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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

UTAH POLITICAL WATCH, INC., and BRYAN SCHOTT,

Plaintiffs,

v.

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

Defendants.

PLAINTIFFS' REPLY IN SUPPORT OF AMENDED MOTION FOR PRELIMINARY INJUNCTION (DKT. 37)

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

Hon. Robert J. Shelby

Hon. Cecilia M. Romero

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INTRODUCTION

In opposing Plaintiffs' motion for a preliminary injunction, Defendants misconstrue the nature of the relief sought, distort the legal standards governing injunctive relief, and make arguments that their own deposition testimony and evidence directly contradict.

Plaintiffs' requested injunction is prohibitory, not mandatory, as it seeks only to halt Defendants' enforcement of an unconstitutional policy that violates Plaintiffs' First Amendment rights. Plaintiffs are likely to succeed on the merits, as Defendants' policy and practices are riddled with discretionary and viewpoint-discriminatory applications, unsupported by any legitimate justification. Defendants' depositions, in which they could not agree on basic definitions, or applications of the policy, drive this point home.

First, Defendants mislabel Plaintiffs' request as seeking a mandatory injunction. Tenth Circuit precedent defines a mandatory injunction as one needing ongoing court supervision or disruption of the status quo. Plaintiffs seek only to prohibit Defendants from enforcing their policy's blanket ban on "blogs" and "independent media," requiring neither ongoing supervision by the court, nor an affirmative action from Defendants beyond routine credential evaluations Defendants already perform. The status quo ante—before Defendants' unconstitutional revocation and denial of Schott's credentials—supports this prohibitory relief.

Second, Plaintiffs' likelihood of success is bolstered by Defendants' deposition testimony exposing Defendants' policy as a pretext to target Schott. Defendants' inability to clearly or consistently define "blog" and "independent media," coupled with their admitted discretion and personal animus toward Schott's reporting, reveal viewpoint discrimination. Their claim that Plaintiffs are not harmed by this discrimination because Plaintiffs have "alternative" access is insufficient. These inferior methods fail to mitigate the First Amendment violations. Finally,

Defendants' post hoc justifications—such as journalistic quality, space constraints and security needs—are undermined by their own testimony that no such concerns exist.

The evidence, including Defendants' contradictory deposition testimony and Senator Weiler's revealing statements, confirms that Defendants revoked Schott's credentials and then modified their Policy to punish Schott for his reporting, not to serve any viewpoint neutral purpose. Only Schott was harmed by this change. And Defendants did not anticipate that other new media would apply before they changed the policy. When the impact falls upon a universe of one respected journalist, all pretext falls away, and the only conclusion remaining is that Plaintiffs were victims of viewpoint discrimination—just as Senator Weiler revealed.

By enforcing this policy only against Schott, Defendants infringe Plaintiffs' constitutional rights, causing irreparable harm. For these reasons, this Court should grant Plaintiffs' motion for a preliminary injunction to restore their rightful access to press credentials pending the resolution of this case.

REPLY

I. DEFENDANTS CANNOT AVOID INJUNCTION BY MISLABELING PLAINTIFFS' REQUESTED RELIEF OR MISREPRESENTING THE LAST UNCONTESTED STATUS BETWEEN THE PARTIES.

Defendants misstate the differences between prohibitory and mandatory injunctions. Defendants argue that any injunction that would change the current status and require them to take "affirmative action" is a per se "mandatory injunction." Dkt. 54 (Defs' Opp.) at 16-19.[1] Not so. As the Tenth Circuit explained, a mandatory injunction is usually found where injunction either: (1) "affirmatively requires the nonmovant to act in a particular way" placing the "issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is

[1] All cites to briefs on the docket use ECF pagination.

abiding by the injunction;" or (2) "alter[s] the status quo." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1260-61 (10th Cir. 2005). The injunction sought does neither.

Plaintiffs ask only that Defendants stop violating the law. Their Policy, insomuch as it completely bars "blogs" and "independent media" from obtaining credentials, infringes on Plaintiffs' First Amendment rights and should not be enforced while this case is pending. In other words, Defendants need only *stop enforcing* the unconstitutional part of their Policy for Plaintiffs to obtain the preliminary relief they need to stop the harm they are suffering. They then can apply the remaining portions of the policy to Schott's application and decide accordingly.

The injunction will not require Defendants to "affirmatively act." The only "affirmative action" Defendants would have to take would be to re-evaluate Schott's application. But, they obviously need to evaluate journalists' credential applications whether an injunction is in place or not. They would only be prohibited from performing that evaluation using their Policy's prohibition on "independent media" and "blogs."

Plaintiffs do not demand this Court order their application approved. Besides, Defendants have already admitted they *only* denied Schott's application on the basis that UPW was a "blog" or "independent," and, therefore, not an "established reputable news organization or publication." Musselman Depo. (Dkt. 57-17) 18:11-15; Peterson Depo. (Dkt. 57-18) 42:3-6. There is no reason this Court would need to continue to conduct "ongoing supervision" because Defendants have admitted to having no other grounds to deny Schott's application. *See id.*; *see also* Peterson Depo. 41:22-24 (agreeing "Schott is a professional member of the media"), 33:8-10 (believes Schott is "bound by a code of ethics"), 35:1-10 (agreeing Schott is a journalist that regularly covers the state legislature); Musselman Depo. 18:8-10 (stating Schott "met the personal qualifications" for a press credential under the 2025 Policy).

Not only would an injunction not require affirmative action, it also would also meet the second *Schrier* factor because it would restore the status quo ante. While Defendants argue this is untrue, they do so by continuing to erringly insist the "status quo" is "Schott without a press credential *and* ineligible for one." Defs' Opp. 27. But the status quo can only be "the last *peaceable uncontested* status existing between the parties before the dispute developed." *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1006 (10th Cir. 2004) (emphasis added). Schott sued precisely *because*, for reasons that violate the First Amendment, he is "without a press credential and now ineligible for one." His present status was created *by* Defendants' unconstitutional actions and, thus, *cannot* be the last "peaceable uncontested" status.

Although Defendants acknowledge that status quo means "before the challenged action" they fail to acknowledge Schott held a press credential for *years* as the last peaceable status quo. Schott was not deprived of a press credential or eligibility until *after* the challenged action – Defendants unconstitutional application of their 2024 Policy to revoke his credentials[2] and modification and application of their 2025 Policy to continue to deny him those credentials. At the very least, the last peaceable uncontested status was when Defendants operated under a constitutional policy that did not discriminate based on viewpoint. Because that is all the injunctive relief Plaintiffs seek, this Court should find the injunction sought is prohibitive.

II. DEPOSITION TESTIMONY SUPPORTS PLAINTIFFS' LIKELIHOOD OF SUCCESS ON THE MERITS.

Defendants argue that Plaintiffs are unlikely to succeed for several reasons, all of which are practically copied and pasted from their Motion to Dismiss (Dkt. 53). Plaintiffs will not do

[2] Defendants mistakenly claim that Schott has "never contested" the revocation of his credentials. But the revocation of his credentials is clearly one of several grounds on which Schott alleges viewpoint discrimination in his First Amendment Complaint. Dkt. 36 ¶126. Plaintiffs have also referenced the revocation as part of the analysis of their claims in their response to Defendants' motion to dismiss (Dkt. 59 at 25).

the same in response and, instead, incorporate their Response to Defendants' Motion to Dismiss (Dkt. 59) by reference to better preserve judicial resources and ensure timely resolution of all issues before the court. With those arguments incorporated,[3] Plaintiffs will use their reply to highlight the deposition testimony the parties have obtained, and Defendants filed with the court, which further supports the arguments in Plaintiffs' Motion (Dkt. 37).

A. Deposition testimony further demonstrates that availability of inferior newsgathering alternatives does not alleviate the burden on Plaintiffs' First Amendment activities nor demonstrate Defendants' policy is reasonable.

As in their MTD, Defendants continue to insist that Plaintiffs' claims fail because Plaintiffs can, and have had to, access some information through secondary, inferior methods (which other media obtains live and in-person). Defendants believe these "alternatives" to the access they provide the media not only lessens the burden on Plaintiffs' First Amendment rights to newsgathering and editorial discretion[4] but also demonstrates their policy is reasonable as part of the limited public forum doctrine analysis. Defs' Opp. at 33-35, 40-41. Neither is correct.

As previously explained, to whatever extent Defendants provide lower-quality, public-level alternatives to their "unpreferred" credentialed media members, it does not cure their First Amendment denial of access violation. *See* Dkt. 59 at 13-15 (providing explanation, supported by case law, as to why Defendants misunderstand their "alternatives" to be dispositive of the First Amendment burdens at issue in this case). Moreover, available inferior alternatives do not render Defendants' policy "reasonable" for purposes of analyzing the free speech violations in

[3] To be clear, *all* arguments are being incorporated, including regarding forum analysis, strict scrutiny, prior restraint and vagueness. *See* Dkt. 59.

[4] This is the only substantive argument that Defendants offer in response to Plaintiffs' assertion of the right to editorial discretion. It bears mentioning, however, that Defendants' deposition testimony provided useful insights into just how Defendants' requirement for an editor infringes on editorial discretion. As further discussed below, *infra* Section II.C, Defendants require an editor so that they can ensure "facts are being conveyed accurately." Musselman Depo. 58:18-59:2. Defendants make the subjective determination as to what is "accurate" and, if they make that determination in the negative, then force the journalist to resolve the issue in their favor by contacting the editor. *Id*.; Peterson Depo. 59:3-22.

the context of a limited public forum.[5] See *id*. at 17-18 (explaining Defendants misrepresentation of the case law to make this argument).

Although Defendants, despite making this "alternative channels" argument, were not the ones to ask him to explain his reasoning further, Schott was asked on direct examination "how . . . it affect[s] you as a journalist to have to get your sources from archived, old videos rather than viewing them in real time, live?" In response, he provided the following:

> I'm at the mercy of whoever is running the camera and sometimes the archives that I'm pointed to or the delayed video isn't even there. Although on the legislative website, for the most part, from this last session everything is available, but there have been times when the recordings in the past, I can't point to specifics, but I do know there have been times in the past where the recording is not available on the website. And, additionally, the daily media availability with the Senate president, I know that they missed posting that three times this session so I have no idea what happened in those recordings. Also, while the ones on the legislative website, the audio is good because people are talking directly into the camera, the audio from the media availabilities varies wildly. I know that the Senate President's daily media availability is recorded on an iPhone and there are times when I can't understand what someone has said because it's garbled.[6] It's not clean audio and so I have to, you know, if I were a less responsible journalist, I would guess at what somebody said. Otherwise, I just to skip that part in my article because I don't know for sure what was said. The camera quality is bad. And so, I'm at the mercy of where they are pointing that camera. And I can't observe in the room body language, what somebody else reacts and, also, I can't ask questions, so, you know, I can't follow up on something and, that means that I would have to hope that one of my colleagues wanted to ask the same follow-up that I did. But, you know, again, that just leaves me at the mercy of them.[7]

Schott Depo. (Dkt. 57-1) 134:12-135:22.

When asked, "What are you not able to do because you did not have media credentials for this past legislative session?" *Id*. at 136:1-3, Schott responded:

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[5] Defendants continue to misrepresent the holding of *CLS v. Martinez*, 561 U.S. 661 (2010) in their Response. Defs' Opp. at 40. Again, it is only "when access barriers are *viewpoint neutral*" that the Supreme Court has "counted it significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those barriers." *CLS*, 561 U.S. at 690. Where "restrictions on access to a limited public forum are viewpoint discriminatory, *the ability of a group to exist outside the forum would not cure the constitutional shortcoming*." *Id*. (emphasis added).

[6] Peterson also stated the press conferences were videoed on her iPhone. Peterson Depo. 25:12-26:8.

[7] Schott has a slight speech impediment. Schott Depo. 138:4-5. Therefore, the portions of his transcript used herein are cleaned up to eliminate any stutters or errant words. The substance of any statements made has not been changed.

> I am not able to attend the daily media availability after floor time with the Senate president. I am not able to attend the weekly media briefings with House Speaker Mike Schultz and members of his leadership. I have missed several press conferences. I didn't even know about them until after the fact when somebody else published a story about them because I am not allowed to be on the media press release list because I don't have a credential. And they point me to the website to see the press release. They will not post notice of a press conference on the website. If I want to see if there is . . . a press release on their website, I have to manually go to the website and refresh several times a day to see if there is something that was posted. And if I'm doing other things, I'm going to miss something. I cannot be in person at the governor's monthly televised press conference. You must attach a picture of your press credential in order to get an in-studio slot. There were end-of-session press conferences with the governor and the lieutenant governor. That was for a credentialed member of the media. So, the ability to be treated the same way as other journalists who are doing legitimate news stories is hampered because I cannot ask questions. And it's just not – it's just not an equitable thing to say. You can look at this on a delay, because sometimes the delay isn't there. . . I would have to rely on somebody else's reporting to inform my reporting and I don't know what changes they've made, what things they've omitted, and what things that they have included. You can read two or three stories about the same press conference and get wildly different takeaways because reporters use their news judgment and decide what to include and not to include. And then I would have to rely on the news judgment of other reporters to inform my article should I try to write one.

Id. at 136:4-137:24.

At their own depositions, Musselman and Peterson both acknowledged that credentialed media access more than what is typically given to the public. Musselman Depo. 60:18-25, 61:3-8; Peterson Depo. 22:7-13, 23:6-26:19. Musselman even noted that their "media distribution lists are reserved for credentialed media and then communications directors or staff PIOs [public information officers] of state agencies." Musselman Depo. 32:21-24. Peterson stated that providing the press room in the basement of the Capitol offered some media members a "substantial benefit." Peterson Depo. 22:7-13. Peterson also acknowledged the designated media area in the House and Senate galleries have specialized audio capabilities, data ports and power plugs for media to be able to perform their duties. Peterson Depo. 23:15-25:2. Also, both Defendants admitted to delays – minutes, hours or days – in posting legislative videos, the Senate President's press conferences, and press releases to the website; or even not posting them

at all. Musselman Depo. 48:17-25 (media availability videos are delayed); Peterson Depo. 16:17-23 (press releases on a delay); Peterson Depo. 25:12-26:25 (senate president press conferences posted on a delay or not at all).

Thus, even if the availability of "alternatives" was relevant to any part of the analysis required in this case, deposition testimony underscores that these touted "alternatives" are woefully inadequate and fail to mitigate any burdens imposed on Plaintiffs. These inferior methods—marked by delayed, incomplete, or poor-quality access—deprive Schott of real-time reporting capabilities and equitable treatment compared to credentialed media, as evidenced by his detailed accounts of missed opportunities and unreliable sources. Accordingly, this Court should reject Defendants' argument and recognize that their policy's restrictions on Plaintiffs' First Amendment rights remain unjustified and unlawful.

B. Deposition testimony further demonstrated the broad discretion Defendants exercise in applying their Policy.

As they did in their Motion to Dismiss, Defendants urge this Court to find that their most recent Policy change eliminated all the discretion they previously had in credentialing media for the past 10+ years and, therefore, their Policy is not unreasonable (in the limited public forum context) and not a prior restraint. Defs' Opp. at 41-42, 46, 54.

Their own words destroy these arguments. When asked what a blog was, Musselman said they "generally have a *single* author and provide *commentary*/insight into a particular topic," but, moments later, stated blogs could also have "*multiple* authors" and "*no* commentary." Musselman Depo. 23:2-20 (emphasis added). Musselman also conceded that blogs do independent reporting, break news and can even be considered journalism. *Id*. 23:8-13. In essence, she has a "general understanding of what a blog is" that contains contradictory criteria –

"single author" versus "multiple authors" and "commentary" versus "no commentary" – which in no way establishes the existence of a "non-discretionary" policy. *Id.* 23:4-24.

Despite Defendants' position that they have a policy that deprives them of any discretion to permit "blogs" or "independent" media to be credentialed, neither could answer what would qualify as either using basic hypotheticals or fact patterns. Here are some of the questions Musselman and Peterson were asked about their "nondiscretionary policy" regarding blogs and independent media to which they could not definitively answer "yes" or "no":

- Whether – now knowing that UPW has an editor and does not write in a "stream of consciousness" – Defendants could make a new decision on Schott's application. Musselman Depo. 19:23-20:9; Peterson Depo. 50:4-12.
- "If there was a website with a single author that had journalism on it and no commentary, would that be a blog?" Musselman Depo. 23:18-20
- "Would, in your mind, a website classifying itself as a blog cause you to deny an application?" Musselman Depo. 26:16-17
- "So you can't say whether having an editor who's separate from the reporter is sufficient to make a publication not a blog?" Peterson Depo. 51:2-5.
- Whether, now that Musselman knows UPW has "liability insurance" and "currently lists an editor. . . would you expect Mr. Schott's application to be granted, denied or can you not say?" Musselman Depo. 29:8-24
- "Would knowing that [UPW] has an editor check that box for that aspect of [Schott's] application?" Musselman Depo. 44:11-16
- If learning that a news organization, despite being owned by a parent company, indicates on its website that it is "independently managed, run, and edited" would impact Defendants' decision to grant credentials. Musselman Depo. 58:3-9
- How Defendants determine who is "reputable." Musselman Depo. 16:1-9
- What an "established track record" is for purposes of determining what qualifies an organization as "independent" or a "blog" Musselman Depo. 14:9-13.
- "*Question*: So if there's a news organization that's either an individual or an independent media organization that doesn't have the structure that you're talking about, but is established and reputable, you would want to grant them a pass? *Answer*: I'd review their application. *Question*: Yeah, but might you grant them a pass? *Answer*: Depends on the situation." Peterson Depo. 43:19-25.
- If Tucker Carlson, who "has his own media organization[,] could . . . qualify for credentials?" Peterson Depo. 44:5-13.

If discretion is gone, questions of whether and when a news organization or journalist can be credentialed would not be answered as "I can't say," "I don't know," or "I'd have to review

the application." But that's exactly how Musselman and Peterson answered, over and over. In fact, one of the few questions Musselman unequivocally answered "Correct" to was when she was asked if "the definition that [she] applied for a blog in this case was just sort of *[her] general understanding of what a blog is*." Musselman Depo. 23:21-24 (emphasis added).

For her part, Peterson stated being a "one person shop" is just "*one* of the terms . . . or definitions [they] use" to determine if a media organization is "independent." Peterson Depo. 9:6-21. She also could not explain, definitionally, what the difference was between "independent media" and a "blog" choosing instead to just say "it depends on the situation for each." Peterson Depo. 43:3-7. Indeed, even though Building Salt Lake *expressly identifies* itself as a blog, Peterson insisted she would not deny their credential application on that basis because "*I* don't consider them a blog." *Id*. 49:9-24 (emphasis added).

If eliminating discretion were the intent, none of this makes sense. Defendants still have so much pondering and evaluating to do to decide if a particular website is a blog or independent media because the policy *did not* eliminate their discretion. What is a "blog" or "independent media" are not "non-discretionary" determinations; they depend entirely on Musselman and Peterson's subjective – or *discretionary* – case-by-case rulings. The goal of the policy change was to ensure Schott's exclusion, which is why Defendants could not provide definitive answers about how their "non-discretionary" policy would apply in any given factual scenario.

"Blog" and "independent" are not the only terms that Defendants seemed to be unable to provide a non-discretionary definition for. When asked about whether UPW's subscription and other statistics informed whether UPW was established and reputable, Musselman admitted they were helpful but quickly added "they are not the sole determining factor on if an organization is 'established and reputable.'" Musselman Depo. 43:6-24. When Peterson was asked if Schott was

a "journalist" she claimed it "depends." Peterson Depo. 35:1-14. What it depended on, according to Peterson, was whether Schott had met her personal view of "journalistic standards" in reporting on any given story, and particularly if he was "reaching out for comment before a story is published versus not." *Id*. 35:15-36:1. In other words, someone is only a journalist if he performs his job in a way that serves or satisfies Peterson.

Defendants' depositions reveal that Defendants have no defined concepts of what a "blog" or "independent media" are despite claiming that they removed their discretionary decision-making by completely prohibiting such media. It is a farce that demonstrates what Plaintiffs have been saying: this policy change had nothing to do with eliminating discretion. It had everything to do with keeping Schott out, as Senator Weiler said, to teach him a lesson.

C. Defendants changed their policy to target Schott and for no other reason

Without the excuse of "lack of discretion" to lean on, there are no other valid reasons left for why Defendants changed the 2025 Policy in a way that impacted only Schott.

In their depositions, both Musselman and Peterson admitted that they had neither space nor security concerns that precipitated their modification of the Policy. Musselman Depo. 51:6-8 ("Q. . . . [S]pace limitations were not part of the contemplation? A. No."); *id.* 42:13-20 (stating her belief that Schott would use media credentials appropriately); *see also* Peterson Depo. 31:18-25 (agreeing it would be "any problem for the legislature" to add one additional media member to the 20 organizations they credentialed for the 2025 legislative session); *contra* Defs' Opp. at 42 ("There are space constraints"). And, different from their arguments to this Court, Defendants were *not* "concerned that [they] were going to start receiving more applications then because there were more of those independent media out there[.]" Peterson Depo. 11:15-18, *contra* Defs'

Opp. at 16 ("The revision also partly anticipated an uptick in nontraditional, independent media.").

So, space and security were not a basis for the Policy change either. With that, the only remaining strawmen left are Defendants' claims that outright denying blogs and independent media – on the grounds that they lack an "editor," write in a stream of consciousness, or have no "established track record" – is done to "advance the goals of journalistic quality and accurate coverage[.]" Defs' Opp. at 43. Again, neither Musselman nor Peterson mentioned these goals as part of the reason for the change in their depositions. *See* Musselman Depo. 50:24-51:2 ("Q. As far as the policy change in 2025 that made the firm rule excluding bloggers, were there any reasons other than simply eliminating discretion that you had for making that change? A. No."); Peterson Depo. 10:22-25 ("Q. Why did you decide to exclude [blogs and independent media] in 2025? A. We had policies in place that could possibly be credentialed under rare and limited circumstances. We had not utilized it.").

That aside, if an editor, "established track record," or lack of "stream of consciousness" writing style were truly required for Defendants to reach these "goals," then it defies logic that Defendants never looked for or asked about those things before denying Schott's application. They did not consider Schott's track record. Musselman Depo. 14:14-16. They did not consider that UPW's track record was similar in length to another organization they credentialed in 2024. *Id*. 57:2-22. Indeed, Musselman stated there really was "no particular threshold" when determining whether an organization had a "track record" that was "established." *Id*. 14:9-13.

As for the requirement that reporting not be done in a "stream of consciousness," this was also not something Defendants were concerned about when reviewing Schott's application. Musselman admitted at her deposition that she understood Schott, under UPW, would "continue

reporting on the legislature the way that he had in the past[.]" Musselman Depo. 24:4-7, *contra* Musselman Decl. (Dkt. 56) ¶5. In other words, Defendants expected Schott's reporting to be the same as it had been at the Tribune, when he *was* credentialed, which ipso facto meant they were not concerned that he would engage in a "stream of consciousness" style of reporting. *Id*.

As for the "editor" or "editorial structure" requirement, the testimony and evidence show that this, perhaps more than anything else, is the clearest indication that Defendants used pretextual, post hoc reasoning to justify what was an unconstitutional application of their Policy against Schott. For being of such high importance, Defendants did not ask Schott *once* during the application process whether UPW employed an editor. Musselman Depo. 44:3-6; Peterson Depo. 38:8-15. Indeed, Defendants' own credential application does not even ask for the name or details of an editor or for that organization's specific editorial process.[8] Schott Depo. 138:18-139:4; *see also* Dkt. 55-20. And, despite Defendants requiring that organizations have an editorial structure to avoid being labelled "independent" or a "blog," Defendants do not ask *any organizations* for specific details on their editorial structure, even when their websites do not provide that information. Peterson Depo. 38:12-15, 44:1-4; Musselman Depo. 44:22-45:5.

Well, that is not entirely true. There is *one* person Defendants have demanded this level of detail from: Schott. Schott is the only person Defendants have asked to provide detailed information on his editorial process, his editor's professional background, his editor's contractual and salary terms and the step-by-step procedures for publishing a story. *See* Schott Depo. 25:6-53:18 (asking 28-pages worth of questions about UPW editorial process); *See, generally,* Morrell

[8] Defendants appear to argue in their response that Schott should have known to put Morrell's name in the portion of the application that asks for the name of a "Supervisor." Defs' Opp. 45. But as was previously explained to Defendants, and reflected in their attached evidence, a "supervisor" and an "editor" are two entirely different jobs and, therefore, not always the same person. Schott Depo. 138:18-139:25. And because Morrell is his editor, but *not* his supervisor, as Defendants well know, there would be no reason for him to name Morrell as his supervisor on his application. Schott Depo. 38:25-39:2.

Depo. (Dkt. 57-15) (same); *see also* Defs' Opp. at 21-22 (extensive argument as to all the ways in which Morrell does not meet Defendants' personal standards – never previously disclosed – of what qualifications and job duties an editor should have). But Defendants asked these questions and sought these details only *after* this litigation. In other words, as part of their defense, Defendants essentially argue that, even though they've *never* asked for similar detail from *any* other journalist, this Court should find Schott unlikely to succeed because they have subjectively determined, after a fact-finding mission, that UPW does not have a "good enough" editor or editorial structure. Yet, even after receiving the information, Defendants could not say whether they would approve his application if he resubmitted it now, or even next year.

These factual realities – the ever-moving goal posts, complete lack of effort to confirm these supposedly "non-discretionary" characteristics are met by any other media organizations and demonstrated ambivalence towards "journalistic quality and accurate coverage" – can only exist in a world where Schott is the reason Defendants changed their Policy. The rest of Defendants' deposition testimony only proves that.

Defendants knew Schott had established UPW before modifying their policy. Peterson Depo. 29:19-21. They did not deny a single journalist in 2025, except for Schott. Musselman Depo. 25:8-13, 53:20-54:1. And, the fact is, Defendants simply do not like what or how Schott reports. Musselman admitted Schott gets under her skin. Musselman Depo. 42:21-24. Indeed, his post that inspired the tweet from Defendant Osborne in January 2024 genuinely upset her. Musselman Depo. 51:9-52:1. As for Peterson, she admitted to being "disappoint[ed]" with Schott during her text exchange regarding the article Schott wrote about Senator Adams. Peterson Depo. 52:12-16; Dkt. 37-10. Peterson also stated the reason she was upset with Schott was that he "wasn't employing *what I would consider* practices of a journalist." Peterson Depo. 52:17-21.

Five days after Peterson made that determination of what sort of journalist Schott was, she and Musselman denied his application. Dkt. 37 at 18.

Defendants even made it clear in their deposition of Schott and Morrell how much they dislike Schott and the content of his reporting. At both depositions, Defendants introduced 13 exhibits that were nothing more than articles or podcast episodes that Schott had published on UPW or the Special Sessions podcast, all of which were critical of the Utah legislature. Defendants make lists of articles they do not like.

They started with the President Adams article, of course, and then proceeded to 12 others, all of which involved questions about what, how and why Schott had gathered the facts and reported the stories he did. These questions – about the content of a journalists' reporting – are not the questions that government officials ask if they truly "did not apply the[ir] policy in this case to the plaintiffs on the basis of their viewpoint." Defs' Opp. 44. These are the questions of government officials who don't like what a journalist wrote and want to "prove" it is poor reporting, editing or newsgathering to discredit them. Those are the questions of government officials who *also* ask, "Do you write stories commending the legislature for actions that it has taken?" and, if the answer is not a glowing "yes" deny him credentials. Schott Depo. 112:8-9.

Thus, Defendants were never concerned about "journalistic quality" or having "too much discretion." Their concern was, and continues to be, that Schott does not report what they approve. As Musselman stated, when she read the UPW articles, her opinion was that Schott's reporting was only "partially" "designed to report the facts and get that message out to the people." Musselman Depo. 16:10-24. According to Musselman, the fact that UPW contained only a "single author's perspective[,]" was problematic for her and Peterson because it meant

they could not ensure "facts [we]re being told correctly" – "correctly," of course, being determined by them. *Id*. 16:10-17:14.

Peterson went even further. Her explanation of why she and the other defendants require an organization to have an "editorial structure" – although never mentioned in the Policy – to not be considered a "blog" or "independent media" was extremely telling. When asked why editorial structure was important to Defendants, Peterson said it was because Defendants want to have someone "responsible for hiring and firing decisions" that "[they] can call if there's issues, personnel *or with a story*." Peterson 45:9-13 (emphasis added). She further explained that Defendants want to be able to "have someone we can call" to ensure that *she and the other Defendants* are "making sure [a journalist] is fair and reputable" in their reporting. *Id*. 46:17-21. Peterson wants to make sure each journalist is "shar[ing] the facts equally and fairly," which, again, Defendants solely determine what is "equal" or "fair." *Id*. 46:24-25. But we know it includes getting a statement from her before publishing stories. *Id*. 35:15-36:1. And if that determination does not go in the journalist's favor, it is appropriate, according to Peterson, for that journalist to be held "accountab[le]" by Defendants. *Id*. 46:22-47:6.

In other words, all media are accountable to Defendants, who exert complete control over the media and its editorial decisions. This allows Defendants to arbitrarily and discriminatorily deny credentials by prohibiting "blogs" and "independent media." It also allows them to punish journalists they *do* credential. If Defendants decide they have a problem "with a story" written by a credentialed journalist, they can call the journalist's boss to pressure them. Bottom line: Schott is not credentialed because he has no one to answer to, and therefore, no one Defendants can use to ensure he is "accountable" to them.

The recording of Senator Weiler only supports this. As Weiler stated, the reason Schott was not credentialed was not because UPW is an "independent blog" but because Schott "has kind of burned some bridges with some of the House and Senate leadership." Dkt. 50; Dkt. 52 at 4. Because Defendants personally "don't feel like he's particularly honest . . . and he's screaming foul" Defendants and legislative leadership decided to "show[ ] who's the boss" by depriving him of his First Amendment rights. *Id*.

Although Defendants now argue Weiler is merely speculating, Peterson admitted in her deposition that she has no idea why Weiler has the opinion he does. Peterson Depo. 17-19. Peterson does not know who Weiler has spoken to or who has told Weiler about their conversations with Musselman or Peterson. *Id*. 19:14-23 *contra* Defs' Opp. at 50 (arguing Weiler is only saying "what he '*think[s]*' is 'going on.'"). And strangely, even though she is the media contact for the Senate, she claims to have not spoken to Weiler about his apparent misunderstanding. *Id*. Thus, Defendants may not *like* Weiler's explanation of why Schott was denied credentials. But they have not provided any evidence to the contrary.

III. DEFENDANTS DISPUTES AGAINST THE REMAINING PRELIMINARY INJUNCTION FACTORS ARE MERITLESS.

Defendants' arguments against irreparable harm lack merit. Defendants reiterate that Schott is not harmed "given the alternative channels for newsgathering." As explained, *supra*, the "alternative channels" Defendants propose do not resolve any of the First Amendment rights at issue in this case and therefore do not resolve the irreparable harm Plaintiffs suffer. The case Defendants cite - *Johnson v. Cache Cnty. Sch. Dist.*, 323 F. Supp. 3d 1301 (D. Utah 2018) - does not require holding otherwise. That case involved a cheerleading team, whose school asked them to merely *delay* their planned speech by *one* day for the benefit of certain student athletes. *Id*. at 1314. Thus, the "ample capacity to convey a message" in that case was simply the *same* channel

that the students were intending to use – social media – but just used a few hours later. Here, the "alternative channels" Defendants propose are inferior, *other* methods for newsgathering that do not equate to the live, in-person, journalistically beneficial channels that credentialed media get.

Defendants' second argument fares even worse. They claim this Court should not find harm because Plaintiffs filed their Motion after the 2025 legislative session had concluded. This argument deliberately ignores what occurred during that delay. First, as the Court knows, it *suggested* that Plaintiffs, if they believed the TRO ruling to be made in error, should "help correct me in the next round of briefing" (Tr. 62:5-6) and then gave Plaintiffs the "opportunity to conduct some expedited discovery, and then a chance to file a new or different brief in view of what has been said here today." Tr. 89:1-2. And, as can be seen from the evidence in this motion, discovery was *necessary* to part of the preliminary injunction briefing.

Plaintiffs tried to do that quickly. But, and what Defendants fail to tell this Court is, Defendants resisted any attempts by Plaintiffs to expedite discovery and the Motion for Preliminary Injunction to be resolved before the end of the short legislative session. At the TRO Hearing, they stated they could not do expedited discovery or brief a response during session because they "[we]re fully slammed and absolutely at capacity." Tr. 92:19-93:7. They then insisted to the Court: "if we're going to have discovery and a second PI motion, *if that could come after the end of the session*." Tr. 93:10-12 (emphasis added). As they fail to mention, Defendants only continued their resistance to expediting Plaintiffs' Motion when the parties attempted to confer. Exhibit A. The day after the TRO hearing, Plaintiffs proposed agreeing to a briefing and discovery timeline where a MPI and MTD hearing would occur in February. *Id*. Defendants refused. *Id*. (objecting to Defendants' having to "simultaneously" brief a MPI opposition and MTD and conduct discovery "*while the legislative session is still happening*" and

stating they would "*get the Court involved to address the schedule*" if Plaintiffs pushed the issue) (emphasis added). With that, Defendants successfully tied Plaintiffs' hands.

Now, in their Opposition, Defendants point the finger at Plaintiffs as the cause of the delay. But it was Defendants' actions that ensured there was no world in which Plaintiffs were going to obtain relief during this legislative session. So, Plaintiffs waited, which let Defendants no longer be "fully slammed and absolutely at capacity" and ensured the issues were briefed to the Court's satisfaction and discovery was done correctly and efficiently. To find irreparable harm on these *complete* set of facts would be egregious and reward intentional dilatory tactics.

Any remaining grounds Defendants assert for finding the other preliminary injunction factors do not favor Plaintiffs ignore well-settled case law. Irreparable harm exists because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020). And public interest "favor [Plaintiffs]" because "[e]njoining unconstitutional conduct "is the highest public interest.'" *United States v. Raines*, 362 U.S. 17, 27 (1960). After all, "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties." *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995).

As the Supreme Court has recognized, "[t]he newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity, and, since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with

grave concern." *Grosjean v. American Press Co*., 297 U.S. 233, 250 (1936). Defendants' actions in this case should cause "grave concern."

CONCLUSION

This Court should grant Plaintiffs' Amended Motion for Preliminary Injunction (Dkt. 37).

DATED: May 10, 2025.

INSTITUTE FOR FREE SPEECH
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CERTIFICATE OF WORD LIMIT COMPLIANCE

I hereby certify that the foregoing, including footnotes, but exclusive of caption, signature block, certificate of service, and word-count certification, is less than 20 pages, and is in compliance with the Court's order granting an overlength reply of 20-pages or 6,200-words (Dkt. 35).

/s/ Charles Miller
Charles Miller