No. 25-4124

IN THE
United States Court of Appeals for the Tenth Circuit

UTAH POLITICAL WATCH, INC., and
BRYAN SCHOTT

Plaintiffs-Appellants,

v.

ALEXA MUSSELMAN, Utah House of Representatives Communications Director and Media Liaison Designee, ANDREA 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-Appellees.

Appeal from the United States District Court
for the District of Utah
No. 2:25-CV-00050
Judge Robert J. Shelby

AMICUS CURIAE BRIEF OF THE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae the Foundation for Individual Rights and Expression (FIRE) certifies that (1) it does not have a parent company, and (2) no publicly held company has a 10% or greater ownership interest in it.

Amicus curiae the Reporters Committee for Freedom of the Press (RCFP) certifies that (1) it is an unincorporated association of reporters and editors, and (2) it has no parent corporation and no stock.

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INTEREST OF *AMICI CURIAE* [1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan nonprofit dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended individuals' rights through public advocacy, strategic litigation, and participation as *amicus curiae* in cases implicating expressive rights under the First Amendment. In lawsuits across the United States, FIRE works to vindicate First Amendment rights without regard to the speakers' views, including by representing journalists who face government censorship or sanctions for their reporting.

The Reporters Committee for Freedom of the Press (the Reporters Committee or RCFP) is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

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[1] *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or its counsel made a monetary contribution to its preparation or submission. Counsel for all parties have consented to the filing of this brief.

FIRE and the Reporters Committee are deeply concerned by efforts by state government officials to subject journalists and news organizations to adverse action for the content or perceived viewpoints of their reporting. *Amici* submit this brief to aid the Court in resolving the important issues presented in this appeal, which arises from the district court's dismissal of claims by Utah Political Watch, Inc. (UPW) and independent journalist Bryan Schott (collectively "Appellants"), including their claim that Mr. Schott was unconstitutionally denied a press credential to cover the Utah Legislature in retaliation for his reporting.

INTRODUCTION

Amici write to emphasize for the Court three major errors in the decision below. First, the district court failed to recognize that the denial of a press credential implicates important First Amendment and due process rights. Second, the district court gave unduly short shrift to Plaintiffs-Appellants' claims of viewpoint discrimination—a paradigmatic First Amendment violation—that has been historically understood as prohibited including in the specific context of press access to legislative spaces. Third, the district court improperly applied the objective

standard for assessing whether the government's viewpoint-based retaliation was sufficiently adverse to amount to a First Amendment violation.[2]

Appellant Bryan Schott is a journalist who has covered Utah politics and the Utah Legislature for more than 25 years. As alleged, during the 2024 legislative session, while employed by the *Salt Lake Tribune*, Mr. Schott reported on the Utah Legislature in a manner Defendants-Appellees perceived as critical of the legislature and its leadership. Amended Complaint ¶ 46. In 2024, Mr. Schott left the Tribune to launch an independent media outlet: *Utah Political Watch* (UPW), where his hard-hitting coverage of the Legislature continued. *Id.* ¶ 16. Multiple legislators and staffers responded angrily to Mr. Schott's reporting for UPW, calling him a "dick" and a "former media member," accusing him of bias and a "lack of professionalism," and claiming that he had disregarded accuracy and ethical standards. *Id*. ¶¶ 50–56.

Since 2018, the Utah Legislature has utilized a media credentialing policy to provide the press with access to the press room, the Senate chamber floor, workspace in the house and senate galleries, and designated parking. *Id.* ¶¶ 26–40. From its initial formalization until 2024 that policy did not distinguish between journalists from independent media organizations. *Id.* ¶ 32. But in November 2024—after Mr.

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[2] While this brief largely focuses on the erroneous dismissal of Counts I through III of the Amended Complaint—Plaintiffs-Appellants' claims predicated on viewpoint discrimination and retaliation—*amici* agree with Plaintiffs-Appellants that the dismissal of the other counts in the Amended Complaint also constitutes reversible error.

Schott launched UPW—the Legislature amended its policy to deny press credentials to journalists from blogs and independent media, without defining those terms. *Id.* Although Mr. Schott had obtained a media credential every year since 1999, just five days after Mr. Schott published an article covering allegations that Senate President Stuart Adams had violated campaign finance laws, the Legislature denied Mr. Schott's application for a press credential citing its amended policy to deny press credentials to blogs and independent journalists. *Id.* ¶¶ 45, 60.

The Amended Complaint plausibly alleges that this rationale—and the Legislature's decision to alter its media credentialing policy—was pretextual: Defendants-Appellees sought to deny Mr. Schott a media credential as a result of prominent legislators' well-documented displeasure with his reporting. *Id.* ¶¶ 46–55. In short, Plaintiffs-Appellants allege they were denied a press credential and, thus, the ability to cover the Utah Legislature from the Capitol grounds, in retaliation for the content and perceived viewpoints of Mr. Schott's journalism.

Such allegations state a First Amendment claim multiple times over. "Government discrimination among viewpoints is a 'more blatant' and 'egregious form of content discrimination.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 156 (2015) (quoting *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)). Because the government may not "burden the speech of others in order to tilt public debate in a preferred direction[,]" *Sorrell v. IMS Health Inc.*, 564 U.S.

552, 578–79 (2011), the Utah Legislature may not regulate press access to the Capitol in a manner that "advance[s] its own vision of ideological balance," *Moody v. NetChoice, LLC*, 603 U.S. 707, 741 (2024), or "impose special prohibitions on those" who express disfavored views. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). The government violates the First Amendment when it denies access to a public, limited, or nonpublic forum based on viewpoint, *see*, *e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985), or when it imposes an adverse consequence on a speaker in retaliation for the content or viewpoint of his speech, *see*, *e.g.*, *Hartman v. Moore*, 547 U.S. 250, 256 (2006). As alleged in the Amended Complaint, the Utah Legislature did both. Accordingly, as the district court erred when it dismissed Plaintiffs-Appellants' claims, FIRE and RCFP respectfully urge this Court to reverse.

ARGUMENT

I. The Denial of a Press Credential Implicates Important First Amendment and Due Process Rights.

The district court erroneously characterized this case as resting on the "assertion of an unequivocal right to gather news." Order, Dkt. 67 at 11. In so doing, it overlooked the important due process and First Amendment rights implicated by the denial of a press credential. This Court has not previously had occasion to address a claim that government officials refused to grant a press credential to a bona fide journalist because of the content or viewpoint of that journalist's speech, or in

retaliation for his reporting. And while there is "no general First Amendment right of access to all sources of information within governmental control," *Smith v. Plati*, 258 F.3d 1167, 1178 (10th Cir. 2001), as other courts of appeals have recognized, the denial of a press credential, even in the absence of viewpoint discrimination, implicates important First Amendment as well as due process rights.[3]

The pathmarking case is *Sherrill v. Knight*, where the D.C. Circuit held that because the denial of a press credential may infringe on First Amendment guarantees it "cannot be permitted to occur in the absence of adequate procedural due process." 569 F.2d 124, 128 (D.C. Cir. 1977). Recognizing that important First Amendment interests are implicated when the White House denies access to "press facilities for correspondents who need to report therefrom[,]" *id.* at 129, the court explained that: White House "press facilities having been made publicly available as a source of information for newsmen, the protection afforded newsgathering under the first amendment guarantee of freedom of the press requires that this access not be denied arbitrarily or for less than compelling reasons." *Id.* (citations omitted). Specifically, the court explained that the First Amendment interests of "newsmen and the publications for which they write" as well as "the public at large" require that "restrictions on newsgathering be no more arduous than necessary, and that

[3] As Plaintiffs-Appellants explain, *Smith* did not involve a written press credentialing policy or concrete allegations of viewpoint discrimination. *See* Opening Br. of Appellants at 26–28.

individual newsmen not be arbitrarily excluded from sources of information." *Id.* at 129–30.

In other words, journalists' access to government spaces for newsgathering and reporting purposes is of special constitutional concern because the freedoms of speech and of the press safeguard journalists' ability to report and the public's ability to receive the news. These powerful First Amendment interests undergirded the court's holding that journalists have a liberty interest in their press credentials that they cannot be deprived of without due process. *Id.* at 130–31.

In *Karem v. Trump*, the D.C. Circuit reaffirmed that the interest of a journalist in possessing a press credential "is not only 'protected by the first amendment' but also 'undoubtedly qualifies as [a] liberty [interest] which may not be denied without due process of law under the fifth amendment.'" 960 F.3d 656, 660 (D.C. Cir. 2020)660 (alternations in original) (quoting *Sherrill*, 569 F.2d at 130–31). In *Karem*, the court considered a journalist's challenge to a one-month suspension of his White House "hard pass" (a credential that gives journalists access to the White House) based on the journalist's purportedly unprofessional conduct. *Id.* at 659. The D.C. Circuit held that a "duly issued hard pass may not be suspended without due process," and because the suspension of a hard pass "implicates important first amendment rights," any suspension must be analyzed "under a particularly stringent vagueness and fair-notice test." *Id.* at 665 (quotation marks and alterations omitted).

Because the White House had failed to provide the journalist fair notice not only of the conduct that would subject him to punishment but also of the severity of the penalty that might be imposed, the D.C. Circuit held that the suspension of his hard pass violated due process. *Id.*; *see also*, *e.g.*, *Nicholas v. Bratton*, 376 F. Supp. 3d 232, 281 (S.D.N.Y. 2019) (police department's suspension of a journalist's press credential violated due process because government failed to provide sufficient notice); *Alaska Landmine, LLC v. Dunleavy*, 514 F. Supp. 3d 1123, 1133–34 (D. Alaska 2021) (explaining that the government's refusal to provide "explicit and meaningful standard[s] governing its denial of press conference access" likely violated due process).

While decided on due process grounds, both *Sherrill* and *Karem* make clear that suspensions and denials of press credentials implicate the First Amendment. In *Sherrill*, the defendants conceded, and the D.C. Circuit agreed, that "content-based criteria for press pass issuance are prohibited under the first amendment." 569 F.2d at 129; *see also Karem*, 960 F.3d at 660. And, indeed, content- or viewpoint-based restrictions on speech are presumptively unconstitutional, *see Rosenberger*, 515 U.S. at 828–29—so, *a fortiori*, such considerations cannot constitute "compelling reasons" for denying press access. *Sherrill*, 569 F.2d at 129. Further, "[a]lthough *Sherrill* predated modern forum analysis, its description" of the White House press area at issue "fits the definition of a nonpublic First Amendment forum." *Ateba v.*

Leavitt, 133 F.4th 114, 122–23 (D.C. Cir. 2025). The government "creates a nonpublic forum when it provides selective access for individual speakers." *Id.* at 122 (quotation marks omitted). In the context of a nonpublic forum, speech and newsgathering restrictions must be "viewpoint neutral." *Id.* at 123 (citing *Cornelius*, 473 U.S. at 800). In *Ateba*, for example, in upholding the White House's press credentialing policy, the D.C. Circuit explained that, unlike here, there was no allegation that the government "denies press credentials based on the content of a correspondent's reporting." *Id.* at 124.

A motions panel of the D.C. Circuit recently confirmed these principles in *Associated Press v. Budowich*, 2025 WL 1649265 (D.C. Cir. June 6, 2025) ("*Budowich*"). While the motions panel reached the preliminary conclusion that the Oval Office was "not any type of forum," and thus "the White House may consider journalists' viewpoints when deciding whether to grant access[,]" *id.* at *4,[4] it also *confirmed* that other press areas, including "the Brady Briefing Room" and "East Room" are nonpublic forums for which "access cannot be restricted based on viewpoint." *Id.* at *6, *13.

[4] The district court in *Budowich* determined that "the Oval Office is properly classified as a nonpublic forum, at least when the Government has voluntarily opened it and journalists are present." *Associated Press v. Budowich*, 780 F. Supp. 3d 32, 49 (D.D.C. 2025). The government's appeal of the district court's decision is now pending before a merits panel of the D.C. Circuit. *Associated Press v. Budowich*, No. 25-5109, (D.C. Cir. 2025).

The First Amendment and due process interests implicated by the denial of a press credential are equally present in the context of independent journalists and media outlets. Historically, the "liberty of the press" was "not confined to newspapers and periodicals," but also "embrace[d] pamphlets and leaflets." *Lovell v. City of Griffin*, Ga., 303 U.S. 444, 452 (1938). "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Id.*

There is no legally relevant "distinction" between "a social-media journalist operating on YouTube and Facebook" and "a journalist working for a traditional news outlet, such as a newspaper or television station." *Pulliam v. Fort Bend Cnty.*, 2024 WL 4068767, at *5 (S.D. Tex. Sept. 5, 2024), *report and recommendation adopted*, 2024 WL 4282088 (S.D. Tex. Sept. 24, 2024); *see also*, *e.g.*, *TGP Commc'ns, LLC v. Sellers*, 2022 WL 17484331, at *5 (9th Cir. Dec. 5, 2022) (holding that county likely engaged in viewpoint discrimination when it denied press credential to conservative news website); *Quad-City Cmty. News Serv., Inc. v. Jebens*, 334 F. Supp. 8, 17 (S.D. Iowa 1971) ("The history of this nation and . . . our complex federal system of government has been repeatedly jarred and reshaped by the continuing investigation, reporting and advocacy of independent journalists unaffiliated with major institutions"). Indeed, today, "news stories are now just as

likely to be broken by a blogger at her computer as a reporter at a major newspaper." *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

In sum, Defendants-Appellees' denial of a press credential to Mr. Schott—a denial that has deprived him of the ability to attend multiple press conferences, ask questions of Utah officials at those press conferences, and view and report on legislative actions, speeches, and other events occurring at the Utah Capitol—implicates Plaintiffs-Appellants' First Amendment and due process rights, just as does the revocation of a previously granted credential. *See Sherrill* 569 F.2d at 128–29 (denial of a press credential); *see also Karem*, 960 F.3d at 660 (suspension of a press credential).

II. Freedom of Speech and of the Press Were Historically Understood to Forbid Viewpoint Discrimination, Including in the Specific Context of Press Access to Legislative Spaces.

Prohibiting viewpoint discrimination and viewpoint-based retaliation of the sort alleged by Plaintiffs-Appellants has historically been understood to be one of the central purposes of the First Amendment.[5] Since the Founding, the First Amendment's Speech and Press Clauses have embodied the understanding that "viewpoint discrimination is uniquely harmful to a free and democratic society,"

[5] Writing as *amici curiae*, a group of leading First Amendment scholars provided extensive discussion of the history of the First Amendment's protections against viewpoint-based burdens on speech and denials of press subsidies or other benefits in *Associated Press v. Budowich*. Brief of Amici Curiae First Amendment Scholars, No. 25-5109, (D.C. Cir. 2025).

Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175, 187 (2024). As James Madison explained on the floor of the House of Representatives in 1794, "the nature of Republican Government" requires "that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794). For the government to proscribe, by legislation or otherwise, certain opinions would threaten "the liberty of speech, and of the press." *Id*. Thus, the Speech and Press Clauses ensure that the people, not the government, decide which ideas will "ultimately prevail" in an "uninhibited marketplace" of ideas. *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984)).

The freedom of the press to freely criticize the government was considered essential during the Founding Era. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455, 491 (1983). In fact, the First Amendment's guarantee of a free and unfettered press originated as a response to "the repression of speech and press that had existed in England and the heavy taxes on the press that were imposed in the colonies" to punish the press for what it published. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 353 (2010). To prevent this kind of viewpoint-based regulation and retaliation from recurring, the Bill of Rights contained express freedoms of press and speech. Anderson, *supra*, at 468.

After ratification of the First Amendment, its protections for the press were applied and clarified during debates surrounding the passage of the Sedition Act of 1798. Stephen Feldman, *Free Expression and Democracy in America: A History* 79 (2008). This Act criminalized "publish[ing] any false, scandalous and malicious writing or writings against the government," seemingly permitting the same kind of viewpoint-based retaliation against the press that the colonies previously sought to eliminate. 1 Stat. 596 (1798) (expired 1801).

The Sedition Act was broadly criticized as violating the First Amendment. The Virginia Resolution of 1798, for example, said the Sedition Act was "expressly and positively forbidden" by the First Amendment "because it [wa]s levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." James Madison, *Virginia Resolutions of 1798*, 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, 553–54 (1836). Such criticism has triumphed. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.").

Of particular relevance here, the First Amendment's historical abhorrence of viewpoint-based discrimination was originally understood to prohibit the retaliatory

denial of press access to legislative spaces. Shortly after the Founding, the House of Representatives allowed journalists to access its chamber—both the galleries of the House and the space-constrained chamber floor. *See* Brief of Amici Curiae First Amendment Scholars at 24, *Associated Press v. Budowich*, No. 25-5109 (D.C. Cir.). Representative Burke proposed a resolution to censure newspapers based on the content of their reporting—allegedly for having misrepresented debates and distorting arguments. 1 Annals of Cong. 952 (1789). Burke moved to expel reporters from the House, or at least to move them to the public gallery. *Id.* at 954 (statement of Rep. Page). But the House rejected Burke's proposals based on what members of the First Congress believed the First Amendment required. Representative Hartley, for example, argued the resolution was "an attack upon the liberty of the press." *Id*. In the face of such criticism, Burke withdrew the resolution. *Id.* This episode demonstrates that members of the First Congress, who were uniquely well positioned to understand the original meaning of the First Amendment, understood the Speech and Press Clauses to preclude the government from denying journalists access to legislative spaces based on (or in retaliation for) the content and viewpoints expressed in their reporting.

III. The District Court Applied the Wrong Legal Standards to Plaintiffs-Appellants' First Amendment Retaliation Claim.

The First Amendment "prohibits government officials from retaliating against individuals for engaging in protected speech." *Lozman v. City of Riviera Beach*, 585

U.S. 87, 90 (2018); *see also Bustillos v. City of Carlsbad, New Mexico*, 2022 WL 1447709, at *5 (10th Cir. May 9, 2022). To state a claim for First Amendment retaliation under this Circuit's precedent, a plaintiff must allege (1) it engaged in constitutionally protected activity, (2) the defendant's actions caused it to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that protected activity, and (3) the defendant's actions were substantially motivated as a response to its protected conduct. *See McBeth v. Himes*, 598 F.3d 708, 717 (10th Cir. 2010).

While the district court correctly observed that a cognizable injury for purposes of a First Amendment retaliation claim must be more than "trivial or de minimis," it erred in concluding Plaintiffs-Appellants had alleged only inadequate, trivial or de minimis harms. Dkt. 67 at 15 (quoting *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1203 (10th Cir. 2007)). Specifically, the district court erred because it (1) considered the sufficiency of Plaintiffs-Appellants' allegations of injury under the "vigorous" standard applicable to allegedly retaliatory government *speech*, not adverse government *action*; and (2) incorrectly concluded the injuries allegedly suffered by Plaintiffs-Appellants are not objectively chilling.

A. The District Court Applied an Erroneously "Vigorous" Standard.

The district court erred as an initial matter by evaluating the sufficiency of Plaintiffs-Appellants' alleged injuries from the denial of a press credential pursuant

to the "vigorous" standard this Court has found applicable in the context of retaliation claims arising out of criticism or censure by government officials. *Eaton v. Meneley*, 379 F.3d 949, 956 (10th Cir. 2004). As this Court has explained, this more rigorous standard is justified in the context of such claims due to the "nature of political debate [as] rough and tumble"; a "substantial" standard is necessary to prevent "all *insults* in public debate" from becoming "actionable under the Constitution." *Id.* (emphasis added). Rather, "[p]laintiffs in public debates are expected to cure most misperceptions about themselves through their own speech and debate." *Id*.; *see also id*. (explaining that mere "injury to one's reputation" caused by critical government speech "is not enough to defeat constitutional interests in furthering 'uninhibited, robust' debate on public issues") (quoting *Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1248 (10th Cir. 2000)).

In *Phelan*, for example, this Court held that official censure for violation of ethics policy did not infringe plaintiff's First Amendment rights because the plaintiff "remained free to express her views publicly and to criticize the ethics policy and the Board's censure." *Id*.. The "vigorous" standard limits the types of injuries allegedly *caused by the government's own speech* that can support a retaliation claim. This Court and district courts in this Circuit have applied the "vigorous" standard in precisely that manner: to reject retaliation claims premised on alleged injuries resulting from government speech. *See*, *e.g.*, *VDARE Found. v. City of*

Colorado Springs, 11 F.4th 1151, 1172 (10th Cir. 2021) (applying "vigorous" standard to conclude government characterizations of plaintiff's speech as "hate speech" did not plausibly allege the second element of a First Amendment retaliation claim); *Valdez v. New Mexico*, 109 F. App'x 257, 263 (10th Cir. 2004) (same, with respect to statements made to the press regarding the plaintiff's possible involvement in criminal activity); *Douglass v. Garden City Cmty. Coll.*, 652 F. Supp. 3d 1329, 1349 (D. Kan. 2023) (same, with respect to officials' statements about plaintiff's sexual relationships); *Schmidt v. Huff*, 2025 WL 2374153, at *5 (D. Kan. Aug. 14, 2025) (same, with respect to government statements causing plaintiff "slander, shame, and ridicule"); *Weise v. Colorado Springs*, 421 F. Supp. 3d 1019, 1042 (D. Colo. 2019) (citation omitted) (same, with respect to officials' reputation damaging statements about plaintiff's alleged illegal and unethical behavior).

Retaliatory governmental *action*, however, is different. When the government takes concrete adverse action in retaliation for the exercise of First Amendment rights, the rationales underlying the application of "vigorous" scrutiny to alleged injuries arising from government speech—that such injuries can be cured by additional speech and that the government's own contributions to robust debate on public issues are valuable, *see Eaton*, 379 F.3d at 956—are inapplicable. When the Utah Legislature denied Mr. Schott a press credential, it was not making its own contribution to the marketplace of ideas, and no amount of Mr. Schott's own speech

could cure the denial of his press credential. When, for example, a police officer similarly took adverse *action* in response to a journalist's exercise of First Amendment rights—specifically, when the officer "stood in front of [the journalist's] camera and shined a flashlight into it, making it difficult … to continue recording a potentially critical moment of the police activity"—this Court did not apply a "vigorous" standard to conclude that the journalist suffered an injury that would chill a person of ordinary firmness. *Irizarry v. Yehia*, 38 F.4th 1282, 1292–93 (10th Cir. 2022).

Applying an unduly "vigorous" standard to evaluate injuries from retaliatory governmental action would contravene Supreme Court precedent. As the Supreme Court recently explained, "'[a]s a general matter,' the First Amendment prohibits government officials from subjecting individuals to 'retaliatory actions' after the fact for having engaged in protected speech." *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022) (quoting *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019)); *see also Hartman v. Moore*, 547 U.S. 250, 256 (2006) (same). And "even an act of retaliation as trivial as failing to hold a birthday party for a public employee … when intended to punish her for exercising her free speech rights" would violate the First Amendment. *Rutan v. Republican Party of Ill.*, 497 U.S. 67, 76 n.8 (1994) (quotation marks omitted); *see Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994) (quoting *Rutan*).

In sum, in evaluating the sufficiency of Plaintiffs-Appellants' First Amendment retaliation claim, the district court erred as a matter of law by applying a "vigorous" standard to Plaintiffs-Appellants' allegations of injury.

B. The District Court Erred in Concluding that Plaintiffs-Appellants' Alleged Injuries Are Not Objectively Chilling.

The district court erred as a matter of law to the extent that, as noted above, a plaintiff alleging retaliation in violation of the First Amendment must show only "that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity." *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000). Ostensibly applying this standard, the district court concluded that Plaintiffs-Appellants "allegations are insufficient to infer a denial of a media credential would 'chill a person of ordinary firmness from continuing' unfavorable reporting." Dkt. 67 at 15. In support of that conclusion, the district court noted that Mr. Schott "in fact reported on the 2025 legislative session without a media credential." *Id* at 16..

Although the district court purported to undertake an "objective" analysis, its reasoning rested solely on Plaintiffs-Appellants' *subjective* response to the government's retaliatory conduct. However, properly assessed, Defendants-Appellees inflicted on Mr. Schott and UPW an injury sufficient to chill a person of ordinary firmness.

First, the district court erred by focusing on Mr. Schott's "continued reporting," instead of conducting an objective analysis. This Court's articulation of the standard for a First Amendment retaliation claim leaves no doubt that the inquiry is an objective one: "injury that would chill *a person of ordinary firmness* from continuing to engage in protected activity." *Irizarry*, 38 F.4th at 1296 (emphasis added). Other courts of appeals likewise emphasize that the "chilling analysis depends on the reaction of a 'person of ordinary firmness,' not the individual plaintiff." *Capp v. Cnty. of San Diego*, 940 F.3d 1046, 1054 (9th Cir. 2019) (internal citations omitted); *see also Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005) (rejecting the notion that the objective inquiry "depends upon the actual effect . . . on a particular plaintiff.").

This Court's precedent conclusively establishes this point: The "objective standard of a person of ordinary firmness … *permits a plaintiff who perseveres* despite serious injury from official misconduct to assert a constitutional claim." *Eaton*, 379 F.3d at 956 (emphasis added). Applying this objective standard, other courts of appeals have routinely concluded a plaintiff adequately alleges or demonstrates chilling effect even where the plaintiff was not subjectively dissuaded from continuing their activities. In *Capp v. Cnty. of San Diego*, for example, the Ninth Circuit found that "the alleged retaliation would objectively have had a chilling effect" although the plaintiff "was not chilled by the alleged retaliation" and

instead "continued, and even escalated, his protected activity." 940 F.3d at 1054–55; *see also Linnemann v. City of Aberdeen*, 2013 WL 3233526, at *8 (D. Md. June 25, 2013) (finding a chilling effect where plaintiff continued with their First Amendment actions because "a person of ordinary [firmness] would likely refrain").

Further, contrary to the district court's ruling, a complete *cessation* of First Amendment-protected activity is not required to prove a chilling effect. A claim of unconstitutional retaliation "targets conduct that tends to *chill*" First Amendment-protected activity, "not just conduct that *freezes* it completely." *Constantine*, 411 F.3d at 500 (emphasis in original); *see also*, *e.g.*, *Keenan v. Tejeda*, 290 F.3d 252, 260 (5th Cir. 2002) (holding plaintiffs who stated they "*curtailed* their protected speech activities in response to the defendants' actions" had "sufficiently averred that they were deprived of a constitutional right, even though they were not completely silenced.") (emphasis added); *United States v. Vazquez*, 145 F.3d 74, 81 (2d Cir. 1998) (holding protestor outside abortion clinic had standing to bring a First Amendment retaliation claim because even though plaintiff "persiste[d] in protesting" she "may have felt obliged to tone down her rhetoric."). Even the "'threat of administrative and judicial intrusion into newsgathering and editorial process' that arises from official process and its possible enforcement" "is sufficient to deter protected speech." *Media Matters for Am. v. Paxton*, 732 F. Supp. 3d 1, 28 (D.D.C. 2024) (quoting *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir.

1988)), *aff'd*, 138 F.4th 563 (D.C. Cir. 2025); *see also Media Matters for Am. v. Paxton*, 138 F.4th 563, 581 (D.C. Cir. 2025) (finding that media organization and news reporter alleged retaliatory harm by detailing "special burdens on their newsgathering activities and operation of their media company.").

Consistent with this principle, courts find a chilling effect on the First Amendment-protected work of journalists and news organizations when the government forces them to "choose between exercising their First Amendment right to cover newsworthy events or suffer the risk" of adverse government action. *Deep South Today v. Murrill*, 779 F. Supp. 3d 782, 801 (M.D. La. 2025); *see, e.g.*, *Nat'l Press Photographers Ass'n v. McCraw*, 90 F.4th 770, 783 (5th Cir.) (finding a chilling effect of legislation was sufficient to confer standing where the plaintiffs "restricted their use of drones for newsgathering purposes due to the threat of" government action); *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 381 (D.D.C. 2020) (finding a chilling effect from government action where journalists and editors were "less willing to take on controversial but important stories and exercise[d] greater caution in making statements that may offend defendants.").

And, of particular relevance here—in light of the district court's dismissal of Plaintiffs-Appellants' allegations that they have been "unable to report on in-the-room context and publish breaking news in real time" due to the lack of a press credential, Dkt. 67 at 16—courts have recognized that retaliatory denial of a press

credential or press access, in particular, can have a chilling effect. *Budowich*, 780 F. Supp. 3d at 57 (holding that denial of access to the Associated Press was sufficient to establish a chilling effect because access "could lead to incisive and cutting-edge reporting that the AP cannot reproduce by watching from afar"); *see also TGP Commc'ns, LLC*, 2022 WL 17484331, at *6 (finding that a journalist being limited to watching "press conference live streams" was more than a de minimis injury from the denial of a press credential).

In sum, courts have repeatedly found a chilling effect from adverse government actions, including retaliatory denials of press access, that burden, limit, or deter the work of journalists, even where journalists have not ceased newsgathering and reporting entirely. Thus, had it applied the correct legal standards, the district court would have—and should have—concluded based on the allegations in the Amended Complaint that denial of Mr. Schott's press credential is an "action[] causing injury that would chill a person of ordinary firmness" from exercising their First Amendment rights, including by engaging in newsgathering and reporting critical of the Utah Legislature and its leadership. *Irizarry*, 38 F.4th at 1296.

CONCLUSION

For the reasons above, FIRE and the Reporters Committee respectfully urge this Court to reverse and remand this matter to the district court for further proceedings.

Respectfully submitted this 17th day of November, 2025.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B), because it contains 5,441 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2025, a true and accurate copy of the foregoing filing was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

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