

No. 25-4124

In the United States Court of Appeals for the Tenth Circuit

UTAH POLITICAL WATCH, *et al.*,

Plaintiffs-Appellants,

v.

ALEXA MUSSELMAN, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Utah,
Hon. Robert J. Shelby
(Dist. Ct. No. 2:25-cv-00050-RJS-CMR)

**BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION OF UTAH
FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae ACLU of Utah states that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

/s/ Jason M. Groth

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INTERESTS OF AMICI CURIAE

The American Civil Liberties Union (“ACLU”) is a nationwide, non-profit, non-partisan organization of over 1.6 million members. Since 1920, the ACLU has sought to protect the constitutional rights and civil liberties of all Americans through litigation, policy advocacy, and organizing. The ACLU has frequently appeared as counsel in cases about the Constitution’s limits on government power, including First Amendment cases about governmental restrictions on speech and the press. The ACLU also files amicus curiae briefs in courts across the country, weighs in as subject matter experts on First Amendment issues, and seeks to educate the public and contribute to the important jurisprudence addressed in this case. The American Civil Liberties Union of Utah is a state affiliate of the ACLU; has frequent contact with the press and Utah legislature through its policy advocacy work; and works to protect the First Amendment rights of all Utahns.

DISCLOSURE STATEMENT

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, I hereby certify that the enclosed brief is the work of undersigned counsel and not authored by counsel for either party. No party or party's counsel contributed money intended to fund the preparation of this brief, and no person contributed money to fund the preparation or submission of this brief.

/s/ Jason M. Groth

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INTRODUCTION

In this case, Plaintiffs challenge a policy that categorically excludes independent media—news sources that are run by individuals unaffiliated with a larger institution—from press credentials in the Utah State Capitol, fondly referenced as the “People’s House.” Compl., App. Vol. I at 30–41. The Utah Capitol Media Access and Credentialing Policy (“Press Policy”) governs which journalists have “access to cover the Legislature and other significant events at the Utah State Capitol,” but specifically provides that “[b]logs, independent media or other freelance media do not qualify for a credential.” Press Policy, App. Vol. I at 68.

Plaintiff Brian Schott is a local, award-winning journalist who has covered Utah politics for over 25 years. Mr. Schott has been granted press credentials for several years to cover the Utah state legislature, but following a change to the Press Policy, he was denied access for the first time after he started his own media organization in 2024 called Utah Political Watch (“UPW”). The asserted reasons for the denial were that “media credentials are currently not issued to blogs, independent, or other freelance journalists,” and Mr. Schott “was not a professional member of the media associated with an established, reputable news organization or publication.” Def. M. to Dismiss, App. Vol. I at 174–75. The Press Policy and purported reasons for denial, at face value, undermine the constitutional protections afforded to the press

under the First Amendment of the United States Constitution. Moreover, the record below demonstrates viewpoint bias against Mr. Schott for his coverage of the legislature as an independent journalist. The government should not be in the business of permitting only institutional journalists to cover issues impacting all Utahns, nor should the government modify press credential requirements to do the same.

Although the district court found that the Press Policy “does not include terms that are not commonly misunderstood,” Order, App. Vol. II at 264, amici respectfully disagree, and find it important to clearly define what, and who, is excluded by this policy.¹ Because none of the categories of prohibited media (“blogs, independent, or other freelance journalists,”) were defined in the Press

¹ See *The United States Supports Press Freedom Worldwide*, U.S. DEPT OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (May 5, 2008), <https://2001-2009.state.gov/g/drl/rls/83991.htm> (referencing independent journalism in connection with non-state sponsored media); Deborah Potter, *Handbook of Independent Journalism* 4, https://common.usembassy.gov/wp-content/uploads/sites/32/2020/06/Handbook-of-Independent-Journalism_Handbook-Series_English_Lo-Res.pdf (referencing independent journalism as journalism “as it is practiced in democratic systems.”); Katherine Reynolds Lewis, *Diverse Freelancers Play a Crucial Role in Journalism*, NIEMANREPORTS (March 11, 2022), <https://niemanreports.org/freelance-journalism-diversity/> (referencing independent journalism largely as synonymous with freelance journalism); *Overview*, INDEPENDENT JOURNALISM FUND, <https://independentjournalismfund.org/> (last visited November 17, 2025) (referencing independent journalism largely as synonymous with community-based investigative journalism); *Independent Journalism: Definition, Importance, And How To Protect It*, LIBERTIES (Oct. 28, 2021), <https://www.liberties.eu/en/stories/independent-journalism/43789> (defines independent journalism as “any news media that is free from influence by the government or other external sources like corporations or influential people,” including “television, newspapers, radio and online journalism”).

Policy, this brief references them collectively as “independent journalists,” because they share the common characteristics of being non-traditional, non-affiliated media. In contrast, this brief references the preferred larger institutionally organized news outlets described by earlier versions of the Utah Press Policy as “institutional media.”²

When the district court granted the Defendants’ motion to dismiss, it erred in finding that Mr. Schott failed to allege “an infringement of an activity protected by the first amendment.” Order, App. Vol. II at 255. Central to this error was the characterization that “[a]t the heart of the Plaintiffs’ claims is an assertion of an unequivocal right to gather news,” despite Plaintiffs’ own clarification that they merely sought protection from credentialing policies that are discriminatory, arbitrary, or retaliatory. Order, App. Vol. II at 255; Compl., App. Vol. I. at 30–38. In this prayer for relief, the Plaintiffs asked the court not for a privileged protection or recognition of an “unequivocal right to gather news,” but rather to afford Plaintiffs the same basic protections afforded to all under the First Amendment: to be free from unreasonable restrictions and to be free from viewpoint discrimination. Compl., App. Vol. I at 41.

At a time where the public is more divided than ever, trust in traditional news outlets is at an all-time low, and access to local news poses a significant

² Compl., App. Vol. I at 29 (setting forth “defining characteristics” of eligible reporters, which emphasized institutional affiliation and formal education/training).

barrier to democratic participation, the stakes of this case are particularly high. Defendants claim that their intention was to create a “black and white” rule that would be easy to administer, Resp. to M. for PI, App. Vol. I at 248, and that “limiting press credentials to established news organizations reasonably helps the press corps maintain its legitimacy amid the rise in nontraditional media,” M. to Dismiss, App. Vol. I at 187–188. But a rule that prioritizes administrative convenience over the protections of the First Amendment cannot stand, and a rule that seeks to make the government the arbiter of press legitimacy by limiting access based on institutional connections contravenes the freedom of the press because “the First Amendment does not ‘belong’ to any definable category of persons or entities: It belongs to all who exercise its freedoms.” *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 801–802 (1978) (Burger, C.J., concurring) (“[t]he very task of including some entities within the ‘institutional press’ while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country”).

Independent journalists, including Mr. Schott, are entitled to the same First Amendment protections paramount to this nation’s democracy as everyone else. This includes the protection from unreasonable restrictions and

viewpoint discrimination. Plaintiffs sufficiently pled, and both parties acknowledged many times, that this case concerns a protected First Amendment activity. Accordingly, amici respectfully request this Court reverse the district court and remand the case for further proceedings.

ARGUMENT

News gathering is a protected activity under the First Amendment of the Constitution, regardless of who the journalist is, what perspective they take, or how credible the government finds that perspective based on institutional affiliation (or lack thereof). This protection is particularly important in seats of democracy, like the state house. Here, the Defendants' Press Policy is unconstitutional because it limits this protected activity in the Utah Capitol's legislative forum, drawing unreasonable and impermissible distinctions between journalists. Although reasonableness is a low bar and the government is not required to prove that a forum's "intended function" will actually be disrupted, it does require the government to offer "some explanation as to why certain speech is inconsistent with the intended use of the forum." *Int'l Soc'y for Krishna Consciousness, Inc. (ISKON) v. Lee*, 505 U.S. 672, 691–92 (1992) (citation modified) (holding that a leafleting ban in an airport terminal was unreasonable because despite being a nonpublic forum, it was multipurpose and there was no explanation showing that completely prohibiting peaceful pamphleteering preserved the property for its intended functions).

This brief first discusses how First Amendment jurisprudence demands strong protections for the press, *particularly* the many journalists who are categorically excluded by the Press Policy. Second, this brief discusses the legislative forum, which is intended to foster democratic discourse, showing that the distinctions drawn between institutional and independent media are not reasonable because permitting independent journalists access to media spaces is wholly consistent with and furthers the forum's purpose. Third, this brief highlights that the Press Policy violates the United States Constitution by categorically targeting and excluding journalists based on a failure to represent a particular perspective, impermissibly discriminating based on viewpoint.

I. THE FIRST AMENDMENT DEMANDS STRONG PROTECTIONS OF INDEPENDENT JOURNALISM

The First Amendment prohibits unreasonable and viewpoint discriminatory policies that target expressive activity in legislative forums. Here, news gathering by independent journalists is an expressive activity, and our nation's history and tradition inform a broad reading of who is considered press under the First Amendment. Moreover, these protections are crucial in the present moment where independent journalists are increasingly critical for informing the public about local politics.

A. The First Amendment Protects News Gatherers from Discrimination

Gathering news “is simply collecting information for the purpose of presenting it to an audience.”³ Without “protection for seeking out the news, freedom of the press could be eviscerated,” *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), and First Amendment jurisprudence reflects the perseverance of this protection, with courts recognizing the right to gather news through observation and access (e.g. to prisons and the court system), and providing heightened protections (e.g. from contempt of court, searches and seizures, and liability for defamation).⁴ Similarly, recent circuit court cases “have accepted the premise that the denial of a reporter's access to a press briefing is a cognizable First Amendment violation, reviewable in the traditional framework of a First Amendment forum.” *Ateba v. Jean-Pierre*, 706 F. Supp. 3d 63, 76 (D.D.C. 2023), *aff'd sub nom. Ateba v. Leavitt*, 133 F.4th 114 (D.C. Cir. 2025) (collecting cases from the Second, Seventh, and Ninth Circuits).

The traditional framework of a First Amendment forum is a three-step process that applies when there are restrictions of expressive activity on government property. *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1138–39

³ Eric Ugland, *Demarcating the right to gather news: a sequential interpretation of the first amend.*, 3 DUKE J. OF CONST. LAW AND PUB. POL’Y, 137 (2008), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1042&context=djclpp>

⁴ Lauren Gailey, *Does the Press Get Special Rights?*, 12 TEX. A&M L. REV. 1045, 1064–87 (2025), <https://doi.org/10.37419/LR.V12.I3.3>.

(10th Cir. 2001). The first step of this process is determining whether there is a protected First Amendment activity. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 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.*

Here, the district court erred when it dismissed the Plaintiffs’ complaint following the first step of this analysis. Instead of the expansive interpretation that Plaintiff was asserting an “unequivocal right to news gathering,” the court should have assessed the activity simply as news gathering. Had it done so, it would have found that news gathering is an activity given protection by the First Amendment under *Branzburg* and its progeny. Because the court erred in its conclusion at the first step, it failed to reach the subsequent substantive steps required. After establishing that Plaintiffs’ activities are protected by the First Amendment, the court should have proceeded to identify the nature of the legislative forum at issue here and assessed if the justifications for excluding independent journalists could satisfy the requisite standard. *Cornelius*, 473 U.S. at 797.

Had the District Court engaged in the proper analysis, it would have found that the law is also settled, *and the parties agree*, that there is no

“unequivocal right” to access non-public information from the government. The Plaintiff does not claim an unlimited right to gather news under the First Amendment. However, when the government does open an area for the press generally, it creates a forum where the exclusion of some reporters “presents a wholly different situation.” *TGP Commc’ns., LLC v. Sellers*, 2022 WL 17484331, at *6 (9th Cir. Dec. 5, 2022) (quoting *Consumers Union v. Periodical Correspondents’ Ass’n*, 365 F. Supp. 18, 25–26 (D.D.C. 1973) *rev’d on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975)). In that situation, the nature of the forum requires that any distinctions the government draws to control access must be both 1) reasonable in light of the purpose served by the forum and 2) viewpoint neutral. *Cornelius*, 473 U.S. at 806.⁵ Applying this standard below in sections II and III, this brief shows that the justifications offered for exclusion from the legislative forum in this case were unconstitutional because they were not reasonable or viewpoint neutral and thus failed to meet the requisite standard.

⁵ Under traditional forum analysis, there are several types of forums that have emerged through case law. Generally, though, forums are either public or non-public. In public forums, where there is general access to the public and the property’s principal purpose is “the free exchange of ideas,” strict scrutiny applies. In non-public forums, where the property’s primary purpose is not public expression, a reasonableness test applies where restrictions must only be reasonable in light of the purpose of the forum and viewpoint neutral. Although the parties may disagree how to categorize the forum at issue—as either a designated public forum or a non-public forum—*amici* limits discussion only to the narrower reasonableness test, which applies to both. See *United States v. Kokinda*, 497 U.S. 720, 730 (1990).

B. History and Tradition Particularly Guard Independent Journalism

The press has always played the traditional role of a watchdog for the people, but when the First Amendment was adopted in 1791, “journalism as we know it did not exist,” and “freedom of the press referred to the freedom of the people to publish their views rather than the freedom of journalists to pursue their craft.”⁶ Regardless of any potential ambiguity about who was included in the “press,” dedicated spaces were created for the press to gather news as early as 1819.⁷ Thus, “it would be odd to interpret the Press Clause, whose core meaning is that the government may not select the authors who inform the public, as a vehicle for reducing this diversity and imposing professional standards as a condition of publishing to the public.”⁸ “There is no coherent way to distinguish the institutional press from others who disseminate information and opinion to the public through communications media.”⁹

⁶ David Anderson, *Freedom of the Press*, 80 TEX. L. REV. 430, 446–47 (2002).

⁷ *About Past Senate Chambers*, U.S. SENATE, <https://www.senate.gov/about/historic-buildings-spaces/past-chambers.htm> (last visited Nov. 17, 2025).

⁸ Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 440 (2013).

⁹ *Id.* at 438.

Just as “the press” has been liberally construed, so have the forms of communication that are protected. Protections of the First Amendment “extend not just to the traditional press embodied by newspapers, television, books, and magazines, but also humble leaflets and circulars, which were meant to play an important role in the discussion of public affairs.” *John K. MacIver Inst. for Pub. Pol’y, Inc. v. Evers*, 994 F.3d 602, 614 (2021) (quoting *Mills v. State of Ala.*, 384 U.S. 214, 219 (1966)) (internal quotations omitted). Taken together, the nature of First Amendment press protections are broad, intending to cover a spectrum of speakers and activity. Although Mr. Schott himself was clearly the kind of speaker who was intended to be protected—as an accomplished, accredited, and experienced journalist—so too are journalists who more broadly work for a “blog, independent media, or other freelance media.” Like humble leaflets and circulars that were not affiliated with institutional media, unaffiliated news providers today still play an important role in the discussion of public affairs and represent a particular viewpoint that would otherwise go unrepresented.

In addition to the national history and tradition of strong protections for independent journalists, Utah—the home of the forum at issue—has also particularly emphasized both protections for the press generally and protections for independent journalists. When the Utah Constitution was ratified in 1895, it contained its analogue to the First Amendment to the

United States Constitution, contained in Article 1, Section 15: “No law shall be passed to abridge *or restrain* the freedom of speech or of the press.” (emphasis added), alongside Article One, Section One, providing that all persons have the right “to communicate freely their thoughts and opinions.” In so doing, Utah emphasized protection of freedom of speech and press, reflecting concerns pioneers had with upholding liberty and promoting truth. To this end, “Brigham Young began efforts to secure a printing press and type even before he reached the Salt Lake Valley in 1847,” intending to create newspapers and pamphlets.¹⁰ Just three years later in 1850, *Deseret News* was founded “at the edge of the American frontier by pioneers committed to “Liberty & Truth,”¹¹ followed by many other small, independent publications that sometimes consisted of “only one or two persons.”¹² As small publications without a formal structure or editorial staff, these significant contributors to Utah discourse would certainly be excluded by the Defendant’s Press Policy today, offending this State’s constitution and history.

¹⁰ Sherilyn Cox Bennion, *Journalism in Utah*, UTAH HIST. ENCYCLOPEDIA (1994), https://www.uen.org/utah_history_encyclopedia/j/JOURNALISM.shtml; David J. Whittaker, *Early Mormon Pamphleteering*, J. OF MORMON HIST. 4 (1977) 36–38, <http://www.jstor.org/stable/23286138>.

¹¹ *About Us*, DESERET NEWS, <https://www.deseret.com/pages/about-us/> (last visited November 14, 2025).

¹² Sherilyn Cox Bennion, *Journalism in Utah*, UTAH HISTORY ENCYCLOPEDIA (1994).

In targeting small, upstart, independent media, the Press Policy offends one of the most notable hallmarks of the United States' Constitution that differentiates a free country from a repressive one. The United States Department of State, Bureau of Democracy itself has noted that "in countries where independent journalists and media are at risk, the fundamental freedoms of all citizens are at stake," and actions that impose restrictive media laws or restrict media access are cause for alarm.¹³ Thus, although the government has certainly been given wide latitude to manage its affairs, particularly on its own property, mere administrative convenience does not outrank significant constitutional protections. This policy of dismissing and excluding independent journalists as entire categories of the press is wholly inconsistent with the American constitutional tradition of recognizing even small voices as significant vehicles of information, particularly when we know that these journalists are serving the press function the founders envisioned.

¹³ *The U.S. Supports Press Freedom Worldwide*, U.S. DEPT OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (May 5, 2008), <https://2001-2009.state.gov/g/drl/rls/83991.htm>.

C. Modern trends emphasize the importance of affording independent journalism First Amendment protections

Media trends across the country reflect a shift from traditional or institutional media to independent journalism.¹⁴ In 2023, more than 21,000 corporate media jobs were cut and over half of traditional journalists report that they have considered quitting.¹⁵ This has led many prominent journalists previously affiliated with institutional media to venture out as independent journalists, creating alternative platforms their readers engage with and trust.¹⁶ These changes coincide with the rapid decline in the existence of newspapers and the rise of Americans who are consuming at least some of their

¹⁴ *News Influencers Fact Sheet*, PEW RSCH. CTR., (Nov. 4, 2025), <https://www.pewresearch.org/journalism/fact-sheet/news-influencers-fact-sheet/> (indicating that today, about one in five U.S. adults regularly get news from “news influencers”—another common label for independent journalists who operate outside of a more formal news institution).

¹⁵ Matt Purdue, *The rise of indep. journalists and tips for engaging with them*, PR DAILY (Nov. 11, 2024), <https://www.prdaily.com/the-rise-of-independent-journalists-and-tips-for-engaging-with-them/>.

¹⁶ David Bauder, *How journalists leaving legacy news strive to survive in new media*, FREE SPEECH CTR. (Aug. 4, 2025), <https://firstamendment.mtsu.edu/post/how-journalists-from-legacy-news-strive-to-survive-in-new-media/> (for example, Jennifer Rubin, co-founder of The Contrarian, was previously a journalist at The Washington Post before becoming an independent news entrepreneur); *see also* Alison Hill, *Citizen Journalism vs. Traditional Journalism*, WRITER’S DIGEST (Feb. 8, 2022), <https://www.writersdigest.com/write-better-nonfiction/citizen-journalism-vs-traditional-journalism> (“Many former traditional journalists, such as Pulitzer Prize winning Glenn Greenwald, have left the mainstream and established their own news sites, blogs, and newsletters, and successfully utilize online platforms such as Substack, a subscription-based service.”).

news on untraditional platforms like social media.¹⁷ Recent studies indicate that at least half of U.S. adults get at least some of their news from social media, and 86% indicate that they get at least some of their news online generally.¹⁸ This trend is particularly evident looking at the growth of Substack, one of the most active spaces for independent journalism, which currently has over 500,000 creators (over 50,000 of which are writers who earn an income) and 40 million subscribers.¹⁹ Notably, the federal government has acknowledged the rise in independent journalism by granting Freedom of Information Act fee waiver requests to freelance journalists. *See* 5 U.S.C. 552(a)(4)(A)(ii).

These trends are also reflected locally, where Utah has seen a rise in independent journalism. In addition to UPW (founded by Mr. Schott in 2024 after leaving institutional journalism), Utah News Media founded in 2024 and the Utah Investigative Journalism Project founded in 2016 serve as potent examples, also housing journalists who transitioned from institutional to

¹⁷ Kevin Lind, *What's happening to local news? A media study reflects on 20 years of data*, DESERETNEWS (Nov. 9, 2025), <https://www.deseret.com/business/2025/11/09/local-news-business-continues-struggle-america-newspapers-closing/> (“Nearly 40% of all newspapers that operated 20 years ago have ceased to exist.”); Matt Purdue, *The rise of indep. journalists and tips for engaging with them*, PR DAILY (Nov. 11, 2024).

¹⁸ *News Platform Fact Sheet*, PEW RSCH. CTR. (Sep. 25, 2025), <https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet/>.

¹⁹ Ash Anderson, *The Rise of Indep. Journalism: Why Journalists Are Turning to Substack*, QWOTED (October 10, 2023), <https://www.qwoted.com/the-rise-of-independent-journalism-why-journalists-are-turning-to-substack/#section-0>.

independent journalism.²⁰ Moreover, organizations like Utah Journalism Foundation recognize the importance of independent journalism, “endeavor[ing] to ensure that independent and local journalism survives and thrives at a time when our society and democracy need it most.”²¹

The existence and protection of independent journalists is increasingly important as trust in traditional media falls to new lows, with only 28% of Americans expressing at least a “fair amount” of trust in “newspapers, television and radio to report the news fully, accurately and fairly. This is down from 31% last year and 40% five years ago.”²² In this climate, where “citizens distrust mainstream media, they have a tendency to withdraw from it” and instead turn to independent journalists they feel they can trust.²³ Moreover, local independent reporters like Mr. Schott are critical because the U.S.

²⁰ *About us*, UTAH NEWS DISPATCH, <https://utahnewsdispatch.com/about/> (last visited Nov. 17, 2025); *About*, UTAH POLITICAL WATCH, <https://utahpolitics.news/> (last visited Nov. 17, 2025); THE UTAH INVESTIGATIVE JOURNALISM PROJECT, <https://www.utahinvestigative.org> (last visited Nov. 17, 2025).

²¹ *About the Found.*, UTAH JOURNALISM FOUND., <https://utahjournalism.org/about/our-vision-mission> (last visited Nov. 17, 2025).

²² *Trust in Media at New Low of 28% in U.S.*, GALLUP (October 2, 2025), <https://news.gallup.com/poll/695762/trust-media-new-low.aspx>.

²³ Michael Hameleers, Anna Brosius, & Claes H. de Vreese, *Whom to trust? Media exposure patterns of citizens with perceptions of misinformation and disinformation related to the news media*, EUROPEAN J. OF COMM’N 37(3), 237–268 (2022), <https://doi.org/10.1177/02673231211072667> (Distinguishing between mainstream media and “alternative media,” defining the latter broadly, consistent with independent media) (“[A]ll online sources that are less centrally organized, and are more focused on addressing certain segments of the news audience that identify less with the mainstream news institutions.”).

currently has at least 213 news deserts, areas “that have no local reporting at all,” which have “on average, lower median incomes, greater rates of poverty and lower percentage of people with college degrees.” These news deserts represent “50 million Americans — some 15% of the country — with limited or no access to reliable local news.”²⁴ Utah has five news deserts, and 13 counties where there is only one local news outlet. *Id.* As stated by The State of Local News: The 2025 Report from Northwestern Medill Local News Initiative:

“Smaller, independent local outlets are a key backbone of the American local news ecosystem, as they are often the most active and trustworthy sources for community audiences. These are also the outlets that have proved especially vulnerable to closures and mergers over the past year, in a departure from the corporate consolidation of years past. Supporting community local news, especially in rural areas that are often overlooked by funders, is essential to ensuring that people can continue to access reliable information and maintain a strong sense of local identity.”²⁵

Aside from the First Amendment requirements, on a practical level, providing Utah’s independent media equal access to the state legislature will help foster a more informed public where other news sources may be limited or nonexistent. The press, whether institutional or independent, “serve as a

²⁴ Kevin Lind, *What’s happening to local news? A media study reflects on 20 years of data*, DESERETNEWS (Nov. 9, 2025).

²⁵ Zach Metzger, *The State of Local News: The 2025 Report*, NORTHWESTERN MEDILL LOCAL NEWS INITIATIVE (October 20, 2025), <https://localnewsinitiative.northwestern.edu/projects/state-of-local-news/2025/report/>.

powerful antidote to any abuses of power by government officials.” *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

II. THE 2025 PRESS POLICY’S CATEGORICAL EXCLUSION OF INDEPENDENT JOURNALISM IS AN UNREASONABLE DISTINCTION IN LIGHT OF THE LEGISLATURE’S PURPOSE

The legislature is a cornerstone of our democracy. Here, the Utah legislature has opened its doors to members of the press, but has categorically excluded “blogs, independent media, or other freelance media.” This policy violates the First Amendment on its face and as applied to Mr. Schott because it is simply not a reasonable distinction in light of the purpose served by the forum: democratic discourse. This exclusion requires access to be premised on *government* credibility determinations, which is the exact concern that the Founders sought to protect the governed against.

Although reasonableness is often a low bar, it is not toothless and does require a reasoned analysis based on the underlying facts. *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.* 508 U.S. 384, 393 (1993) (faulting the lower court for “utter[ing] not a word in support of its reasonableness holding”). It must consider the purpose of the environment, and why the restriction—here, a total ban—preserves the property for that purpose. *Int’l Soc’y for Krishna Consciousness, Inc.*, 505 U.S. at 690–92. A policy categorically prohibiting significant drivers of democratic discourse from press credentials

fails to serve the purpose of the legislature and actively restricts the dissemination of critical information.

D. The Legislative Forum is Intended to Foster Democratic Discourse

In this case, the forum at issue could, and should, be assessed on three levels: the State Capitol Building, the Utah State Legislature which it houses, and the specific media spaces for credentialed journalists. Regardless, the purpose is the same and is appropriately enshrined on the very walls of the House Chambers: *VOX POPULI* (Latin phrase meaning “the voice of the people”).

Broadly, a capitol building is considered “[t]he most recognized symbol of democratic government” and is where the laws of a nation are written, debated, and passed.²⁶ The same is true on a state level, where the state capitol serves as a symbol of the democratic process and discourse. Functionally, the state capitol houses the state government's legislative branch, where laws are debated and passed. These spaces include galleries for the public, and additional spaces for press, who have always been considered integral parts of this democratic purpose and function, even at the federal level. “From its earliest iterations, the House Chamber has included space for the public and

²⁶ *U.S. Capitol Bldg.*, U.S. SENATE, <https://www.senate.gov/about/historic-buildings-spaces/capitol/overview.htm> (last visited November 17, 2025).

the press to observe the proceedings of Congress.”²⁷ To this end, the *nature* and purpose of the legislative space are easily distinguishable from other cases, such as the educational nature of a university space or the functional nature of the Oval Office, which do not serve the primary purpose of serving democratic discourse.

On a more granular level, within the legislature, there are spaces created particularly for credentialed press approved under the press policy, which are the spaces Plaintiffs seek access to specifically through the Press Policy. The specific areas that the press policy deals with are related to the press generally and are also easily distinguished from the “intimate spaces” discussed in other cases, like a space in someone’s home or access to one-on-one interactions.²⁸ Here, all of the areas that Mr. Schott seeks access to are housed in larger areas granted to the press generally, many of which are small spaces that make journalists’ expressive activity easier, providing things like workspaces and internet access:

²⁷ *Gallery Level*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Exhibitions-and-Publications/Capitol/1951-Present/Gallery-Level/#:~:text=From%20its%20earliest%20iterations%2C%20the%20House%20Chamber,press%20to%20observe%20the%20proceedings%20of%20Congress> (last visited November 17, 2025).

²⁸ *Ateba v. Leavitt*, 133 F.4th 114, 117 (D.C. Cir. 2025) (describing the White House as the President’s “official residence,” consisting of his “private living quarters as well as government office space”); *Associated Press v. Budowich*, 780 F. Supp. 3d 32 (D.D.C. 2025).

The 2025 Credentialing Policy dictates which areas of the Utah Legislature credentialed press are granted access to. Those areas include: (1) “some secure areas of the Capitol, such as the press room and designated areas in the Senate and House chambers;” (2) “designated media workspaces in the Senate and House galleries;” (3) “set up in the Senate and House galleries for credentialed videographers and photographers;” (4) “[c]redentialed media may be permitted access to media availabilities and other press events with elected officials;” (5) “designated media parking;” (6) “the Capitol press room, which is equipped with internet access and an audio feed from both chambers;” (7) “designated areas in the galleries of the Senate and House;” and (8) “Committee Rooms.”²⁹

All Utah legislators take an Oath of Office solemnly swearing that they will support, obey, and defend the Constitution of the United States and the Constitution of the State of Utah.³⁰ This vow includes swearing to make no law abridging the freedom of the press. Here, this solemn oath has been undermined by limiting access to the legislative forum, a centerpiece of Utah’s democracy.

E. Independent Journalism Fosters Discourse

In addition to their role as the watchdog of government, journalists serve a critical role in disseminating information to the public, fostering discourse and accessibility. Informal journalists particularly serve the public in a way that serves the legislative forum’s purpose by democratizing the news and

²⁹ Compl., App. Vol. I at 20.

³⁰ *Const. Oath of Office*, UTAH.GOV, <https://notary.utah.gov/wp-content/uploads/2017/05/Constitutional-Oath-of-Office.pdf> (last visited November 17, 2025).

giving a voice to the people. In fact, the historic journalistic practice of quoting “random passers-by for illustrative or exemplifying purposes,” to represent the general public—and public opinion—in the news, is called “vox pop” (short for *vox populi*, the same Latin phrase enshrined in the Utah legislature).³¹

As discussed above, the public increasingly relies on independent journalists like Mr. Schott to gain vital information about government affairs, especially in the Utah legislature because internet sources and independent media are increasingly central to the dissemination of news and information. Categorically prohibiting a large and increasingly important sub-set of journalists impedes democratic discourse by slowing the free flow of information between certain subsets of the public.

Importantly, unique to the forum in this case is the nature of the legislative session that Mr. Schott seeks to cover. Unlike other states, Utah’s legislative session takes place over the span of only 45 hectic days—one of the shortest legislative sessions in the country. During that time, lawmakers sprint through hundreds of bills, making it impossible for any single news outlet to cover all of them. For example, in 2025, the year Mr. Schott was initially denied

³¹ Kathleen Beckers, *Vox pops in the news: The journalists’ perspective*, COMMUNICATIONS, 101–111 (vol. 43, no. 1, Oct. 6, 2017), <https://doi.org/10.1515/commun-2017-0040>.

a press pass, Utah lawmakers introduced a record number of 959 bills.³² Of those, the legislature passed 582 that were sent to the governor's desk.³³ Excluding independent journalists, especially those like Mr. Schott who are trusted sources of information for many in the community, has significant impacts on the public's ability to access critical information about government in the legislative forum where democracy is quickly unfolding. Slowing legislative news for even a day may leave constituents unable to contact their representatives before a bill that impacts them passes committee or makes it out of a legislative chamber.

III. DISCRIMINATING AGAINST INDEPENDENT JOURNALISTS IS VIEWPOINT DISCRIMINATION

In addition to being unreasonable, the 2025 Press Policy impermissibly discriminates based on viewpoint. Viewpoint discrimination occurs when the government targets “particular views taken by speakers on a subject” that may be “based on the specific motivating ideology or the opinion or perspective of the speaker.” *Vidal v. Elster*, 602 U.S. 286, 293–94 (2024). In evaluating whether the policy is viewpoint neutral, this Court must consider whether it tends to “favor some viewpoints or ideas at the expense of others.” *Pahls v. Thomas*, 718 F.3d 1210, 1234 (10th Cir. 2013).

³² UTAH LEGISLATURE 2025 SESSION SYNOPSIS (2025), <https://www.slc.gov/attorney/wp-content/uploads/sites/4/2025/03/2025-Session-Synopsis.pdf>.

³³ *Id.*

Categorically excluding journalists who lack an institutional affiliation discriminates based on viewpoint because by their nature, independent journalists provide a different viewpoint. Unlike institutional media, whose structure and motivating ideology is reliant on profit-gains, independent journalists are able to engage with news gathering more freely, particularly when the subjects may be unprofitable or unpopular.³⁴ Moreover, independent journalists are a closer proxy to the general public, with an entire sub-category of independent journalists referenced as “citizen journalists” who may provide a perspective that reflects “the inside looking out” as opposed to “the outside looking in” of traditional, institutional journalism.³⁵

Here, the Press Policy favors the viewpoints and ideas of institutional media over independent ones on its face, providing exclusive access to press spaces in the legislature at the expense of independent journalists who are categorically targeted and excluded from even being considered for a press

³⁴ Clay Calvert, *And You Call Yourself a Journalist?: Wrestling With a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411, 434 (1999) (“In an era in which hard-hitting investigative reporting at many large-chain-owned newspapers takes a back-seat to corporate profits, it is important that reporters at small or alternative news operations who do practice investigative journalism receive protection.”) (internal citations omitted).

³⁵ Alison Hill, *Citizen Journalism vs. Traditional Journalism*, WRITER’S DIGEST (Feb. 8, 2022), <https://www.writersdigest.com/write-better-nonfiction/citizen-journalism-vs-traditional-journalism> (referring to independent journalism as citizen journalism, describing the same core characteristics of being small and unaffiliated).

credential. Because of this differential access and unreasonable distinction, independent journalists are disadvantaged in their ability to gather news.

The First Amendment was adopted to prevent the government from making credibility determinations among the press or effectively licensing/accrediting the media. The concern with the government co-opting this role is that “the government could grant protection only to established entities it agreed with politically or ideologically”³⁶ and “whatever entity that is given the power to accredit would wield enormous power. . . to exclude fringe or alternative news organizations that cater to minority issues ignored or under-reported by mainstream media.”³⁷ Scholars even warn that “[t]here is a tremendous danger that accreditation will become synonymous with mainstream, traditional news organizations, and establishment news media outlets.”³⁸

Based on these concerns, the wide consensus among scholars is that

³⁶ Kathryn A. Rosenbaum, *Protecting More than the Front Page: Codifying a Reporter’s Privilege for Digital and Citizen Journalists*, 89 NOTRE DAME L. REV. 1427, 1463 (2014).

³⁷ Clay Calvert, *And You Call Yourself a Journalist?: Wrestling With a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411, 449 (1999).

³⁸ *Id.* at 449.

“journalist” should be interpreted broadly under a functional framework.³⁹

The Press Policy at issue here does the opposite and has essentially created a licensing system in its application of a bright line rule that grants access only to institutional media. This system ignores the significant press function that independent journalists serve in the collection and dissemination of information to the public.

Although the defendants here claim that their policy is intended to protect journalistic integrity, this concern is misplaced and unrelated to the forum’s purpose. First Amendment rights simply “do not turn on, nor are they calibrated to, the quality of the reporting.” *John K. MacIver Inst. for Pub. Pol’y, Inc. v. Evers*, 994 F.3d 602, 614 (7th Cir. 2020) (citing *Lund v. City of Rockford, Illinois*, 956 F.3d 938, 941 n.1 (7th Cir. 2020)). Functionally, this policy substitutes the public’s judgement and opportunity to make credibility determinations with the government’s own assessment of journalistic quality. This de facto licensing system is particularly concerning given the modern

³⁹ *Id.* (emphasizing the importance of defining journalists according to function); see also Sonja R. West, *Press Exceptionalism*, 127 HARVARD LAW REV. 2434, 2454 (2014), <https://harvardlawreview.org/print/vol-127/press-exceptionalism/> (“the press is as the press does”); Keith Werhan, *Rethinking Freedom of the Press After 9/11*, 82 TUL. L. REV. 1561, 1601 n.243 (2008) (favoring a definition of the press that includes “anyone who regularly gathers and disseminates information of public interest to the public”); Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 519–20 (2007) (same).

news-scape discussed above, where not only is trust in institutional media eroding but, more significantly, so is access to local news sources generally.

The public increasingly relies on independent journalists where there is an absence of mainstream media coverage, particularly when it comes to local news. In these circumstances, independent journalism may be the only viewpoint available on a particular topic and categorically prohibiting independent journalists increases the danger that people will have no access to critical government information. In this case, excluding entire categories of journalists, *which include well-established and respected journalists like Mr. Schott*, the Defendants' Press Policy not only impedes independent journalists' access to news gathering, but also impedes the public's access to the sole or alternative viewpoints to crucial governmental information during Utah's legislative session.

CONCLUSION

The district court's dismissal of this case on 12(b) grounds was incorrect as a matter of law. This decision violates not just the rights of Brian Schott as a member of the press, but the rights of the public and its access to information. The decision exchanges fundamental protections in our democracy for the government's administrative convenience, risking further deterioration of free speech and press in this nation. *Amici* respectfully request that this honorable Court reverse and remand for further proceedings.

Dated this November 17, 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the cover page, tables of contents and authorities, certificates of counsel, and oral argument statement, but including footnotes) contains 6,221 words as determined by the word counting feature of Microsoft Word 2019. This brief thus complies with the type-volume limitation contained in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B). I further certify that this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 13-point Century Schoolbook font, in compliance with Fed. R. App. P. 32(a)(5)–(6).

Dated this November 17, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2025, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. Through the Court's CM/ECF system, this brief has been served on counsel for all parties.

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