Charles Miller (admitted *pro hac vice*)
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW, Suite 801
Washington, D.C. 20036
Tel: (202) 301-9800
Fax: (202) 301-3399
Email: cmiller@ifs.org

Robert P. Harrington (12541)
KUNZLER BEAN & ADAMSON, PC
50 W Broadway, Suite 1000
Salt Lake City, Utah 84101
Telephone: (801) 994-4646
Email: rharrington@kba.law

Attorneys for Plaintiffs Utah Political Watch, Inc., and Bryan Schott

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

UTAH POLITICAL WATCH, INC., and BRYAN SCHOTT,

Plaintiffs,

v.

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

Defendants.

PLAINTIFFS' RESPONSE TO SUPPLEMENTAL AUTHORITY

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

Hon. Robert J. Shelby

Hon. Cecilia M. Romero

Defendants point the Court to a recent 2-1 motion panel decision from the D.C. Circuit. The decision is useful to the Court, but not helpful to the Defendants. It supports issuing a preliminary injunction here.

The motions panel agreed with the District Court that the White House could not engage in viewpoint discrimination to exclude the Associated Press from receiving "hard pass" press credentials, or from attending even non-public fora, such as the East Room or the Brady Room, to newsgather and report. *AP v. Burdowich,* No. 25-5109, 2025 US App. LEXIS 13980, 2025 WL 1649265 (June 6, 2025). The order specifically stated "that the preliminary injunction [remains] applicable to the East Room." *Id*. at *2. Viewpoint discrimination violates the First Amendment under fora analysis, even in nonpublic fora.

The limited, and potentially effervescent, "win" that the White House received was a determination that certain work spaces of the President, e.g. the Oval Office, Air Force One, and the President's privately owned personal residence, are so small and/or tightly controlled to not be fora at all. *Id*. at *11 (Rao, J., concurring).

The order, by maintaining the injunction for the East Room, and the concurrence, through its reasoning, reaffirmed that "[w]hen the White House opens its facilities to the press generally, as it does in the Brady Briefing Room, it cannot exclude journalists based on viewpoint." *Id*. at * 14-15 (Rao, J., concurring). "We decline to stay the part of the preliminary injunction applicable to the East Room. The identified harms [to the government] are less clear with respect to the East Room, which does not share the hallmarks of spaces like the Oval Office." Id. at * 34 (Rao, J., concurring).

In dissenting over whether even Air Force One is a forum, Judge Pillard reasoned "The only basis for defendants' action in that the AP had expressed … a point of view that the White

House disagreed with and sought to 'suppress.' Even without any forum analysis, that resolves the case." Id. at *48-49 (Pillard, J., dissenting). Judge Pillard's view may yet prevail when the case is heard on the merits. But either way, *Burdowich* does not support Defendants here.

This case is about issuing credentials and denying access to for a based on viewpoint discrimination. 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). Nor were Defendants "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. Thus the space limitations and unique aspects of Air Force One, the Oval Office, and Mara Lago that caused the motions panel to conclude that those spaces were not even nonpublic fora, do not apply here by the Defendants' own admission.

What remains from *Burdowich* is the conclusion that Defendants cannot engage in viewpoint discrimination against Plaintiffs, which they have clearly done.

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/s/ Charles Miller
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