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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

Defendants' Response in Opposition to Plaintiffs' Amended Motion for Preliminary Injunction

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INTRODUCTION

Plaintiffs appear to view this Court's instructions about standards and burdens as mere suggestions. Their renewed motion remains wrong on several legal standards and still fails to carry their heavy—and heightened—burden. The "fundamental failings" the Court identified in denying Plaintiffs' first motion, Tr.7:10-14 [Dkt.32], persist here. Remarkably, Plaintiffs nowhere address—or even cite—the Court's prior ruling.

Even now, after limited discovery, no evidence exists that Defendants revised the Legislature's 2025 media credentialing policy because of Schott, his publications, or his viewpoints. Legislative staff denied Schott a credential for the sole reason that he did not satisfy the policy's objective, neutral criteria. The Court should deny Plaintiffs' amended motion for preliminary injunction and again reject their arguments that the credentialing policy is unlawful and that they would suffer irreparable harm absent equitable relief. Tr.62:20-87:22.

BACKGROUND

A. Open access to the Capitol and the Legislature

The Utah Legislature strives to maintain a government accessible and open to the people and press. Peterson-Decl. ¶3. The Capitol is open to all. Any person can attend and observe from the chamber galleries the proceedings on the Senate and House floors. *Id.* Senate and House committee and subcommittee meetings are also open to the public. *Id.*

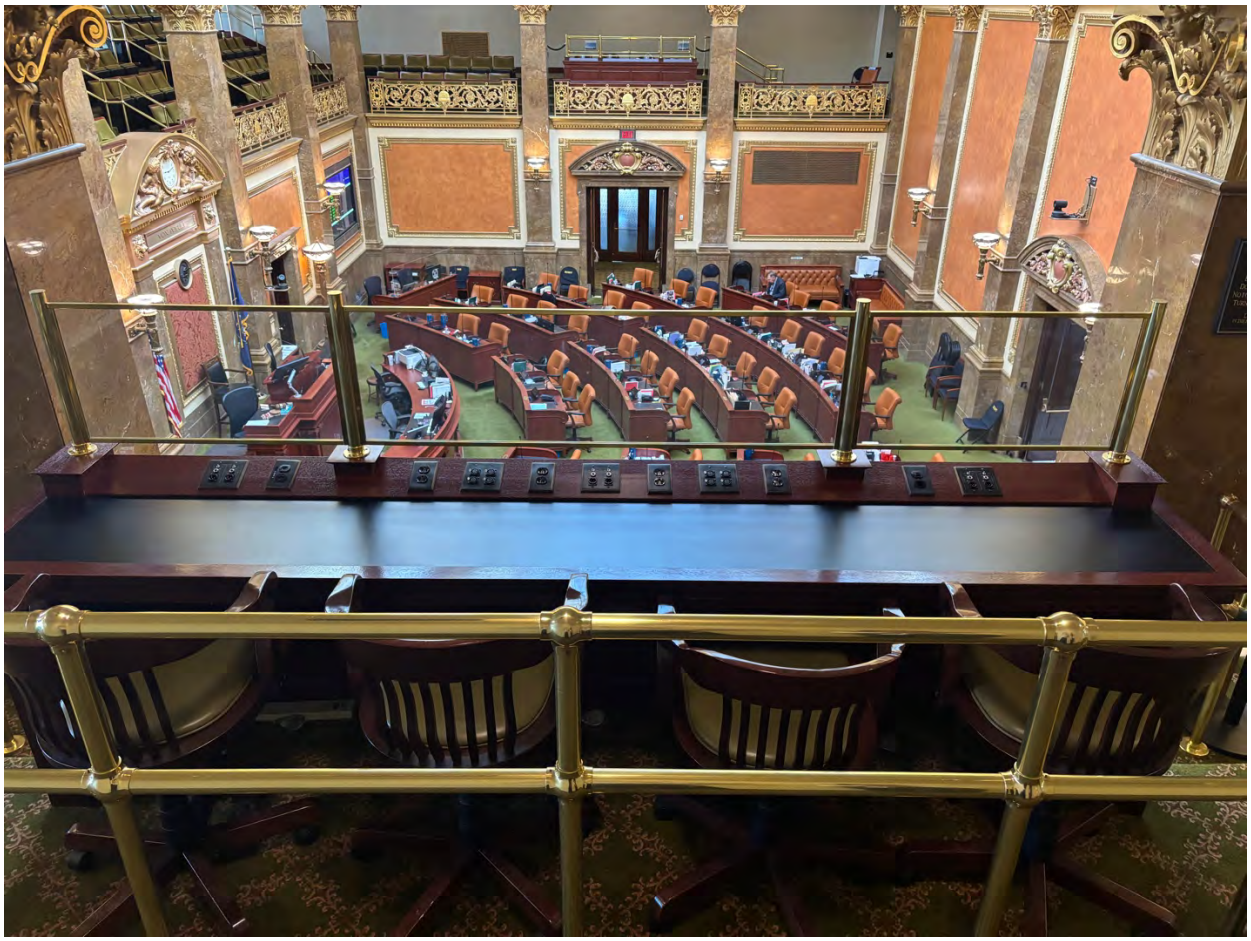
Beyond that, every official action taken by the Legislature is livestreamed and archived on the Legislature's website. That includes committee and subcommittee meetings and general floor time, including debates, votes on bills, and other matters. *Id.* ¶4. Press releases, blog posts, and additional communications are publicly available on the House and Senate websites. *Id.* ¶5. The House and Senate also maintain accounts on numerous social media platforms. *Id.* ¶6.

B. The Legislature's media credentialing policy

The Legislature has maintained a formal media credentialing policy since at least 2018. *Id.* ¶7. Legislative staff review and update the policy annually, typically in the fall before the next year's legislative general session. *Id.* ¶9. As part of this review, staff consider and incorporate feedback from existing established media. *Id.* The established media have expressed appreciation for the formal credentialing policy, explaining that it helps them maintain their legitimacy. *Id.*

1. Credentialed media receive certain benefits at the Capitol. They have access to a limited number of designated media parking spaces. *Id.* ¶11. They also have access to workspace with about 20 desks in the press room in the Capitol's basement. *Id.* ¶12. Committee chairs may permit credentialed media—generally photographers and videographers, not reporters—to access a designated area behind the dais in committee rooms. *Id.* ¶15.

Credentialed media have access to designated workspaces, or press boxes, in the galleries of the Senate and House chambers. *Id.* ¶13. These workspaces are immediately adjacent to the public seating in each chamber's gallery:



Id. ¶13 & Exs.3-4. Because the galleries contain a limited number of media workspaces (six in the Senate, eight in the House), credentialed media may cover floor proceedings in each gallery's general seating open to the public. *Id.* ¶13.

Credentialed media also receive invitations to certain press events. These include the Governor's monthly news conferences and—when the Legislature is in general session—the Senate President's daily in-office media briefings and the House Speaker's weekly in-office briefings. *Id.* ¶14. Recordings of those press events are publicly available online. *Id.* Credentialed media are included in the House and Senate e-mail circulation lists for press releases, which are also available online. *Id.* ¶¶5, 16.

2. Since formalizing the media credentialing policy in 2018, legislative staff have applied objective, neutral criteria to determine eligibility for credentials. *Id.* ¶17. Building on prior practice, the 2018 policy set forth "[d]efining characteristics" of eligible reporters: "represent institution that hire and fire, can be held responsible for actions, sued for libel"; "have editors, to whom they are responsible," "aren't the final arbiter and executioners of their own stories," and "don't just represent their own stream of consciousness"; "have some degree of education and/or professional training in journalism"; "adhere to a defined professional code of ethics"; and "represent institutions with a track record," *i.e.*, "have been in the business for a period of time and have established they are not lobbyist organizations, political parties, or flash-in-the-pan charlatans with blog sites." *Id.* ¶¶19-20 & Ex.5. Characteristics of ineligible reporters included "[b]log site owners" where "[t]he writing is essentially their own stream of consciousness, with little or no editorial oversight"; "[o]rganizations with no history or track record," "[l]ittle or no institutional framework," and "not bound by a journalistic code of ethics"; and "[i]nstitution and reporters whose main purpose seems to be Lobbying or pushing a particular point of view." *Id.* ¶21. The 2018 policy recognized that "these defining characteristics can be debated," but "[f]or practical purposes, we need to create a clear definition, so this is the starting point. These characteristics will likely change as the characteristics of the media industry evolve." *Id.* ¶22.

As anticipated, the Legislature made incremental changes over the years. The 2019 policy maintained the same criteria. *Id.* ¶23 & Ex.6. The 2020 policy provided that an applicant must "[b]e a professional journalist" and "[r]epresent news organizations or publications that have a track record," among other things. *Id.* ¶25 & Ex.7. The 2021 policy required, among other things, that an applicant "[b]e a professional journalist" and "[r]epresent an established, reputable news organization or publication." *Id.* ¶26 & Ex.8. The 2022, 2023, and 2024 policies maintained those requirements. *See id.* ¶¶27-29 & Exs.9-11. Legislative staff consistently applied the "defining characteristics" set forth in the 2018 and 2019 policies. *Id.* ¶¶25-29.

As to bloggers and independent media, the 2019 policy added a note suggesting that "a blog site owner or organization not bound by a code of ethics" could receive a credential by agreeing to abide by one. *Id.* ¶23 & Ex.6. The 2021 and 2022 policies provided: "Bloggers representing a legitimate independent news organization may become credentialed under some circumstances." *Id.* ¶¶26-27. The 2023 and 2024 policies narrowed that availability: "Bloggers representing a legitimate independent news organization may become credentialed *under limited, rare circumstances*." *Id.* ¶¶28-29 & Exs.10-11 (emphasis added).

3. In November 2024, the Legislature issued its 2025 credentialing policy. Like immediately preceding policies, the 2025 policy requires applicants to "[c]omplete the online application"; "[b]e a professional member of the media … who regularly covers

the Legislature and Capitol in person and is part of an established reputable news organization or publication"; "provide an annual background check"; "[a]dhere to a professional code of ethics"; and "[c]omplete the yearly harassment prevention training." *Id.* Ex.1.

Directionally consistent with prior revisions, the 2025 policy further narrowed the rule for bloggers: "Blogs, independent media or other freelance media do not qualify for a credential." *Id.* The primary reason for this revision was to establish objective, black-and-white criteria and eliminate any discretion of the House and Senate media liaison designees. *Id.* ¶32. No blogger or independent journalist had ever received a credential under the prior exceptions. Musselman-Depo.40:8-22, 63:19-64:1, 64:18-20 [Vitagliano-Decl. Ex.Q]; Peterson-Depo.10:22-11:3 [Vitagliano-Decl. Ex.R]. Legislative staff believed this revision would improve consistency and predictability for members of the media, eliminating the possibility of some bloggers or independent media receiving credentials but others not. Peterson-Decl. ¶32. The revision also partly anticipated an uptick in nontraditional, independent media and thus increased inquiries about credentials from nonqualifying individuals. *Id.* The change comported with the Legislature's position since 2018 that qualifying characteristics "will likely change as the characteristics of the media industry evolve." *Id.*

C. The denial of Schott's credentialing application

Schott most recently possessed media credentials as an employee of the *Salt Lake Tribune*. *Id.* ¶49. But the *Tribune* fired Schott in August 2024. Schott-Depo.15:4-7 [Vitagliano-Decl. Ex.A]. In September 2024, the *Tribune* politics editor advised legislative staff that Schott "no longer works at" and "no longer represents The Tribune," considering this may "impact[] his press pass." Peterson-Decl. ¶49. Following standard practice, staff revoked Schott's credential. *Id.* ¶50; *see* Musselman-Depo.30:15-21. Schott "knew that [he] didn't have a [credential] at that time." Schott-Depo.18:11-18. Schott launched Utah Political Watch in September 2024. Schott-Depo.9:1-3.

On December 17, 2024, Schott applied for a credential for the 2025 legislative session. Musselman-Decl. ¶4. Upon review of UPW's website, it was "self-evident" to legislative staff that Schott was ineligible because UPW is a blog or independent media. *Id.* ¶¶5-6. UPW's website was written entirely in the first person by Schott personally ("About me," "Question? Reach me at … ," "How to support my work," "I'd do this work for free if I could," "Buy me a coffee," etc.). *Id.* ¶6 & Ex.3. UPW's website also listed Schott's personal social media accounts as a "way[] to support" UPW. *Id.* ¶6. Staff concluded that Schott is not responsible to an editor and is the final arbiter and executioner of his stories, since Schott listed his "Supervisor" as "Self" on his application and UPW's website listed no staff or editors other than Schott. *Id.* ¶¶5-6 & Ex.3. Staff also concluded that the three-month-old UPW did not have any institutional framework or

a sufficiently established track record. *Id.* ¶5. The decision was "straightforward." Musselman-Depo.18:16-18.

Legislative staff denied Schott's appeal, explaining that Schott was not "a professional member of the media associated with an established, reputable news organization or publication" and that "[b]logs, independent media outlets or freelance media do not qualify for credentials." Musselman-Decl. ¶9 & Ex.7. In response to Schott's baseless accusation that the application denial "may be based on retribution," staff explained that the decision was "in accordance with clearly established, and consistently applied, policies." *Id.* ¶¶8-9 & Ex.7. Staff assured Schott that "nothing prevents individuals from reporting on the proceedings of the Utah Legislature, regardless of whether they hold a media credential," as information on legislative action is "readily accessible on the legislative website," and "everyone is welcome to attend committee meetings and floor time." *Id.* ¶9 & Ex.7.

D. Procedural history

1. On January 22, 2025, one day after the legislative regular session began, Plaintiffs sued and moved for a TRO and preliminary injunction to require Defendants to issue Schott a press pass. Dkts.1-3. After full briefing and a hearing, the Court orally denied the motion.

The Court identified "foundational" and "fundamental failings" in Plaintiffs' motion, Tr.7:11-13, 12:10, including Plaintiffs' failure to identify "which claims [they

were] moving on," "any elements of any of the claims that are asserted," or "what it is [they] are required to show to succeed on [their] claims at trial," Tr.9:4-10:6. Nor did Plaintiffs specify whether they were bringing "a facial attack or an as-applied attack." Tr.11:22-12:2. "[T]he motion never g[ot] off the ground for those reasons." Tr.61:17-18.

The Court held that Plaintiffs failed to show a likelihood of success on the merits on each of their four claims. Tr.73:11-85:7. *First*, the Court rejected Plaintiffs' "assertion of an unequivocal … 'right to gather news.'" Tr.74:24. The Court explained that "the First Amendment does not invalidate every incident burdening of the press that may result from the enforcement of government policies of general applicability." Tr.75:2-21. The Court held that Defendants did not "violate the First Amendment by establishing certain criteria to regulate the distribution of media credentials, because the plaintiffs do not have an unfettered constitutional right of access" and are not prohibited "from entering the legislature" to gather information. Tr.76:10-17.

Second, the Court held that the credentialing policy satisfied the requisite standard for a limited public forum because it is "reasonable and viewpoint neutral." Tr.77:12-14, 78:15-19. The Court explained that the policy "draws no distinctions based upon the viewpoint of the speaker, and there is no reason to think that in application it would tend to favor some viewpoints or ideas at the expense of others." Tr.78:20-24. Rather, "the policy … is designed to give professional journalists and media representatives

from reputable organizations access to cover the legislature." Tr.79:1-4. Those criteria do not "assume or prescribe any particular viewpoint" or "govern what can be published"—only "how information is disseminated." Tr.79:6-9. Plaintiffs also failed to show "that the credentialing criteria were modified to discriminate against Plaintiffs' content or viewpoint." Tr.79:9-12.

Third, the Court rejected Plaintiffs' vagueness challenge. Tr.79:20-24. Assuming void-for-vagueness doctrine applied, the Court held that the credentialing criteria "provide fair notice to the public" of what the policy requires and "ensure that the policy is not administered arbitrarily." Tr.81:10-15. The Court explained that the policy includes terms "commonly understood in the English language" and "incorporated" "additional defining characteristics" from earlier iterations of the policy. Tr.81:17-21. The Court also noted that the policy "removed some of the discretion that was previously permitted" and thus "reduced the potential for … arbitrary application." Tr.82:4-9.

Fourth, the Court held that the credentialing policy is not an unconstitutional prior restraint. Plaintiffs failed to show "that the 2025 policy was changed to prevent the plaintiffs from reporting or publishing." Tr.83:12-15. And the policy "does not have that effect," as Plaintiffs "are able to attend and view the legislators' actions" and "have not been restricted from speaking or publishing any commentary on the 2025 legislative session." Tr.83:15-16, 84:20-25.

The Court further held that Plaintiffs failed to show that they would suffer irreparable harm absent equitable relief because "Schott's lack of a media credential imposes little, if any, restrictions on the plaintiffs' ability to cover and report on the legislative session." Tr.86:14-20. The Court explained that Schott could continue to "attend the proceedings on the Senate and House floors from a position immediately adjacent to the press boxes," and all official legislative actions, legislative leadership's in-house briefings, and gubernatorial news conferences are live-streamed and archived online. Tr.86:18-87:3.

The Court concluded the hearing by directing the parties to confer about Plaintiffs' desire to file an amended complaint, pursue an amended preliminary injunction motion, and conduct limited discovery. Tr.88:9-96:16.

2. Three weeks later, Plaintiffs amended their complaint and filed an amended preliminary injunction motion with an amended declaration of Mr. Schott. Am.Compl. [Dkt.36]; Mot. [Dkt.37]; Schott-Decl. [Dkt.37-1]. The parties then conducted discovery on those new claims and assertions.

Schott's new declaration claims "UPW employs an editor, Malissa Morrell, to review my work," and "Morrell has served as my editor in an unofficial capacity since at least 2015." Schott-Decl. ¶15. But Schott confirmed in his deposition after failing to disclose in his declaration that Morrell is his wife. Schott-Depo.25:16-21; Morrell-Depo.12:8-22 [Vitagliano-Decl. Ex.O]. Nor is Morrell a professional editor. She is a

"licensed marriage and family therapist" and "doctoral student." Morrell-Depo.7:7-15. She has no training or professional experience in media, journalism, or editing (separate from UPW). Morrell-Depo.9:14-25, 10:1-22 & Ex.1. Morrell is not a UPW "employee" in any sense: She "work[s]" an estimated five hours per week; has no employment contract; and does not receive a paycheck, other compensation, or benefits from UPW. Morrell-Depo.21:19-22:11; Schott-Depo.35:21-36:12.

Morrell's "work" includes discussing ideas for stories, sources, and when to publish stories and reviewing articles for "wording," "flow," and "grammar." Morrell-Depo.14:4-16:4, 23:24-11; Schott-Depo.46:7-19. Morrell "does not review every piece" that UPW publishes, specifically UPW's "morning newsletter" and "breaking news" stories "that needed to be published quickly." Schott-Depo.40:14-22, 42:17-22, 51:9-11, 51:17-52:14; *see* Morrell-Depo.31:3-5. Morrell does not "do any sort of fact checking or verifying the accuracy of matters that are reported on." Morrell-Depo.28:3-6. She does not review "every document that is cited in every article" or "review footage" of legislative proceedings. Morrell-Depo.29:1-12. Nor does she "verify the identity of unnamed sources." Morrell-Depo.31:3-5.

Morrell's role as "editor" is at most advisory. When Schott worked at the *Salt Lake Tribune*, Schott's editors had "the final say over what gets published." Schott-Depo.54:19-55:3. At UPW, however, Schott maintains "the final say over what gets published," Morrell notwithstanding. Schott-Depo.53:16-18, 54:10-18; *see* Morrell-

Depo.23:6-7, 18-22 (explaining Schott has "the final say"). Schott "can freely publish" something despite Morrell's "disagreement." Morrell-Depo.33:1-3. And Schott "[f]or sure" has "rejected … Morrell's suggested edits." Schott-Depo.53:8-11. As Schott explained, when he and Morrell disagree, "if I think that my way is better, I will probably stick to the way that I want to do it." Schott-Depo.52:15-53:7.

Schott's amended declaration points to the "list of media credentials issued for the 2025 session" and claims that "Defendants[] do not uniformly or clearly apply their Policy." Schott-Decl. ¶¶55-56. But Schott has no personal knowledge of other media organizations' publication or editorial processes, organizational structure, affiliation with large media groups, or other characteristics relevant to credentialing. *See* Schott-Depo.70:16-79:15 (confirming Schott's lack of personal knowledge as to Utah News Dispatch, Utah Policy, *Davis Journal*, and Building Salt Lake).

Despite Schott's claim that a press credential is "the primary way" that he reports on Utah politics, Schott-Decl. ¶70, Schott continued to cover the Legislature during the 2025 legislative regular session without a credential. Schott-Depo.79:16-23. He maintained access to the House and Senate chamber galleries to observe floor debates and other proceedings in person. Schott-Depo.82:18-83:7. He reported on events in the Legislature; bills that were introduced, passed, or failed; floor debates; and committee meetings. Schott-Depo.87:6-22, 79:24-80:13, 86:2-4 & Exs.7-10. His reporting included video and audio of legislative proceedings. Schott-Depo.101:14-104:17 & Exs.16-17.

Schott also reported on gubernatorial press conferences with video footage. Schott-Depo.99:15-101:12 & Ex.15. He communicated with legislators and their staff by telephone, text message, and in person for his stories. Schott-Depo.87:23-25, 89:3-16, 90:6-18. And he included statements from legislators in articles he published, some of which he received directly from legislators, while others were obtained for him by legislative staff. Schott-Depo.91:15-99:17 & Exs.11-14.

LEGAL STANDARDS

A preliminary injunction is "an 'extraordinary remedy' that requires the moving party make a 'clear and unequivocal showing it is entitled to such relief.'" *Colorado v. Griswold*, 99 F.4th 1234, 1240 (10th Cir. 2024). As the movants, Plaintiffs carry the burden. *Gen. Motors Corp. v. Urb. Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007). Plaintiffs cannot get a preliminary injunction unless they show that (1) they are "substantially likely to succeed on the merits," (2) they will suffer irreparable harm absent relief, (3) their threatened injury outweighs any harm to Defendants, and (4) the injunction is in the public interest. *Harmon v. City of Norman*, 981 F.3d 1141, 1146 (10th Cir. 2020). Because Plaintiffs seek a "disfavored" injunction, they must "make a heightened showing of the four factors." *Griswold*, 99 F.4th at 1240 n.4; *infra* pp.16-19.

To prevail on a claim under 42 U.S.C. §1983, Plaintiffs must establish a "(1) deprivation of a federally protected right by (2) an actor acting under color of state law." *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 (10th Cir. 2016). The elements

necessary to establish the deprivation of a federal right "will vary with the constitutional provision at issue." *Pahls v. Thomas*, 718 F.3d 1210, 1225 (10th Cir. 2013).

ARGUMENT

I. Plaintiffs seek a mandatory injunction that would alter the status quo.

The Tenth Circuit "caution[s] courts against granting injunctions that alter the status quo or that require the 'nonmoving party to take affirmative action,'" *i.e.*, "a mandatory preliminary injunction." *Att'y Gen. of Okla. v. Tyson Foods*, 565 F.3d 769, 776 (10th Cir. 2009). Such "disfavored" injunctions "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc); Tr.71:6-13. Plaintiffs' desired injunction is mandatory and would alter the status quo, triggering a heightened burden.

A. This Court held that Plaintiffs' first motion sought "a mandatory injunction" because it "would affirmatively require the defendants to act in a particular way and to take specified action by order of the Court, that is, to issue a media credential to the plaintiffs and actively provide access and benefits associated with that status." Tr.72:1-7, 16-21; *accord Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1260-61 (10th Cir. 2005). Plaintiffs' amended motion requests the same relief as before and so again seeks a mandatory injunction. *Compare* Mot.2-3, *with* Dkt.3 at 3.

To be sure, Plaintiffs claim to seek a "prohibitive injunction" because it would "prohibit Defendants from applying the unconstitutional portions of the 2025 Credentialing Policy against Schott." Mot.15. Their framing does not make the injunction prohibitory. *See Curtis v. Oliver*, 479 F. Supp. 3d 1039, 1125 (D.N.M. 2020) ("a creative enough lawyer can present any injunction in either prohibitory or mandatory terms"). The Court must "look[] at the relief" sought. *Salazar v. San Juan Cnty. Det. Ctr.*, 2016 WL 335447, at *39 (D.N.M. Jan. 15). Plaintiffs seek an order "enjoining Defendants to restore Schott's press credentials" and "enjoining Defendants … from withholding press credentials and placement on the legislative press release distribution list from Schott." Mot.2-3. Any such injunction would require Defendants "to take affirmative action," *Little v. Jones*, 607 F.3d 1245, 1251 (10th Cir. 2010)—whether to issue Schott a press credential, add him to the press release distribution list, or provide him other benefits associated with a credential. *See* Tr.72:16-21; *Kelly v. Lightfoot*, 2022 WL 4048508, at *4 (N.D. Ill. Sept. 2) (request "to reinstate" press credential was mandatory); *Nicholas v. Bratton*, 2016 WL 3093997, at *1-2 (S.D.N.Y. June 1) (request to return revoked press credential was mandatory); *see also Schrier*, 427 F.3d at 1261 (injunction to "reinstall" plaintiff as department chair was mandatory); *SCFC ILC, Inc. v. Visa USA*, 936 F.2d 1096, 1099 n.6 (10th Cir. 1991) (injunction that "required Visa to take the affirmative step of approving issuance of the cards" was mandatory).

B. Plaintiffs' desired injunction would also alter the status quo, *contra* Mot.15-17, though the Court need not reach this issue since the injunction is mandatory, *see* Tr.72:1-7; *Westar Energy v. Lake*, 552 F.3d 1215, 1224 n.7 (10th Cir. 2009).

"An injunction disrupts the status quo when it changes the 'last peaceable uncontested status existing between the parties before the dispute developed.'" *Beltronics USA v. Midwest Inventory Distribution*, 562 F.3d 1067, 1070-71 (10th Cir. 2009). Where, as here, "an injunction challenges a policy or action that has taken place, … the status quo is the position of the parties *before* the challenged action or policy occurred." *Spiehs v. Larsen*, 2024 WL 1513669, at *4 (D. Kan. Apr. 8); *see Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 798 n.3 (10th Cir. 2019) (explaining status quo was "the status existing *before* Fort Collins enacted the challenged public-nudity ordinance").

Here, the status quo is Schott without a press credential *and* ineligible for one. It is *not* "when Schott was credentialed to report from the Capitol" or "Schott (likely) qualifying for press credentials" before "the policy was changed." *Contra* Mot.15-16. Plaintiffs challenge the November 2024 revision of the policy and the December 2024 denial of Schott's application. Before these two events, Schott neither held a credential nor was eligible for one. Legislative staff revoked Schott's credential in September 2024 after he was fired from the *Tribune*, Peterson-Decl. ¶¶49-50—an action Schott has never contested, *contra* Mot.16. After his firing, he was no longer eligible for a credential under the 2024 policy because Schott did not "[r]epresent an established reputable news

organization or publication." Peterson-Decl. Ex.11. And Schott's situation—a journalist recently fired from a qualifying news organization—would not present the "limited, rare circumstances" to justify issuing a credential under the exception for "[b]loggers representing a legitimate independent news organization," *see id.*, an exception that has never been used, Musselman-Depo.40:8-22, 63:19-64:1, 64:18-20.

Dominion Video Satellite v. EchoStar Satellite, 269 F.3d 1149 (10th Cir. 2001), is inapposite. *Contra* Mot.16. There, Echostar activated new Dominion subscribers for four years regardless of whether they met the "qualifying residential subscriber" criteria in the parties' contract before it reversed course and Dominion sued. 269 F.3d at 1151-53. The Court held that the status quo was the four years where EchoStar automatically activated Dominion subscribers, not the period after Echostar said it would no longer do so, even if Echostar had the right not to activate the nonqualifying Dominion subscribers. *Id.* at 1155. Unlike Echostar in *Dominion*, the Legislature always has considered whether applicants satisfy the credentialing criteria and has denied applications for those who do not. Peterson-Decl. ¶43. In other words, unlike Echostar in *Dominion*, the Legislature has not elected now to enforce criteria it did not previously enforce. Schott became ineligible when he was fired from a qualifying media organization. An injunction requiring Defendants to deem him eligible and "restore Schott's press credentials," Mot.2-3, would alter the status quo. *See Nicholas*, 2016 WL 3093997, at *1-2; *Kelly*, 2022 WL 4048508, at *4.

II. Plaintiffs have failed to show a substantial likelihood of success on the merits.

Plaintiffs' amended motion repeats many merits arguments that this Court already rejected. It also contains many of the same "fundamental failings" and "deficienc[ies]." Tr.7:12-14, 9:4-6. Despite the Court's admonishments, Plaintiffs do not identify which claims they are moving on or the elements of those claims. Tr.9:4-20, 73:17-21. Nor do Plaintiffs specify "whether this is a facial attack or an as-applied attack." Tr.11:22-12:2.

Defendants understand Plaintiffs to be moving on Counts I, II, IV, and V of the amended complaint—not Count III, since the motion never mentions "retaliation." *See* Am.Compl. ¶¶134-39. As explained below, Count II (alleging content discrimination and strict scrutiny) asserts the wrong legal standard and is otherwise duplicative of Count I because public forum doctrine applies. *Infra* pp.41-43. Defendants understand Plaintiffs' motion to make as-applied challenges, except for the prior-restraint claim—the only part of the motion that mentions "facial" challenge. Mot.30.

A. Plaintiffs' First Amendment claims fail under public forum doctrine.

As the Court recognized and Plaintiffs now concede, public forum doctrine applies to Plaintiffs' First Amendment claims (Counts I, II). Mot.20-21; Tr.13:12-20, 77:9-78:4. The doctrine applies because Plaintiffs seek access to "government property" to engage in alleged First Amendment activity, *i.e.*, newsgathering. *Verlo v. Martin*ez, 820

F.3d 1113, 1129 (10th Cir. 2016); *see, e.g.*, *John K. MacIver Inst. for Pub. Pol'y v. Evers*, 994 F.3d 602, 611-12 (7th Cir. 2021) (explaining forum doctrine "addresses who has the right of access to government property to engage in various expressive pursuits," including "gathering information for news dissemination").

Under public forum doctrine, a "three-step analytical framework" applies to Plaintiffs' claims. *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1144 (10th Cir. 2001). First, Plaintiffs must show that their activities are protected by the First Amendment. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985). Second, the court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id.* Third, the court "must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id.* Plaintiffs' motion fails to articulate this three-step framework.

1. Plaintiffs have not shown a burden on protected First Amendment activity.

Counts I and II fail at step one of the forum analysis because Plaintiffs have not established an infringement of activity "protected by the First Amendment." *Id.* Plaintiffs assert three First Amendment rights burdened by the denial of a press pass: (1) a "right to news gather," Mot.17, (2) a right of "equal access" as a "member[] of the media," Mot.19, and (3) a "right to exercise independent editorial judgment," Mot.19. Plaintiffs again "have misdefined the protected activity." Tr.60:18.

"It is helpful first to identify the nature of the right allegedly infringed" because "the asserted right is more narrowly defined" than Plaintiffs claim. *Courthouse News Serv. v. Smith*, 126 F.4th 899, 907 (4th Cir. 2025). Defendants do not dispute that Schott engages in protected First Amendment activity when he gathers news. But the denial of Schott's media credential does not limit any protected First Amendment activity because even without a credential, Schott has access to all government information available to the public. He thus has not shown a burden on protected First Amendment activity.

a. This Court already rejected Plaintiffs' "assertion of an unequivocal … 'right to gather news.'" Tr.74:24. As the Court held, Defendants do not "violate the First Amendment by establishing certain criteria to regulate the distribution of media credentials, because the plaintiffs do not have an unfettered constitutional right of access" and "legislative rules do not prohibit Schott from entering the legislature to … '[g]ather information he might find relevant to his opinion of the way the state is being run." Tr.76:9-18 (paraphrasing *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)).

The First Amendment does not bestow an "unrestrained right to gather information." *Zemel*, 381 U.S. at 17. Nor does it "guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). The Supreme Court has long rejected the notion that "the Constitution imposes upon government the affirmative duty to make available to

journalists sources of information not available to members of the public generally." *Pell v. Procunier*, 417 U.S. 817, 834 (1974). Thus, "there is no general First Amendment right of access to all sources of information within governmental control." *Smith v. Plati*, 258 F.3d 1167, 1178 (10th Cir. 2001). This limitation "applies equally to both public and press, for the press, generally speaking, do not have a special right of access to government information not available to the public." *Id.* (collecting cases). So "whatever the extent of protection warranted newsgathering, it is no greater than the right of the general public to obtain information." *Okla. Hosp. Ass'n v. Okla. Publ'g*, 748 F.2d 1421, 1425 (10th Cir. 1984).

This Court already held that denying Schott a media credential has not deprived Plaintiffs of any publicly accessible government information. Tr.76:9-18. Nothing has changed. Plaintiffs still complain only about Schott's inability "to view and report … *from the designated media areas* throughout the Capitol." Schott-Decl. ¶¶62-63 (emphasis added). But "the media have no special right of access … different from or greater than that accorded the public generally." *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (plurality op.). And Plaintiffs are "not being denied access to information available to the public generally." *Raycom Nat'l, Inc. v. Campbell*, 361 F. Supp. 2d 679, 684 (N.D. Ohio 2004) (denying injunctive relief). Floor debates and committee meetings are available to view in person and online, press credential or not. Peterson-Decl. ¶¶3-4. Agenda items,

press releases, and other materials are publicly accessible online, press credential or not. *Id.* ¶5.

Plaintiffs claim their lack of a credential has hampered their ability to gather news in several ways. But each source of information is freely available to the public and thus to Plaintiffs without a credential.

First, Schott claims he cannot attend legislative and gubernatorial press conferences "in person." Schott-Decl. ¶60. Gubernatorial press conferences are livestreamed and archived online, and video of House press conferences is available online. Peterson-Decl. ¶14. Indeed, Schott reported on Governor Cox's March press conference with video footage. Schott-Depo.99:21-101:12 & Ex.15.

Second, Schott claims he could not "cover the opening addresses by the Senate President and Speaker of the House." Schott-Decl. ¶61. He could have viewed these addresses live and in person from the chamber gallery—the *very place* where designated press boxes are located. Peterson-Decl. ¶¶3-4, 13 & Exs.3-4. These addresses were also livestreamed and are archived online. *Senate - 2025 General Session - Day 1*, Utah State Legis., https://bit.ly/4aDcqqo; *House - 2025 General Session - Day 1*, Utah State Legis., https://bit.ly/3EsB9BK. The Senate President's "remarks at a media gathering" after his opening address, Schott-Decl. ¶61, are also archived online. Utah Senate, *Utah Senate Media Availability – Day 1 – 2025 General Session*, Facebook (Jan. 21, 2025), https://bit.ly/4gmkE7w.

Third, Schott claims he "missed several legislative press releases" because Defendants "only provid[e] press releases to credentialed media." Schott-Decl. ¶60. Press releases are publicly available online. Peterson-Decl. ¶¶5, 16; *Archive*, Utah Senate, https://bit.ly/4iW6n3R; *Recent Posts*, Utah House, https://bit.ly/4jDWlnZ; *see Danielson v. Huether*, 355 F. Supp. 3d 849, 868 (D.S.D. 2018) (rejecting First Amendment claim to "receive notifications of press releases … normally sent to the media" where plaintiff could "learn of [them] from other sources").

Fourth, Schott claims he cannot attend "House or Senate rules committee meetings." Schott-Decl. ¶62. These meetings are open to the public. Peterson-Decl. ¶4.

Fifth, Schott claims he cannot attend "meetings with Senate leadership in the Senate President's office" or "media availabilities with the Speaker of the House in his office." Schott-Decl. ¶62. Recordings of these private events are available online. Peterson-Decl. ¶14; *see, e.g.*, Utah House Reps, *House Majority Media Availability – March 7, 2025*, YouTube (Mar. 7, 2025), https://bit.ly/4lx7Ejs; Utah Senate, *Utah Senate Media Availability – Day 42 – March 4, 2025*, Facebook (Mar. 4, 2025), http://bit.ly/3G7uQoa. Insofar as recordings of a few meetings may not have been posted, Schott-Decl. ¶66, all Schott had to do was ask: both the House and Senate websites explain that staff is available to assist members of the media—credentialed or not—with obtaining "audio clips," "photos," and other items. Peterson-Decl.¶¶4, 14.

Sixth, Schott claims he cannot "speak to legislators and their staff" or "ask questions" at press conferences. Schott-Decl. ¶¶60, 63. But his actions prove otherwise; nothing prevents him from doing so in public spaces or through private channels. *See* Schott-Depo.87:23-25, 89:3-16, 90:6-18; Peterson-Decl. ¶49 & Ex.15 (Schott e-mailing); Musselman-Decl. ¶3 & Ex.1 (Schott texting). And he has continued to publish articles with statements of legislators that he obtained through direct communications with legislators or legislative staff. Schott-Depo.91:15-99:17 & Exs.11-14.

Seventh, Schott claims he is in a less advantageous "position … to obtain videos, photographs, and audio recordings." Schott-Decl. ¶63. But he still has access to the information disseminated, whether he attends legislative proceedings in person or views private events online. And Schott has in fact reported on legislative actions with video and audio. Schott-Depo.101:14-104:17 & Exs.16-17.

b. Plaintiffs also assert a First Amendment right of "equal access" as "members of the media." Mot.19; *see* Schott-Decl. ¶70 (claiming Schott cannot "gather news or information on equal footing with other reporters"). The Seventh Circuit squarely rejected this "equal access" theory in *Evers*. 994 F.3d at 612. This Court should too.

Plaintiffs' asserted "right of 'equal access' … cannot be limited to members of the media without conferring a privileged First Amendment status on the press, and the Supreme Court has affirmed that the press does not enjoy special First Amendment rights that exceed those of ordinary citizens." *Snyder v. Ringgold*, 133 F.3d 917, 1998 WL

13528, at *4 (4th Cir. 1998) (citing *Branzburg*, 408 U.S. at 684-85); *see Clyma v. Sunoco, Inc.*, 594 F.3d 777, 780 (10th Cir. 2010) ("the media does not have a special right of access to information unavailable to the public"). Plaintiffs' "asserted right would require that, in each and every circumstance where the government made news available, it would have to give access to that information to *everyone* on equal terms." *Snyder*, 1998 WL 13528, at *4. If that were so, the Legislature could not possibly continue to hold in-office briefings with the Senate President and House Speaker or other private media events. Courts have rightly rejected such a "broad rule" as "untenable." *Id.*

Plaintiffs' theory also "flies in the face of so much well settled practice." *Id.* "Public officials routinely select among reporters when … providing access to nonpublic information." *Balt. Sun v. Ehrlich*, 437 F.3d 410, 417 (4th Cir. 2006). Plaintiffs' view of unbridled "equal access" would categorically "preclude the White House's practice of allowing only certain reporters to attend White House press conferences, even though space constraints make it impractical to open up the conference to all media organizations." *Snyder*, 1998 WL 13528, at *4; *see Pen Am. Ctr., Inc. v. Trump*, 448 F. Supp. 3d 309, 328 (S.D.N.Y. 2020) (noting president's "significant discretion over White House press credentials and reporters' access to the White House"). Accepting Plaintiffs' theory "would 'plant the seed of a constitutional case' in 'virtually every' interchange between public official and press." *Balt. Sun*, 437 F.3d at 418.

Recent events at the White House confirm that Plaintiffs' "equal access" theory is unworkable. The president's press secretary announced that the administration would extend access beyond "legacy media" to "less traditional outlets and even independent bloggers." Eli Stokols, *Trump briefing begins with pledge to boost outside media*, Politico (Jan. 28, 2025), https://bit.ly/4jG7S71. Within 24 hours, the White House received over 7,400 requests for access to the briefing room. Mary Margaret Olohan, *White House Receives Over 7,400 New Media Requests Within 24 Hours*, Daily Wire (Jan. 29, 2025), https://perma.cc/HL5A-FTT7. Surely the First Amendment does not mandate conferring credentials on all 7,400 applicants. As the Seventh Circuit held in rejecting this same "equal access" theory, government officials need not "grant every media outlet access to every press conference." *Evers*, 994 F.3d at 614. The court emphasized the "chaos that might ensue if every gubernatorial press event had to be open to any 'qualified' journalist." *Id.* This Court should reject Plaintiffs' theory and the "havoc" that would result. *Id.* at 612.

c. Plaintiffs also assert a burden on their "right to exercise independent editorial judgment." Mot.19. This Court already "disagree[d]," finding that the criterion of editorial oversight does not "establish a constitutional violation." Tr.39:16-21. As the Court explained, having an editor is simply "an indicia of the reliability of the news organization" and "how established the news outlet is or the media is." Tr.48:15-21.

Nor does requiring an editor burden First Amendment activity because, as explained, Schott maintains access to all information available to the public and he can publish freely without an editor. Plaintiffs' cited cases are inapposite. *NetChoice v. Reyes* concerned a law requiring social media platforms to verify users' ages and impose restrictions on minors' accounts. 748 F. Supp. 3d 1105 (D. Utah 2024). *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* concerned compelling parade organizers to express a particular message. 515 U.S. 557 (1995). And *Miami Herald Publishing v. Tornillo* concerned a "right of reply" statute that required newspapers to print a candidate's response to any attack on the candidate's record. 418 U.S. 241 (1974). None of those cases arose under public forum doctrine or cast any doubt on requiring editorial oversight to access government property for newsgathering.

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Because Plaintiffs have failed to show a constitutionally cognizable restriction on their ability to gather news, their First Amendment claims fail at step one of the forum analysis.

2. The credentialing policy satisfies the requisite standard.

Even if Plaintiffs have shown that the lack of a credential limits protected First Amendment activity, the "justifications" for denying Schott a credential and his "exclusion from the relevant forum satisfy the requisite standard." *Cornelius*, 473 U.S. at 797. As Plaintiffs concede, the designated media areas in the Capitol are a "nonpublic

forum" or a "limited public forum." Mot.21; Tr.77:9-23; *see Evers*, 994 F.3d at 610 (governor's "limited-access press conference" was nonpublic forum); *Ateba v. Jean-Pierre*, 706 F. Supp. 3d 63, 80 (D.D.C. 2023) (White House press area was "nonpublic or limited public" forum). Either way, the standard is the same. *See United States v. Kokinda*, 497 U.S. 720, 730 (1990). Government control over access "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806. Here, the credentialing policy is reasonable and viewpoint neutral.

a. The credentialing policy is reasonable considering the forum's purpose.

"The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Id.* at 808. Reasonableness "must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Id.* at 809.

This Court already held that the credentialing policy is reasonable considering the forum's purpose. Tr.78:15-19. The policy "is designed to give professional journalists and media representatives from reputable organizations access to cover the Legislature and other significant events at the Utah State Capitol." Peterson-Decl. Ex.1. It also "aims to support informed reporting while maintaining the integrity … of the Capitol." *Id.* For this reason, the policy requires applicants be "a professional member of the media" who "is part of an established reputable news organization or publication"

and excludes "[b]logs, independent media or other freelance media." *Id.* Denying credentials to bloggers and independent media reasonably ensures professional journalists and established media maintain sufficient access.

Evers is similar. The credentialing policy there required an applicant to be "a bona fide correspondent of repute in their profession" and "employed by or affiliated with an organization whose principal business is news dissemination." 994 F.3d at 606. The policy further required news organizations to have "published news continuously for at least 18 months" and have "a periodical publication component or an established television or radio presence." *Id.* The Seventh Circuit held these were "reasonably related to the viewpoint-neutral goal of increasing the journalistic impact of the Governor's messages by including media that focus primarily on news dissemination, have some longevity in the business, and possess the ability to craft newsworthy stories." *Id.* at 610; *see Ateba*, 706 F. Supp. 3d at 84 (agreeing). The same is true here.

The reasonableness of the credentialing policy "is also supported by the substantial alternative channels that remain open" for news gathering. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 53 (1983). When considering forum "access barriers," the Supreme Court has "counted it significant that other available avenues for the [plaintiff] to exercise its First Amendment rights lessen the burden created by those barriers." *CLS v. Martinez*, 561 U.S. 661, 690 (2010). Shown above, Plaintiffs have several other available avenues to obtain the information on which they seek to report.

Supra pp.23-26. In other words, Plaintiffs are "assured of equal access to all modes of communication." *Perry*, 460 U.S. at 53. Their "ability" to news gather is not "seriously impinged by the restricted access," *id.*, as this Court recognized, *see* Tr.86:18-87:3. Even if those other channels are not Plaintiffs' preferred means to gather news, "[t]he First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means" to engage in First Amendment activity. *Cornelius*, 473 U.S. at 809.

The "surrounding circumstances" confirm the policy's reasonableness. *Id.* The "primary reason" for revising the policy was to "eliminate any discretion of the House and Senate media liaison designees" and thus "improve consistency and predictability." Peterson-Decl. ¶32. So "[i]nstead of employing discretion in determining which journalists are eligible to hold a [press] pass," staff now employ "clear and definite standards that are not amenable to discretionary judgments." *Ateba*, 706 F. Supp. 3d at 85 (holding White House credentialing policy was "facially reasonable"). Confirming the point, an increased number of bloggers, independent media, and freelance journalists have inquired about credentials. Peterson-Decl. ¶32. Limiting credentials to established news organizations also reasonably helps the press corps maintain its legitimacy amid the rise in nontraditional media. *Id.* ¶9; *cf. Int'l Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 685 (1992) (finding concerns over "incremental effects" reasonable).

Plaintiffs' arguments challenging the policy's reasonableness are unpersuasive. There are space constraints. *Contra* Mot.22. The designated media parking spaces, the workspaces in the press room, and the press boxes in the chamber galleries are all limited in number. Peterson-Decl. ¶¶11-15; Peterson-Depo.23:2-20. Press conferences and in-office media briefings are also necessarily limited in space. While Schott claims fewer than twenty organizations have credentialed staff, Mot.22, there are more than 140 credential holders, Peterson-Decl. ¶42.

Nor is the policy "full of discretionary decisions," *contra* Mot.22, because the terms "blog," "independent," "reputable," and "established" have clear meanings, *infra* pp.48-50. The revision to exclude blogs and independent media "eliminate[d] any discretion of the House and Senate media designees." Peterson-Decl. ¶32. Prior versions of the policy could result in "some bloggers or some journalists outside the traditional media establishment receiving credentials and others not" depending on the "circumstances." *Id.* Now, rather than "employing discretion in determining which journalists are eligible" for credentials, legislative staff employ "clear and definite standards that are not amenable to discretionary judgments." *Ateba*, 706 F. Supp. 3d at 84. That revision reasonably "reduces the risk" that officials "might allocate" credentials "based on the views of certain … reporters." *Id.*

Finally, Plaintiffs argue that the growth of independent media "is a reason to welcome, not exclude it." Mot.22. But limiting access to "professional member[s] of the

media" who represent "an established reputable news organization," Peterson-Decl. Ex.1, reasonably advances the goals of journalistic quality and accurate coverage of the Legislature. *See Ever*s, 994 F.3d at 606-07, 610-11. The credentialing policy is reasonable.

b. The credentialing policy is viewpoint neutral.

Viewpoint discrimination occurs when the government targets "particular views taken by speakers on a subject." *Vidal v. Elster*, 602 U.S. 286, 293 (2024). Government discriminates based on viewpoint "when it denies access to a speaker solely to suppress the point of view he espouses." *Cornelius*, 473 U.S. at 806. Here, the credentialing policy is viewpoint neutral, both on its face and as applied.

As the Court held, the "2025 credentialing policy draws no distinctions based upon the viewpoint of the speaker, and there is no reason to think that in application it would tend to favor some viewpoints or ideas at the expense of others." Tr.78:20-25 (paraphrasing *Pahls*, 718 F.3d at 1234). Not one credentialing criterion is "based on the specific motivating ideology or the opinion or perspective of the speaker." *Vidal*, 602 U.S. at 294. As this Court explained, "[t]he term 'reputable organizations' does not itself assume or prescribe any particular viewpoint." Tr.79:6-7. In assessing whether a news organization or publication is "established" or "reputable," legislative staff consider whether it has "a track record," has "been in the business for a period of time," and "can be held responsible for actions," Peterson-Decl. ¶20. And whether applicants are considered blogs or independent media turns on whether they "have editors, to whom

they are responsible," "aren't the final arbiter and executioners of their own stories," and "don't just represent their own stream of consciousness," among other things. *Id.* These criteria are "based on the *status* of the respective" organization or journalist "rather than their views." *Perry*, 460 U.S. at 49. The credentialing policy excludes these reporters "[n]o matter the message [they] want[] to convey." *Vidal*, 602 U.S. at 293-94.

Beyond that, Defendants "did not apply the policy in this case to the plaintiffs on the basis of their viewpoint." *Hawkins v. City & Cnty. of Denver*, 170 F.3d 1281, 1288 (10th Cir. 1999). Staff denied Schott's application because he and UPW, as a blog or independent media, did not meet the requisite criteria under the 2025 credentialing policy. Musselman-Decl. ¶¶5-7, 9; Peterson-Decl. ¶71. Application of those objective criteria did not turn on Plaintiffs' viewpoint. By the criteria's plain terms, it mattered not that Schott is "a left-leaning journalist" or that he has "often reported critically on the right-leaning majority in the Utah legislature." *Contra* Mot.1. There is "no indication" that Defendants "intended to discourage one viewpoint and advance another." *Perry*, 460 U.S. at 49.

Plaintiffs argue that legislative staff's focus on the nature of the publication, including editorial oversight and whether reporting is "stream of consciousness," reflects viewpoint discrimination. Mot.23. It does not, as this Court held. Such considerations concern merely "how information is disseminated." Tr.79:6-9. As the Court explained, "[i]t is a process of review as an indicia of the reliability of the news organization" and

"of how established the news outlet is or the media is." Tr.48:15:24. "Whether that is in favor of school vouchers or against school vouchers, the same editorial review would take place in that instance." *Id.*; *see id.* ("You have lost me at viewpoint"). Furthermore, governments may limit access to nonpublic forums "based on … speaker identity." *Cornelius*, 473 U.S. at 806. Indeed, such "distinctions … are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *Perry*, 460 U.S. at 49.

Plaintiffs next claim that Defendants' failure to "inquire" about or "validate" the "reasons" for denying Schott's application "indicates … pretext to discriminate." Mot.23-24. It does not. Plaintiffs cite no authority that government officials are obligated to do so. "[I]t is the applicant's responsibility to provide context and address any potential concerns based on the Legislature's policies and guidelines." Peterson-Decl. ¶40; *see* Peterson-Depo.38:3-7. Many organizations have done so during the application process. *Id.* Schott's claim that he did not know to list his editor on his application, Schott-Decl. ¶15, is belied by the fact that he listed his editor under the "Supervisor" entry on past applications, *see* Peterson-Decl. ¶53 & Exs.19-20.

Plaintiffs also claim the Legislature "altered [its] policy to ensure independent journalists were not allowed credentials" specifically to exclude Schott given his unfavorable "reporting on the majority-Republican legislature." Mot.24. That assertion is pure speculation that contradicts the record. "The Legislature changed the 2025

credentialing policy to exclude '[b]logs, independent media or other freelance media' without any consideration of Mr. Schott." Peterson-Decl. ¶34; Musselman-Depo.24:8-11. It made the revision "to establish objective, black-and-white criteria and eliminate any discretion of the House and Senate media designees" and considering "the uptick in nontraditional, independent media" and "increased inquiries from nontraditional media." Peterson-Decl. ¶32. The revision reflected "the Legislature's longstanding position going back to 2018 that characteristics of qualifying journalists 'will likely change as the characteristics of the media industry evolve.'" *Id.* And the revision logically followed prior revisions regarding bloggers, narrowing availability from "under some circumstances" in 2021 and 2022 to "under limited, rare circumstances" in 2023 and 2024. *Id.*

Plaintiffs' proffered evidence of viewpoint discrimination does not change that conclusion. Plaintiffs cite an X post of Ms. Osborne from January 2024—nearly a year before the policy revision and denial of Schott's application. Schott-Decl. ¶34. Plaintiffs omit Schott's initial post to which Osborne responded—which he deleted—where he publicly mocked junior staffers. Musselman-Decl. ¶11 & Exs.8-9; *see* Tr.67:15-17 (characterizing Schott's post as "an unflattering and critical comment of staffers"). In any event, Osborne's post was unrelated to any viewpoints expressed in Schott's reporting.

Plaintiffs also cite Speaker Schultz's criticism over an article Schott wrote and a spat with President Adams and Ms. Peterson. Mot.24-25; Schott-Decl. ¶¶32-33, 35-41. But neither Speaker Schultz nor President Adams played any role in revising the

credentialing policy or in the denial of Schott's application. Musselman.Depo.12:8-10, 34:22-24; Peterson-Depo.18:18-19:19. And as the Court recognized, "the credentialing policy was modified *before* th[e] incident" with President Adams, Tr.79:13-16 (emphasis added), so that incident could not have motivated the policy revision.

Furthermore, neither incident was unusual. As the Court recognized, "plaintiffs are not unique in criticizing the legislature or its members, and yet the criteria do not exclude other critical reporters." Tr.79:16-19. "[L]egislators often publicly criticize journalists or media organizations for their reporting," and "[s]uch criticisms play no role in assessing eligibility for future media credentials." Peterson-Decl. ¶63; *see id.* ¶¶64-66. "Legislative staff routinely reach out to reporters or media organizations with issues or concerns—primarily inaccuracies—over stories they publish," and such exchanges "play no role in assessing eligibility for future media credentials." *Id.* ¶60; Musselman-Decl. ¶12. Confirming the point, when Schott worked at the *Tribune*, legislators criticized him and his reporting and legislative staff raised issues with his stories, yet he still received credentials. Peterson-Decl. ¶¶67-70 & Exs.26-32. "Credentialing decisions are … made without regard to news organizations' or individual journalists' past coverage critical of the Legislature" or their "political leanings or viewpoints." *Id.* ¶¶44, 46. Sworn testimony shows that neither Schott's reporting nor the viewpoints expressed therein played any role in the policy revisions or the denial of his application. *Id.* ¶¶67, 70-71; Musselman-Decl. ¶10; Peterson-Depo.56:10-15; *see Ark. Educ. Television Comm'n*

v. Forbes, 523 U.S. 666, 682 (1998) (holding exclusion from forum was viewpoint neutral where official "testified [plaintiff's] views had 'absolutely' no role in the decision to exclude him").

The Legislature's credentialing history and the composition of the list of credentialed journalists confirms the absence of viewpoint discrimination. Legislative staff have repeatedly credentialed journalists notwithstanding their personal or their organizations' past coverage critical of the Legislature—including Schott when he wrote for the *Tribune*. *See* Peterson-Decl. ¶¶46-48. And journalists of organizations with varying viewpoints—from the *Tribune* to the *Deseret News*—consistently receive credentials. *Id.* ¶45. The current list of credentialed media includes organizations viewed as conservative and liberal and journalists who have praised and criticized the Legislature. *Id.* ¶¶42, 45-47. "[T]he 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.

Plaintiffs are wrong to say Defendants have treated "other news media" differently "when they apply for credentials as 'independent' media." Mot.25-26. Plaintiffs misunderstand the term "independent" in the 2025 policy. It is used in the series "[b]logs, independent media or other freelance media." Peterson-Decl. Ex.1. In context, it refers to media that is not dependent on or connected to the existence or authority of a larger organization. Peterson-Decl. ¶55; *see* Musselman-Depo.63:13-18. Entities

Schott identifies that self-describe as "independent" use the term differently, seemingly referring to independence of "state ownership and funding." Peterson-Decl. ¶55. The fact that credentialed publications consider themselves "independent" in some other sense does not mean they have not satisfied the policy's criteria by having editorial oversight and by being an established reputable news organization, among other things. UPW, conversely, is a self-run blog or independent media without those characteristics.

No evidence supports Plaintiffs' assertion of "arbitrary application of the policies" or disparate treatment compared to other entities like Utah News Dispatch, Utah Policy, *Davis Journal*, or Building Salt Lake. Mot.12-13, 25-26. Schott has no personal knowledge of those entities' publication or editorial processes, organizational structure, affiliation with larger media groups, or other characteristics relevant to credentialing. *See* Schott-Depo.70:16-79:15. Sworn testimony explains how each of those entities satisfies the credentialing criteria with the requisite organizational structure and editorial oversight. *See* Peterson-Decl. ¶¶56-59; Musselman-Depo.25:14-26:7, 55:18-56:16, 57:2-58:17, 59:23-60:10; Peterson-Depo.7:5-9:2, 49:2-50:3. None is a "blog" or "self-edited." *Conta* Mot.12. Conversely, each official denial of credentials was self-supervised blogs, independent media outlets, or freelance journalists who publish without editorial oversight—just like Plaintiffs. Mot. Ex.12 at 11. And many other applicants have been denied credentials unofficially for the same reasons. Peterson-Decl. ¶43. The record reflects only even-handed application of the policy's neutral, objective criteria.

Finally, Schott claim an audio recording of Senator Todd Weiler "confirms" that Defendants revised the policy and denied Schott's application "because they do not agree with how and what I report." Mot. Ex.14 ¶10 [Dkt.52]. That recording establishes nothing. As Senator Weiler acknowledges, he "was not part of th[e] decision" to deny Schott's application. *Id.* ¶8. More to the point, Senator Weiler played no role in revising the credentialing policy or assessing Schott's application. Peterson-Decl. ¶71; Peterson-Depo.19:4-20; *see* Musselman-Depo.7:22-8:5, 12:8-10. Senator Weiler merely expresses his "*opinion*" of "what happened" and what he "*think[s]*" is "going on." Mot. Ex.14 ¶8 (emphases added). Such speculation cannot establish viewpoint discrimination.

3. Standards of content discrimination and strict scrutiny do not apply.

Alternatively, Plaintiffs challenge the credentialing policy as discriminating based on content and subject to strict scrutiny. Mot.26-30. That fails because it employs the wrong legal standard. Plaintiffs concede that the policy regulates access to a limited public forum or nonpublic forum. Mot.21; *see* Tr.77:9-14. Standards of content discrimination and strict scrutiny only apply to "traditional" or "designated" public fora. *Wells*, 257 F.3d at 1144-45. In limited or nonpublic fora, "the government may regulate on the basis of the content of speech, as long as its regulations are reasonable and viewpoint neutral." *Brown v. Palmer*, 915 F.2d 1435, 1440 (10th Cir. 1990); *see also Hawkins*, 170 F.3d at 1287 ("The law draws no distinction between content-neutral and content-based restrictions in a nonpublic forum."); *Summum v. Callaghan*, 130 F.3d 906, 917 (10th

Cir. 1997) ("content-based discrimination is permissible in a limited or nonpublic forum"); *accord Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001). Strict scrutiny simply does not apply here. *See, e.g.*, *Evers*, 994 F.3d at 612-13; *Shero v. City of Grove*, 2006 WL 2708612, at *6 (N.D. Okla. Sept. 20) ("The Tenth Circuit does not apply strict scrutiny when reviewing regulations of speech in a limited public forum … ."), *aff'd*, 510 F.3d 1196 (10th Cir. 2007); *Celebrity Attractions, Inc. v. Okla. City Pub. Prop. Auth.*, 660 F. App'x 600, 606 (10th Cir. 2016) (finding strict scrutiny arguments inapplicable in limited public forum).

Plaintiffs argue that *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), requires applying strict scrutiny. Mot.26-27. It does not. *Reed* concerned content-based restrictions on "the display of outdoor signs anywhere within the Town"; it did not apply public forum doctrine. 576 U.S. at 159. Courts have rejected similar arguments that *Reed* subjects content-based restrictions to strict scrutiny "regardless of the forum." *Ryan v. Grapevine-Colleyville Indep. Sch. Dist.*, 2023 WL 2481248, at *5 (N.D. Tex. Mar. 13). And the Tenth Circuit and other "circuit courts since *Reed* have applied less than strict scrutiny to content-based restrictions of speech in limited public or non-public fora." *Silberberg v. Bd. of Elections of N.Y.*, 272 F. Supp. 3d 454, 475 (S.D.N.Y. 2017) (collecting cases); *see Celebrity Attractions*, 660 F. App'x at 606.

Evers does not support Plaintiffs. *Contra* Mot.27-28. *Evers* explained why strict scrutiny *does not apply* in the context of press credentialing in a nonpublic forum. 994

F.3d at 612-13. The discussion in *Evers* on which Plaintiffs rely distinguished cases about taxes that "singled out the press over other industries for differential treatment" from the press credentialing policy, which was "a rule of general application." *Id.* at 613. *Evers* rejected the plaintiff's disagreement "with the use of forum analysis at all," *id.* at 611—no different than Plaintiffs' alternative argument of content discrimination and strict scrutiny here. This Court should reject it too.

B. The credentialing policy is not a prior restraint.

Plaintiffs again claim that the credentialing policy is an unlawful prior restraint. Mot.30-32. It is not, as the Court already held. *See* Tr.85:3-5 ("[T]he credentialing policy … does not constitute a prior restraint."). "[A] 'prior restraint' restricts speech in advance on the basis of content … ." *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 42 (10th Cir. 2013). "[P]ress gallery regulations" do not impose "a prior restraint on the publication of news articles." *Ateba*, 706 F. Supp. 3d at 85; *see 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" as supported by "no authority").

Here, Plaintiffs have not been "prohibited from speaking or publishing about" the Legislature. *Bralley*, 2015 WL 13666482, at *4. As the policy explains, "nothing prevents individuals from reporting on the proceedings of the Utah Legislature, regardless of whether they hold a media credential." Peterson-Decl. Ex.1. And as the Court

recognized, "plaintiffs have not been restricted from speaking or publishing any commentary on the 2025 legislative session." Tr.84:20-22. The 2025 policy "does not have th[e] effect" of "prevent[ing] the plaintiffs from reporting or publishing." Tr.83:12-16. And this is not the rare case where "*news gathering* (as opposed to speech)" has been "unreasonably restricted in advance," because Plaintiffs maintain access to all the information they seek. *See Bralley*, 2015 WL 13666482, at *3-4 (finding no prior restraint from denial of press pass where government did not "thwart[] any other attempt to attend the debate"). "[P]laintiffs are able to attend and view the legislators' actions, and the defendants have not instituted any policy prohibiting or attempting to regulate the plaintiffs' speech in any way." Tr.84:22-25.

Even if the credentialing policy did constitute a prior restraint, Plaintiffs' claim still fails. "[A] restriction on expression which would otherwise be deemed a prior restraint if it had been applied in a public forum 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). The credentialing policy survives any prior-restraint analysis for the same reasons it survives forum analysis—it is reasonable and viewpoint neutral, as shown above, *supra* pp.30-41. *See, e.g.*, *ACLU v. Mote*, 423 F.3d 438, 446 (4th Cir. 2005) ("Having already determined that the University's policy is viewpoint neutral and reasonable, it is also not an impermissible prior restraint."); *Krishna Lunch of S. Cal., Inc. v. Beck*, 651 F. Supp.

3d 1165, 1176 (C.D. Cal. 2023) (holding plaintiff's "prior restraint argument … suffers the same fate as the forum analysis"), *aff'd*, 2023 WL 6157398 (9th Cir. Sept. 21).

The credentialing policy does not vest "unbridled discretion" in legislative staff. *Contra* Mot.30. As this Court recognized, staff "removed some of the discretion that was previously permitted" and thus "reduced the potential for discriminatory and arbitrary application." Tr.82:4-9. Limits on official discretion must be "made explicit by textual incorporation … or well-established practice." *Wells*, 257 F.3d at 1151. The credentialing criteria explicitly limit any discretion, requiring that applicants "be a professional member of the media" who represents "an established reputable news organizations" and not be a blog or independent media, among other things. Peterson-Decl. Ex.1. And legislative staff's "well-established practice" of incorporating the "defining characteristics" from prior policies only further limits discretion. *Id.* ¶¶25-29. As this Court held, those criteria "are sufficient … to ensure that the policy is not administered arbitrarily." Tr.81:11-15. Plaintiffs cannot seriously contend that it is "impossible to determine" the "reasons" for denying a credential when staff thoroughly explained in writing the reasons for denying Schott's application and appeal. Musselman-Decl. ¶¶7, 9 & Exs.5, 7 The policy's criteria "are reasonably specific and objective, and do not leave the decision 'to the whim of the administrator.' They provide 'narrowly drawn, reasonable and definite standards' to guide [staff's] determination." *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 324 (2002).

Plaintiffs' cited cases are again 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). 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). And in *Forsyth County v. Nationalist Movement*, there were "no articulated standards either in the ordinance or in the county's established practice"—the administrator was "not required to rely on any objective factors" or "provide any explanation for his decision," which was "unreviewable." 505 U.S. 123, 133 (1992). Here, legislative staff apply objective factors in the policy and from established practice, provide an explanation for their decision, and the applicant has a "Right of Appeal." Peterson-Decl. ¶¶40-41, 43 & Ex.1.

Plaintiffs' facial prior-restraint challenge finds no support in case law. Accepting it would be unprecedented and call into question the legality of longstanding media credentialing policies across the country. The Court should reject it.

C. The credentialing policy is not unconstitutionally vague.

Plaintiffs again claim that the policy is unconstitutionally vague—repeating verbatim arguments this Court rejected. *Compare* Mot.32-33, *with* Dkt.3 at 21-23. Void-for-vagueness doctrine does not apply to the credentialing policy, and in any event, the policy is not unduly vague.

Void-for-vagueness doctrine is grounded in the Due Process Clause. *Beckles v. United States*, 580 U.S. 256, 262 (2017). "[T]he Government violates [due process] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Golicov v. Lynch*, 837 F.3d 1065, 1068 (10th Cir. 2016). The credentialing policy, however, is not a law and does not take away Plaintiffs' life, liberty, or property. Plaintiffs still "have not provided any authority establishing that [vagueness] doctrine necessarily applies to credentialing policies like those at issue here." Tr.80:17-22. For that reason alone, Plaintiffs have not met their burden to show likely success on their vagueness claim.

Even if void-for-vagueness doctrine applies, Plaintiffs' claim still fails. "[V]oid-for-vagueness doctrine requires that statutory commands provide fair notice to the public." *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1233 (10th Cir. 2023). Yet "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). To void a civil statute on vagueness grounds, it must be "so vague and indefinite as really to be no rule or standard at all." *Boutilier v. INS*, 387 U.S. 118, 123 (1967). "If persons of reasonable intelligence can derive a core meaning from a civil statute, it is not unconstitutionally void for vagueness." *Integrated Bus. Plan. Assocs. v. Operational Results, Inc.*, 2024 WL 2862420, at *9 (D. Utah June 6).

The policy terms that Plaintiffs challenge as "impermissibly vague," Mot.32, are "commonly understood in the English language," *CFTC v. Reed*, 481 F. Supp. 2d 1190, 1199 (D. Colo. 2007). And when considered in context, the terms have clear meanings. They are not unduly vague, as this Court held. *See* Tr.79:22-24 ("[T]he plaintiffs assert that the media credentialing policy is unconstitutionally vague, and I disagree."); Tr.81:17-21 ("The 2025 credentialing policy does not include terms not commonly understood in the English language … .").

Plaintiffs target the terms "established," "reputable," "blog," "independent," and "freelance" in the abstract. Plaintiffs' "narrow focus" on these terms "removes the important context of the credentialing rules." *Ateba*, 706 F. Supp. 3d at 83; *see Gray*, 83 F.4th at 1234 (considering terms in "context" amid "the surrounding words and phrases"). Viewed in context, the terms have "a core meaning." *Operational Results*, 2024 WL 2862420, at *9. Thus, courts have upheld similar credentialing policies that require a journalist to be "reputable" or "of repute." *See Ateba*, 706 F. Supp. 3d at 83 (rejecting argument that White House "requirement that journalists be 'bona fide ... reporters of reputable standing'" was "standardless and susceptible to abuse"); *Ever*s, 994 F.3d at 606-07, 610-11 (holding "bona fide correspondent of repute in their profession" was a reasonable criterion).

Plaintiffs claim "blog" is vague because "it is unclear what qualifies as a 'blog' and whether it is only journalists who report exclusively on a 'blog,' as opposed to in

conjunction with other media formats, [who] cannot have credentials." Mot.33. But "blog" has a well-known, ordinary meaning. *See Blog*, Merriam-Webster, https://bit.ly/4hgheo5 ("a regular feature appearing as part of an online publication that typically relates to a particular topic and consists of articles and personal commentary by one or more authors"). Read in context, a reasonable person can easily distinguish a blogger from a "professional member of the media" who "is part of an established reputable news organization or publication." Peterson-Decl. Ex.1. And no reasonable person would think a "professional member of the media" becomes ineligible because he also operates a blog. *Contra* Mot.33. The same is true for freelancers—a journalist who is "regularly employed" by a publication is plainly eligible for a credential *on behalf of that publication* even if he separately does freelance work for "another publication." *Contra* Mot.33.

Plaintiffs also challenge the terms "independent media or other freelance media." Mot.33. These terms "are associated in a context suggesting that the words have something in common" and so "they should be assigned a permissible meaning that makes them similar." *Potts v. Ctr. for Excellence in Higher Educ.*, 908 F.3d 610, 614 (10th Cir. 2018). The term "freelancer" already bears a meaning similar to "independent." *See Freelancer*, Merriam-Webster, https://bit.ly/40TW1KW ("a person who acts independently without being affiliated with or authorized by an organization"). And the policy's use

of "other" before "freelance" confirms they should be read similarly. *See Potts*, 908 F.3d at 615.

Plaintiffs misunderstand the criterion that applicants "[a]dhere to a professional code of ethics." Mot.33. The policy does not require adherence to a specific code. Schott must know what it means for a journalist to "[a]dhere to a professional code of ethics," having previously worked at an outlet that professes to do so. *See Editorial policies and ethics*, Salt Lake Trib., https://perma.cc/M8GN-VGDR.

Finally, Plaintiffs cannot seriously claim vagueness when Schott knew all along he did not meet the policy's credentialing criteria. The day before he applied, he expressed concerns on social media that he would not qualify, trying to plant the seeds for his (false) narrative that the policy has been "weaponized against" him to "shut [him] out." @schotthappens.com, Bluesky (Dec. 16, 2024, at 6:40 PM), https://perma.cc/SV5K-XTWW. He then posted a video documenting his application experience, which begins, "Come with me while I get denied a press credential for the first time ever." @schotthappens, Instagram (Dec. 17, 2024), https://bit.ly/4gkJpkv. These actions "demonstrate[] that Schott likely understood the criteria." Tr.81:24-82:3.[1]

[1] Schott started building his false narrative before the Legislature published the 2025 policy, which suggests he knew he would not qualify for a credential under the 2024 policy. On November 4, Schott asked Ms. Musselman when she did not immediately respond to him, "does this mean you're not planning to issue me credentials for the 2025 session?" Musselman-Decl. ¶3 & Ex.1. Schott characterizes his concern *post-hoc* as "sarcasm" that "does not come through well on text message." Schott-Depo.21:12-22:4.

III. Plaintiffs' alternative channels for newsgathering and delay in seeking relief undermines any suggestion of irreparable harm.

Even if Plaintiffs were substantially likely to succeed on the merits, they have not shown irreparable harm given the alternative channels for newsgathering and their months-long delay allowing the 2025 legislative general session to pass.

A. While some courts "assum[e] that a violation of constitutional rights includes irreparable harm, that presumption is not absolute." *Johnson v. Cache Cnty. Sch. Dist.*, 323 F. Supp. 3d 1301, 1314 (D. Utah 2018). The Court still must "consider the specific character of the First Amendment claim." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003). "Injunctive relief is not necessary" when a burden on expressive activity is "minimal" and "leaves ample capacity" for protected activity. *Johnson*, 323 F. Supp. 3d at 1314.

This Court already held that denying a credential has not irreparably harmed Plaintiffs because they have ample capacity to gather news and continue reporting on the Legislature without one. Tr.85:8-87:17. As the Court explained, and as shown above, "Schott's lack of a media credential imposes little, if any, restrictions on the plaintiffs' ability to cover and report on the legislative session." Tr.86:18-20; *supra* pp.23-26. Plaintiffs accordingly have not shown that the denial of a credential is a "great" or "substantial" burden. *Johnson*, 323 F. Supp. 3d at 1316. Plaintiffs' amended motion does not discuss "the difference between Schott's access to the information and the ability to report without a credential versus the same consideration with." Tr.87:4-12 (noting this

was "critically … missing" from Plaintiffs' first motion). Plaintiffs instead repeat arguments that the Court rejected. *Compare* Mot.34-35, *with* Dkt.3 at 24-25. Plaintiffs therefore again "have failed to establish that they will suffer irreparably injury if the [preliminary injunction] is not granted." Tr.87:13-17.

B. Plaintiffs' delay in seeking relief further undermines their claim of irreparable harm. A plaintiff seeking preliminary relief "must generally show reasonable diligence." *Benisek v. Lamone*, 585 U.S. 155, 159 (2018) (per curiam). Thus, "delay is an important consideration in the assessment of irreparable harm for purposes of a preliminary injunction." *GTE Corp. v. Williams*, 731 F.2d 676, 679 (10th Cir. 1984).

Here, Plaintiffs waited eleven weeks to first seek relief after the Legislature published the 2025 policy on November 5, Peterson-Decl. ¶35, even though Schott knew he would not qualify for a credential before then, *supra* n.1; *see* Tr.81:24-82:3 (concluding "Schott likely understood the criteria" all along). Instead of seeking relief, Schott waited, cataloging his experience on social media and his blog. *Supra* p.50; *see* Schott-Depo. Ex.6.

Plaintiffs' delay continued after the Court denied a TRO. As the Court emphasized at the hearing, "time is of the essence and the legislature is meeting daily and there is not a lot of time left." Tr.89:7-8. Yet Plaintiffs then waited *three weeks* to file their amended complaint and amended motion, letting Schott's "access to the legislature" be "lost for the whole session and then … forever lost." Tr.94:20:24. Plaintiffs'

"unnecessary" delay is "inconsistent with a claim that [they are] suffering great injury"' and undermines any suggestion of irreparable harm. *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1221 (D. Utah 2004); *e.g.*, *Am. Ass'n of People with Disabilities v. Herrera*, 580 F. Supp. 2d 1195, 1246 (D.N.M. 2008) (two-week delay "considerably undercuts" irreparable harm).

With the 2025 legislative general session in the rearview, Plaintiffs seek preliminary injunctive relief "with the expectation of special sessions," which they say "can occur." Mot.3, 34. But "purely speculative harm does not amount to irreparable injury." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003). Plaintiffs must show that the prospect of irreparable harm is "certain, great, actual 'and not theoretical'" and "of such *imminence* that there is a clear and present need for equitable relief." *Heideman*, 348 F.3d at 1189. Plaintiffs' "speculation or unsubstantiated fear" that harm "may occur in the future" from a possible special session "cannot provide the basis for a preliminary injunction." *Intelligent Off. Sys. v. Virtualink Canada*, 2016 WL 687348, at *5 (D. Colo. Feb. 18). More to the point, if a special session occured, Plaintiffs could continue to access all publicly available information even without a credential—just as they did during the general session. *Supra* pp.23-26. That eliminates any basis to claim irreparable harm from (unscheduled and uncertain) special sessions. Plaintiffs have failed to satisfy their burden of showing irreparable harm.

IV. The equities and public interest favor Defendants.

Granting Plaintiffs a preliminary injunction would harm the Legislature and the public. Accepting Plaintiffs' equal-access theory and requiring the Legislature to issue a press credential to Schott would open the pressroom doors to anyone who sought access. The Legislature would be left powerless to turn away any future blogger, freelance journalist, or social media "influencer" who sought equal access. This is precisely the "havoc" and "chaos" the Seventh Circuit foresaw. *Evers*, 994 F.3d at 612, 614. An influx of credential holders would make it impossible for the Senate President and House Speaker to continue to hold their in-office briefings, resulting in less access for the press and thus less newsworthy information for Utahns.

CONCLUSION

The Court should deny Plaintiffs' amended motion for preliminary injunction.

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Respectfully submitted,

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WORD COUNT CERTIFICATION

I certify that this Response in Opposition to Plaintiffs' Amended Motion for Preliminary Injunction contains 12,386 words and thus complies with the Court's Order of February 13, 2025. *See* Dkt.35.

/s/ Tyler R. Green