"), *aff'd*, 828 F. App'x 180 (4th Cir. 2020). Plaintiffs also incorrectly contend that the Court has not yet decided the question of reasonableness. Opp.12. To be sure, the Court ruled on a "limited record," but it specifically found that "the credentialing criteria are reasonable and viewpoint neutral." Tr.78:15-17. No new allegations in the amended complaint undermine the Court's conclusion.

Plaintiffs also continue to incorrectly assert that the Legislature "provides *preferred* media with greater access to the Capitol generally not available to others." Opp.9. This Court has already rejected the argument that the criteria discriminate based on a preferred viewpoint. Tr.47:17-20 ("You have lost me at viewpoint. I don't understand, because you have not articulated how there is an opposition to any message that is being communicated."). The credentialing policy "does not reference viewpoints in any way." *Ateba v. Leavitt*, 133 F.4th 114, 124 (D.C. Cir. 2025). Rather, the "credentialing history and the current list of credentialed journalists confirms the absence of viewpoint discrimination." Mot.22. As the amended complaint makes clear, the Legislature "has repeatedly credentialed journalists notwithstanding their personal (or their organizations') past coverage critical of the Legislature." *Id.* "Plaintiffs do not plead that these numerous organizations all have viewpoints Defendants approve of or have not criticized the

Legislature, and any such allegations would be implausible." *Id.* And "the inclusion of a broad range of media outlets on both sides of the political spectrum certainly diminishes any claim that the list is based on political ideology." *Evers*, 994 F.3d at 611.

The credentialing policy also reasonably ensures professional journalists and established media maintain sufficient access. Mot.16-17 (discussing *Evers*). Plaintiffs' allegation that there are no "space or security concerns that justify denying independent journalists or bloggers credentials," Opp.12 (citing Am.Compl. ¶113), is conclusory, unsupported by well-pleaded factual allegations, and implausible, "since the designated spaces for credentialed media are indoors and limited in number," Mot.19. The Court thus "need not accept" it. *Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136, 1144 (10th Cir. 2023). Nor should the Court credit Plaintiffs' contention that space concerns are a "post hoc argument[]" because credentials are never issued to blogs, independent, or freelance media. Opp.12. The requirement that a credential holder be "a professional member of the media" who "is part of an established reputable news organization or publication," rather than a blog, Am.Compl.Ex.8, serves the goals of journalistic quality and integrity in reporting, Mot.16-17. Addressing the space concerns that would result from granting credentials to every blogger or independent or freelance journalist is an additional objective of the policy, not a post hoc rationale.

Plaintiffs' attempt to distinguish *Evers* fails. Plaintiffs claim "there was no written policy" in *Evers*. Opp.12. Not so. That case challenged a "memorandum" from "the

Governor's Office of Legal Counsel," which laid out the relevant policy. *Evers*, 994 F.3d at 606. Plaintiffs state that *Evers* involved "meetings the Governor held with selected reporters" and "private meetings." Opp.12-13. But the media availabilities Schott seeks to access *are* private meetings not open to the public. *Supra* pp.3-4.

No well-pleaded factual allegations support Plaintiffs' argument that Defendants "exercise full discretion when applying their policy." Opp.13. To establish unreasonableness based on supposed discretion, a policy must "provide[] the decisionmaker with unbridled discretion to suppress expression—that is, when the rule is so broad as to provide no meaningful constraint upon the government's exercise of the power to squelch speech." *Ateba*, 133 F.4th at 124-25 (cleaned up). "By contrast, a rule that is capable of reasoned application does not confer unbridled discretion upon the government." *Id.* (cleaned up). The policy here does not allow for unbridled discretion. The terms Plaintiffs dispute—"blog," "independent," "reputable," and "established"—have clear meanings. Mot.19, 30-31. The current policy is also *less* discretionary than earlier iterations because no nontraditional media are eligible for credentials. Tr.82:4-9. The current policy employs "concrete guidelines that cabin" Defendants' "discretion when" applying the policy. *Ateba*, 133 F.4th at 126. The revision to exclude bloggers and independent media thus prevents Defendants from "exercis[ing] 'unbridled discretion' in making press-[credentialing] decisions." *Id.*

2. Plaintiffs base their arguments of viewpoint discrimination primarily on criticisms of Schott. Opp.14-16. But such criticisms do not plausibly establish that Defendants revised the policy to exclude bloggers and independent media *because of* disapproval of his viewpoints. For starters, as this Court already recognized, the policy revision was "a continuation of prior limitations." Tr.84:10-11. Plaintiffs emphasize Ms. Peterson's criticism of Schott's conduct in December 2024, Opp.14-15, but that incident occurred *after* the policy revision (and several months after Schott became ineligible for a press credential because he left the *Tribune*), so it could not have influenced the revision. *See* Tr.79:13-16.

Plaintiffs insist that Schott's "desired style"—"'stream of consciousness' reporting not subjected to third-party control"—is itself a viewpoint. Opp.15. It is not. Plaintiffs cite no authority for this novel view. There is nothing viewpoint discriminatory about requiring Schott to answer to an editor. *Contra id.* As this Court correctly explained, editorial oversight concerns merely "how information is disseminated." Tr.79:6-9. "It is a process of review as an indicia of the reliability of the news organization" and "how established the news outlet is." Tr.48:15-24. That review process applies regardless of viewpoint—whether "in favor of school vouchers or against school vouchers." *Id.*

Plaintiffs argue that the policy is applied inconsistently, citing the credentialing of Utah News Dispatch, Utah Policy, and Davis Journal. Opp.16. Defendants already addressed this argument, explaining that the amended complaint "provides no supporting

factual allegations concerning those entities' editorial structure, oversight, or practices." Mot.24. Plaintiffs respond (Opp.16) by citing only paragraphs of the complaint containing their conclusory allegations about whether other news organizations "call themselves independent" (Am.Compl. ¶71), have a "sole staff member" who is "self-edited" (*id.* ¶¶88-89), or were "formed in January 2024" (*id.* ¶92). Nothing in those paragraphs about Plaintiffs' competitors is "well pled (that is, plausible, non-conclusory, and non-speculative)." *Dudnikov v. Chalk & Vermilion Fine Arts*, 514 F.3d 1063, 1070 (10th Cir. 2008).

C. Plaintiffs claim Count II is based on an "alternative standard" to the forum doctrine. Opp.17. But the cases they cite are unavailing. *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977), "predates modern forum analysis," *Evers*, 994 F.3d at 613. *Baltimore Sun* rejected a retaliation claim to which forum analysis does not apply. 437 F.3d at 418. *Reed v. Bernard* involved access to bail hearings, and Plaintiffs quote the *dissenting* opinion (without saying so), not the majority opinion. 976 F.3d 302 (3d Cir. 2020), *vacated*, 2021 WL 1897359. And *Arkansas Educational Television Commission v. Forbes*, while warning that "public forum doctrine should not be extended in a mechanical way to the very different context of public television broadcasting," applied forum analysis to the candidate debate at issue. 523 U.S. 666, 672-73, 676 (1998). Because forum analysis applies here, Count II is duplicative of Count I and should be dismissed for the same reasons.

II. Plaintiffs fail to plausibly plead retaliation (Count III).

Plaintiffs' retaliation claim fails because they do not plausibly plead that the denial of Schott's application would chill a person of ordinary firmness from engaging in constitutionally protected activity or was motivated by his speech. *See Trant v. Oklahoma*, 754 F.3d 1158, 1169-70 (10th Cir. 2014).

As Plaintiffs concede, Schott continues to engage in reporting critical of the Legislature, and this lack of chilling is "relevant" to his claim. Opp.18; *see* Mot.26; *Balt. Sun*, 437 F.3d at 419 (continued reporting disproved chilling element); *Washington v. Martinez*, 2020 WL 209863, at *6 (D. Colo. Jan. 14) ("persistence in speech is some evidence that the defendant's actions would not prevent such speech"). Plaintiffs fail to explain why denying his application would chill a person of ordinary firmness from engaging in First Amendment activity. Plaintiffs still have "access to government information through alternative means." Mot.11-13. And Plaintiffs' response that the policy "erodes … the quality, capacity and timeliness of Plaintiffs' reporting" (Opp.19) is both untrue and irrelevant. It is not sufficient for Schott to allege that the lack of a press credential results in lower-quality reporting. A retaliation plaintiff must plead facts showing that "a person of ordinary firmness" in the plaintiff's position would be deterred "from continuing to engage in th[e] [First Amendment] activity." *Trant*, 754 F.3d at 1169. Schott has not alleged that the denial of his application deters him from expressing his opinions at all. That dooms his claim.

Plaintiffs' retaliation claim also fails for the independent reason that the Legislature's denial of Schott's application was not motivated by his speech. Plaintiffs claim that "Defendants had allowed independent media and bloggers to have credentials *for at least 10 years prior* to their alteration of the 2025 policy." Opp.20. But the previous policy allowed such media to be credentialed only under "limited, rare circumstances." Mot.27; *see* Tr.84:8-11 (observing that the 2025 revision "appears to be a continuation of prior limitations"). Plaintiffs continue to rely on incidents that occurred either 10 months before the policy change (Ms. Osborne's comment) or *after* the policy change (President Adams's and Ms. Peterson's comments). These do not show that Defendants had Schott in mind when revising the policy.

Plaintiffs' claim that reporting for the *Tribune* "shielded" Schott "from having his credentials revoked" only confirms that his departure from the *Tribune* is what made him ineligible for a credential. Opp.20. What Plaintiffs refer to as "post hoc justifications" (Opp.21) for denying a credential are Defendants simply applying the policy's requirement that an applicant "[b]e a professional member of the media" who "is part of an established reputable news organization" to new facts. Am.Compl.Ex.8. As the Court recognized, "[t]he term 'reputable organizations' does not itself assume or prescribe any particular viewpoint." Tr.79:6-7. Plaintiffs' assertion that other organizations have been credentialed in violation of the policy fails for the reasons discussed above. *Supra* pp.8-9.

III. Plaintiffs' prior-restraint claim fails (Count IV).

This Court correctly held that the credentialing policy is not a prior restraint on speech. Tr.84:20-85:7; *see Ateba v. Jean-Pierre*, 706 F. Supp. 3d 63, 85 (D.D.C. 2023) ("press gallery regulations" do not impose "a prior restraint on the publication of news articles"); *Bralley v. Albuquerque Pub. Sch. Bd. of Educ.*, 2015 WL 13666482, at *4 (D.N.M. Feb. 25) (rejecting claim that "denial of [plaintiff's] press pass constituted a prior restraint … as a member of the press"). But even if it were, a speech restriction that would be deemed a prior restraint "is valid in a nonpublic forum as long as it is reasonable and viewpoint-neutral." *Perry v. McDonald*, 280 F.3d 159, 171 (2d Cir. 2001). Thus, the credentialing policy survives any prior-restraint analysis for the same reasons it survives forum analysis—it is reasonable and viewpoint-neutral. *See* Mot.15-25; *supra* I.B.

Because there is no prior restraint, the Court need not reach the issue of unbridled discretion. *See* Opp.22. But if it does, the Court should readopt its prior conclusions that the policy "removed some of the discretion that was previously permitted" and thus "reduced the potential for discriminatory and arbitrary application." Tr.82:4-9. The new criteria "are sufficient … to ensure that the policy is not administered arbitrarily." Tr.81:11-15. No well-pleaded allegations in the amended complaint undermine those conclusions.

Beyond that, the cases Plaintiffs cite are inapposite. In *City of Lakewood v. Plain Dealer Publishing*, the ordinance "contain[ed] no explicit limits on the mayor's discretion"

other than "a minimal requirement" of assessing the "public interest." 486 U.S. 750, 769-72 (1988). And in *Shuttlesworth v. City of Birmingham*, commissioners issuing parade permits were "guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience.'" 394 U.S. 147, 150 (1969). Defendants' policy here provides far greater guidance to the relevant decisionmakers. *See Ateba*, 133 F.4th at 126 (distinguishing *Lakewood* based on existence of an "'of repute' standard"). Plaintiffs have not plausibly alleged that Defendants do not faithfully follow the policy.

IV. Plaintiffs' void-for-vagueness claim fails (Count V).

Again ignoring this Court's prior decision, Plaintiffs claim that the credentialing policy is impermissibly vague. Opp.23-24. This Court should adhere to its prior ruling. *See* Tr.79:22-24 ("[T]he plaintiffs assert that the media credentialing policy is unconstitutionally vague, and I disagree."). Plaintiffs have *still* failed to cite a case where a credentialing policy has been found unconstitutionally vague. As Defendants explained (Mot.28-32), the credentialing policy uses commonly understood terms and does not authorize or encourage arbitrary or discriminatory enforcement. Plaintiffs' vagueness challenge fails.

CONCLUSION

The Court should dismiss Plaintiffs' amended complaint with prejudice.

Dated: May 13, 2025

Respectfully submitted,

/s/ Tyler R. Green

Victoria Ashby
Christine R. Gilbert
Alan R. Houston
Office of Legislative Research
& General Counsel
W210 State Capitol Complex
Salt Lake City, UT 84114
(801) 538-1032
vashby@le.utah.gov
cgilbert@le.utah.gov
ahouston@le.utah.gov

Tyler R. Green (Utah Bar No. 10660)
Consovoy McCarthy PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
(703) 243-9423
tyler@consovoymccarthy.com

Daniel M. Vitagliano (pro hac vice)
Julius Kairey (pro hac vice)
Consovoy McCarthy PLLC
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
(703) 243-9423
dvitagliano@consovoymccarthy.com
julius@consovoymccarthy.com

Counsel for Defendants

WORD COUNT CERTIFICATION

I certify that this Reply in Support of Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint contains 3,098 words and thus complies with DUCivR 7-1(a)(4)(A)(ii).

/s/ Tyler R. Green