

No. 25-4124

**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)

---

APPELLANTS' OPENING BRIEF

---

***\*\*ORAL ARGUMENT REQUESTED\*\****

---

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

Charles Miller  
INSTITUTE FOR FREE SPEECH  
1150 Connecticut Ave., NW,  
Suite 801  
Washington, D.C. 20036  
Tel: (202) 301-9800  
Fax: (202) 301-3399  
[cmiller@ifs.org](mailto:cmiller@ifs.org)

*Counsel for Plaintiffs-Appellants*

TABLE OF CONTENTS

|                                                                                                                                                           |     |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| TABLE OF CONTENTS .....                                                                                                                                   | i   |
| TABLE OF AUTHORITIES .....                                                                                                                                | iii |
| STATEMENT OF PRIOR OR RELATED CASES .....                                                                                                                 | 1   |
| JURISDICTIONAL STATEMENT .....                                                                                                                            | 1   |
| STATEMENT OF THE ISSUES .....                                                                                                                             | 2   |
| STATEMENT OF THE CASE .....                                                                                                                               | 3   |
| SUMMARY OF THE ARGUMENT .....                                                                                                                             | 20  |
| ARGUMENT .....                                                                                                                                            | 23  |
| I. STANDARD OF REVIEW .....                                                                                                                               | 25  |
| II. THIS CASE IS ABOUT VIEWPOINT DISCRIMINATION, NOT ACCESS IN<br>GENERAL.....                                                                            | 25  |
| III. SCHOTT AND UPW PROPERLY PLED FIRST AMENDMENT VIOLATIONS                                                                                              | 30  |
| A. The media credentialing policy is not reasonable.....                                                                                                  | 31  |
| B. The media credentialing policy is not viewpoint-neutral.....                                                                                           | 34  |
| C. Count II was properly pled in the alternative.....                                                                                                     | 37  |
| D. Plaintiffs alleged an adequate injury on the Retaliation claim .                                                                                       | 38  |
| E. The Complaint alleged a cognizable prior restraint claim .....                                                                                         | 39  |
| F. The complaint cognizably alleges the media access policy is<br>unconstitutionally vague .....                                                          | 41  |
| IV. THE DISTRICT COURT ERRED BY NOT ISSUING A PRELIMINARY<br>INJUNCTION.....                                                                              | 43  |
| A. Plaintiffs are likely to succeed on the merits.....                                                                                                    | 44  |
| B. Defendants’ restrictions fail forum analysis.....                                                                                                      | 48  |
| C. Plaintiffs have suffered and will suffer irreparable harm if this<br>Court permits Defendants to continue to deny them their free<br>press rights..... | 59  |
| D. The Public Interest and Balance of Equities Favor Plaintiffs ...                                                                                       | 60  |

|                                                                                    |    |
|------------------------------------------------------------------------------------|----|
| CONCLUSION.....                                                                    | 61 |
| STATEMENT REGARDING ORAL ARGUMENT .....                                            | 62 |
| CERTIFICATE OF TYPE-VOLUME LIMIT, AND TYPEFACE AND<br>TYPE-STYLE REQUIREMENTS..... | 62 |
| CERTIFICATE OF SERVICE .....                                                       | 63 |
| ATTACHMENTS:                                                                       |    |
| Judgement Entry.....                                                               | 64 |
| Decission and Order.....                                                           | 65 |

## TABLE OF AUTHORITIES

### Cases

|                                                                                                       |            |
|-------------------------------------------------------------------------------------------------------|------------|
| <i>Am. Broad. Cos. v. Cuomo</i> ,<br>570 F.2d 1080 (2d Cir. 1977).....                                | 47         |
| <i>Anderson v. Cryovac, Inc.</i> ,<br>805 F.2d 1 (1st Cir. 1986) .....                                | 47         |
| <i>AP v. Budowich</i> ,<br>No. 1:25-cv-00532, 2025 U.S. Dist. LEXIS 66994 (D.D.C. 2025).....          | 28         |
| <i>AP v. Budowich</i> ,<br>No. 25-5109, 2025 US App. LEXIS 13980 (June 6, 2025) .....                 | 29, 38     |
| <i>Branzburg v. Hayes</i> ,<br>408 U.S. 665 (1972).....                                               | 44, 53     |
| <i>Brown v. Entm’t Merchs. Ass’n</i> ,<br>564 U.S. 786 (2011).....                                    | 56, 58     |
| <i>Citizens United v. FEC</i> ,<br>558 U.S. 310 (2010).....                                           | 54         |
| <i>City of Lakewood v. Plain Dealer Pub. Co.</i> ,<br>486 U.S. 750 (1988).....                        | 40         |
| <i>CLS v. Martinez</i> ,<br>561 U.S. 661 (2010).....                                                  | 34         |
| <i>Consumers Union v. Periodical Correspondents’ Assoc.</i> ,<br>365 F. Supp. 18 (D.D.C. 1973) .....  | 28         |
| <i>Consumers Union v. Periodical Correspondents’ Assoc.</i> ,<br>515 F.2d 1341 (D.C. Cir. 1975) ..... | 28         |
| <i>Cornelius v. NAACP Legal Def. &amp; Educ. Fund, Inc.</i> ,<br>473 U.S. 788 (1985).....             | 28, 31, 33 |
| <i>Dry v. United States</i> ,<br>235 F.3d 1249 (10th Cir. 2000) .....                                 | 25         |
| <i>Elrod v. Burns</i> ,<br>427 U.S. 347 (1976).....                                                   | 60         |
| <i>First Nat’l Bank of Boston v. Bellotti</i> ,<br>435 U.S. 765 (1978).....                           | 45         |

|                                                                                           |        |
|-------------------------------------------------------------------------------------------|--------|
| <i>Flamm v. Am. Ass’n of Univ. Women,</i><br>201 F.3d 144 (2d Cir. 2000) .....            | 46     |
| <i>Garcia v. Bd. of Educ.,</i><br>777 F.2d 1403 (10th Cir. 1985) .....                    | 46     |
| <i>Good News Club v. Milford Cent. Sch.,</i><br>533 U.S. 98 (2001).....                   | 48     |
| <i>Heideman v. S. Salt Lake City,</i><br>348 F.3d 1182 (10th Cir. 2003) .....             | 44     |
| <i>In re IBP Confidential Bus. Documents Litig.,</i><br>797 F.2d 632 (8th Cir. 1986)..... | 46     |
| <i>Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.,</i><br>508 U.S. 384 (1993).....  | 34     |
| <i>Make the Rd. by Walking, Inc. v. Turner,</i><br>378 F.3d 133 (2d Cir. 2004) .....      | 31     |
| <i>Matal v. Tam,</i><br>582 U.S. 218 (2017).....                                          | 20, 35 |
| <i>McDonough v. Garcia,</i><br>116 F.4th 1319 (11th Cir. 2024).....                       | 48     |
| <i>McIntyre v. Ohio Elections Comm’n,</i><br>514 U.S. 334 (1995).....                     | 45     |
| <i>Media Matters for Am. v. Paxton,</i><br>138 F.4th 563 (D.C. Cir. 2025).....            | 38     |
| <i>Ness v. City of Bloomington,</i><br>11 F.4th 914 (8th Cir. 2021) .....                 | 44     |
| <i>Nken v. Holder,</i><br>556 U.S. 418 (2009).....                                        | 60     |
| <i>Obsidian Fin. Group, LLC v. Cox,</i><br>740 F.3d 1284 (9th Cir. 2014) .....            | 46     |
| <i>Price v. Garland,</i><br>45 F.4th 1059 (D.C. Cir. 2022).....                           | 37     |
| <i>Pryor v. Sch. Dist. No. 1,</i><br>99 F.4th 1243 (10th Cir. 2024).....                  | 60     |

|                                                                                                                     |                |
|---------------------------------------------------------------------------------------------------------------------|----------------|
| <i>Reed v. Bernard</i> ,<br>976 F.3d 302 (3d Cir. 2020) .....                                                       | 37             |
| <i>Reed v. Bernard</i> ,<br>No. 20-1632, 2021 WL 1897359 (3d Cir. May 4, 2021) .....                                | 38             |
| <i>Reed v. Town of Gilbert</i> ,<br>576 U.S. 155 (2015) .....                                                       | 54, 55         |
| <i>Rocky Mt. Gun Owners v. Polis</i> ,<br>121 F.4th 96 (10th Cir. 2024) .....                                       | 1              |
| <i>Rodgers v. Bryant</i> ,<br>942 F.3d 451 (8th Cir. 2019) .....                                                    | 55             |
| <i>Rosenberger v. Rector &amp; Visitors of the Univ. of Va.</i> ,<br>515 U.S. 819 (1995) .....                      | 50, 55         |
| <i>Sable Commc'ns of Cal. Inc. v. F.C.C.</i> ,<br>492 U.S. 115 (1989) .....                                         | 56             |
| <i>Sherrill v. Knight</i> ,<br>569 F.2d 124 (D.C. Cir. 1977) .....                                                  | 29, 37, 61     |
| <i>Smith v. Plati</i> ,<br>258 F.3d 1167 (10 <sup>th</sup> Cir. 2001) .....                                         | 19, 25, 26, 27 |
| <i>Snyder v. Phelps</i> ,<br>562 U.S. 443 (2011) .....                                                              | 46             |
| <i>Snyder v. Phelps</i> ,<br>580 F.3d 206 (4th Cir. 2009) .....                                                     | 46             |
| <i>Tex. v. Johnson</i> ,<br>491 U.S. 397 (1989) .....                                                               | 49             |
| <i>TGP Communs., Ltd. Liab. Co. v. Sellers</i> ,<br>No. 22- 16826, 2022 U.S. App. LEXIS 33641 (9th Cir. 2022) ..... | 47, 59         |
| <i>Thornhill v. Alabama</i> ,<br>310 U.S. 88 (1940) .....                                                           | 39             |
| <i>Turner Broad. Sys. v. FCC</i> ,<br>512 U.S. 622 (1994) .....                                                     | 35, 50         |
| <i>United States v. Wallace &amp; Tiernan Co.</i> ,<br>336 U.S. 793 (1949) .....                                    | 1              |

|                                                                                               |    |
|-----------------------------------------------------------------------------------------------|----|
| <i>Verlo v. Martinez</i> ,<br>820 F.3d 1113 (10th Cir. 2016) .....                            | 30 |
| <i>Walker v. Tex. Div., Sons of Confederate Veterans, Inc.</i> ,<br>576 U.S. 200 (2015) ..... | 30 |
| <i>Warner v. Gross</i> ,<br>776 F.3d 721 (10th Cir. 2015) .....                               | 25 |
| <u>Statutes</u>                                                                               |    |
| 28 U.S.C. § 1291 .....                                                                        | 1  |
| 28 U.S.C. § 1292 .....                                                                        | 1  |
| 28 U.S.C § 1331 .....                                                                         | 1  |
| 42 U.S.C. § 1983 .....                                                                        | 43 |
| <u>Rules</u>                                                                                  |    |
| Fed. R. App. P. 4 .....                                                                       | 2  |
| <u>Treatises</u>                                                                              |    |
| 19 Moore’s Federal Practice - Civil § 202.11 (2024) .....                                     | 1  |

## STATEMENT OF PRIOR OR RELATED CASES

There are no prior or related cases to this appeal.

## JURISDICTIONAL STATEMENT

(a) The district court had jurisdiction over this matter under 28 U.S.C § 1331, as the Plaintiffs-Appellants brought a constitutional challenge to Defendants-Appellees' media credentialling policy and the viewpoint-based denial of credentials to Plaintiff-Appellant Bryan Schott.

(b) This Court has jurisdiction over the appeal of the dismissal of the complaint pursuant to 28 U.S.C. § 1291. *See also United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949) (dismissal without prejudice appealable); 19 Moore's Federal Practice - Civil § 202.11 (2024) (involuntary dismissal without prejudice is appealable if it ends action in district court). This Court has jurisdiction over the appeal of the denial of the request for a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1). *See also Rocky Mt. Gun Owners v. Polis*, 121 F.4th 96, 104 (10th Cir. 2024).

(c) The judgment and order denying the preliminary injunction and dismissing the case appealed from were entered on September 29, 2025.

Plaintiffs-Appellants filed their notice of appeal the next day. The appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A).

#### STATEMENT OF THE ISSUES

1. Are any of the following allegations sufficient to survive a motion to dismiss a complaint alleging First Amendment violations for viewpoint discrimination, retaliation, prior restraint and unconstitutional vagueness?

- a. A government media credentialing policy that expressly excludes “independent media” from receiving media credentials constitutes viewpoint discrimination against independent voices;
- b. A media credentialing policy that uses subjective and vague terms such as “established reputable news organization,” and “blogs, independent media and other freelance media” affords too much discretion to government officials issuing credentials;
- c. Government officials apply criteria not included in the written credentialing policy, including requiring institutional ownership and editorial control; or,

d. A media credentialing policy was revised and applied inconsistently to deny credentials and access to a single reporter who had gotten under the skin of elected officials.

2. Should a preliminary injunction issue to prevent the defendants from denying media credentials based on the viewpoint expressed?

#### STATEMENT OF THE CASE

##### *Bryan Schott's Reporting and Commentary*

With over 25 years as a Utah political reporter, Plaintiff Bryan Schott owns and operates Utah Political Watch (UPW), a subscription-based digital newsletter and website covering Utah politics he founded in October 2024. App. Vol I. at 16. Previously, Schott served as Political Correspondent for the *Salt Lake Tribune*, Utah's largest daily newspaper, where he authored 1,201 stories on politics from 2020 to 2024. *Id.* For over a decade before that, he served as managing editor of UtahPolicy.com, where he held press credentials to cover the Utah legislature. *Id.* at 15. Schott is a member of the Society of Professional Journalists and follows its ethics code. *Id.*

Since its launch, UPW has grown in readership, offering free daily newsletters and paid content. *Id.* at 16-17. It has 1,200 subscribers, 25%

of whom pay for extra content, with the website attracting tens of thousands of monthly pageviews and top stories earning 4,000–5,000 views. *Id.* at 17. UPW also produces an affiliated podcast, *Special Session with Bryan Schott*, where Schott talks about events that occur during the Utah Legislative Session as well as other relevant Utah political news. *Id.* at 16. The podcast averages 250–300 downloads per episode, and Schott’s TikTok, with 12,000 followers, garners 4,500–10,000 views per Utah politics video, totaling over 214,000 views in the two months prior to filing the amended complaint. *Id.*

UPW holds a \$2 million Media Liability policy. Its staff consists of Schott as the publisher and main reporter, and Malissa Morrell as editor. *Id.* Morrell has edited Schott’s work since 2015, assisting with story selection, grammar, clarity, and headlines, and has been integral to UPW since its inception. *Id.*

Schott has earned multiple journalistic awards, including Utah Broadcasters Association Awards for Best Feature Story, News Reporting Series, and the 2022 Utah Society of Professional Journalists’ Best Newspaper Reporter. *Id.* at 17. In 2024, he was among 34

journalists awarded the National Press Foundation's Elections Journalism Fellowship. *Id.*

*Defendants' Media Credentialing Policy*

Since 2018, Defendants have maintained a written media credentialing policy. *Id.* Through 2024, bloggers and independent media could receive credentials after additional scrutiny. *Id.* The 2019 policy allowed "a blog site owner or organization not bound by a code of ethics" to gain credentials by agreeing to an ethics code. *Id.* at 18. Schott received credentials as a blog representative in 2018 and 2019. *Id.* at 15. The 2020 policy omitted mention of bloggers or independent media. *Id.* at 18. In 2021 and 2022, the policy permitted "[b]loggers representing a legitimate independent news organization" to be credentialed under some circumstances. *Id.* In 2023, "some circumstances" changed to "limited, rare circumstances." *Id.* The language remained unchanged in 2024. *Id.*

In November 2024, after Schott established UPW, Defendants revised the "Utah Capitol Media Access and Credentialing Policy" to bar blogs and independent media from receiving press credentials entirely. *Id.* at 18, 68. The 2025 policy also added a preamble, which emphasized

providing access to professional journalists from “reputable news organizations” to ensure informed reporting. *Id.* It also stated that credentials were for media primarily covering Capitol news, with no guarantee of issuance, even for previously credentialed individuals. *Id.* Defendants exercise discretion to limit how many credentials an organization receives. *Id.*

Also, for the first time, the 2025 Policy completely barred “[b]logs, independent media or other freelance media” from credentialing. *Id.* at 19, 68. The policy lacks definitions for “blog,” “independent media” or “reputable news organization.”

The policy requires journalists to satisfy five credentialing criteria: (1) complete an online application; (2) be a professional journalist regularly covering the Capitol, affiliated with a reputable news organization; (3) provide an annual background check; (4) adhere to a professional ethics code; and (5) complete yearly harassment prevention training. *Id.* Applicants may need to submit a letter of introduction verifying employment and need for credentials. *Id.* at 20, 68.

Credentialed press gain access to secure Capitol areas, media workspaces, designated areas in the Senate and House (including set up

for videographers/photographers), media availabilities, designated parking, the press room with internet and audio feeds, and committee rooms. *Id.* Press releases are distributed only to credentialed press. *Id.* *Schott's Years of Press-Credentialed Access to the Utah Legislature*

Since 1999, Schott has covered the Utah Legislature for various Utah media outlets. App. Vol. I at 21. Legislature officials issued him press credentials annually. *Id.* The application process typically required a criminal background check by the Utah Highway Patrol and approval from a House or Senate staffer. *Id.* After founding UPW in September 2024, Schott expected to receive press credentials based on past practice. *Id.* He notified Defendants of his reporting for UPW, requested credential application details, and asked to join the legislative press release list. *Id.* Defendants did not respond initially but later clarified that only credentialed media receive press releases. *Id.*

#### *Schott's Reporting Angers Defendants*

In 2024, Schott often reported critically on the Utah legislature and Defendants. *Id.* at 22. On January 10, Schott posted a humorous X.com comment about legislative staffers struggling with a backdrop. *Id.* Defendant Osborn replied on X.com, calling Schott a “dick” for mocking staff and labeling his actions “#classless.” *Id.* The backdrop was for a

House Republican press conference outlining 2024 priorities. *Id.* at 21.

When KUTV asked about banning DEI at state colleges, Rep. Katy Hall was present, but Schultz blocked her from responding. *Id.* Schott's next-day article noted Schultz's evasion. *Id.* Schultz sent Schott angry messages accusing him of bias, one stating, "You used to be the best reporter in the Legislature. It's sad how far you've fallen." *Id.*

On December 12, 2024, Schott reported for UPW that a nonprofit accused Senate President Stuart Adams of violating campaign disclosure laws. *Id.* at 22. Adams responded on X.com, calling Schott a "former media member" and his story "neglectful journalism." *Id.*

Defendant Peterson, Adams' Deputy Chief of Staff, also criticized Schott for the same story and for not waiting for her to provide a comment on her own timeline before publishing. *Id.* Peterson referred to Plaintiff Schott as "someone who claims to be a journalist," and Plaintiff UPW as a "blog," accused Schott of a "lack of professionalism," "lack of journalistic integrity," having "disregard for accurate reporting and ethical standards." *Id.* She chided him for "fail[ing] to obtain information from the Lieutenant Governor's Office," and told him "You

aren't a journalist" when he asked which ethical standards she claimed he had not met. *Id.*

Schott clarified he had sought comment from the office multiple times, and after learning of the public complaint that day, rushed to report breaking news. *Id.* He offered to update the story and asked if Peterson's criticism would affect his press credential application. *Id.* Over five hours later, Peterson finally provided a comment she had already given to another outlet, which Schott had already seen, and called UPW a "blog" while accusing Schott of lacking ethics. *Id.* at 23. When asked what standards Schott violated, Peterson replied, "If you have to be told, you aren't a journalist," and with respect to his credential application, said only, "We will follow our policy." *Id.*

#### *Defendants Deny Schott's Press Credentials Application*

Five days later, on December 17, 2024, Schott applied for a press credential, passed the background check, and contacted House Communications Director Alexa Musselman. *Id.*; App. Vol. II 101. Musselman said she needed to review the application and would follow up. *Id.* Schott had never faced additional scrutiny before. *Id.* Nonetheless, he waited for a decision. *Id.* When he asked if Utah News

Dispatch faced similar scrutiny, Musselman claimed they'd had "conversations" but then noted she was on leave during their process.

*Id.* Other applicants received quick approvals. *Id.* at 24.

After waiting 90 minutes, Schott texted Musselman, who, with Senate Deputy Chief of Staff Aundrea Peterson, emailed that his application was denied because "Utah Capitol media credentials are not issued to blogs, independent, or freelance journalists." *Id.* Schott appealed, but on December 26, 2024, Abby Osborne and Mark Thomas upheld the denial not only because UPW was a "blog" or "independent" media but also because they did not believe Schott was "a professional member of the media associated with an established, reputable news organization or publication." *Id.*

The denial email and appeal letter did not specify why UPW was deemed a non-reputable "blog" or "independent media outlet." *Id.* Only after Schott filed suit, Defendants provided further explanation that those terms meant the publication lacked an "editor," used a "stream of consciousness" writing style and was missing "any institutional framework or a sufficiently established track record." *Id.* at 26. None of these conditions appear in the 2025 policy. Defendants never asked

whether UPW had an editor, nor did they inquire into UPW's institutional framework or whether Schott used a "stream of consciousness" writing style. *Id.*

In contrast to their treatment of Schott, Defendants issued credentials to numerous journalists and organizations who seemingly would not qualify under the standards Defendants claim to employ, including *Building Salt Lake*, which self-describes as "independent media" and "Top-100 Urban Planning Blog." *Id.* at 25.

Defendants also issued credentials to independent outlets like *Gephardt Daily*, *Utah Policy*, and *Utah News Dispatch*. *Id.* Becky Ginos, the self-edited sole staff of *Davis Journal*, and Holly Richardson, the self-edited sole employee of *Utah Policy*, a news aggregator, also received credentials. *Id.* at 27.

### *The Stated Justifications*

In testimony, defendants state they denied Schott's application on the basis that UPW was a "blog" or "independent," and admit Schott and UPW otherwise qualify for credentials. *See App. Vol. IV 21:11-15*;<sup>1</sup>

---

<sup>1</sup> The numbering format is the Appendix page number, colon, transcript line numbers.

*Id.* at 129:3-6. *See also Id.* at 128:22-24 (agreeing “Schott is a professional member of the media”), 120:8-10 (believes Schott is “bound by a code of ethics”), 122:1-10 (agreeing Schott is a journalist that regularly covers the state legislature); *Id.* at 21:8-10 (stating Schott “met the personal qualifications” for a press credential under the 2025 Policy).

Musselman and Peterson both acknowledged that credentialed media have greater access to the Legislature. *Id.* at 63:18-25, 64:3-8; 109:7-13, 110:6-26:19. Musselman also noted that their “media distribution lists are reserved for credentialed media and then communications directors or staff PIOs [public information officers] of state agencies.” *Id.* at 35:21-24. Peterson stated that providing the press room in the basement of the Capitol offered some media members a “substantial benefit.” *Id.* at 109:7-13. 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. *Id.* at 110:15-25:2. Also, both 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. *Id.* at 51:17-25 (media availability videos are delayed); *Id.* at 103:17-23 (posting press releases on a delay); *Id.* at 102:12-103:25 (Senate president press conferences posted on a delay or not at all).

*Defendants Exercise Abundant Discretion When Applying their Ambiguous Policy*

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.” *Id.* at 26:2-20 (emphasis added). Musselman also conceded that blogs can do independent reporting, break news and can even be considered journalism. *Id.* at 26:8-13. In essence, her “general understanding of what a blog is” contains differing potential criteria – “single author” versus “multiple authors” and “commentary” versus “no commentary.” *Id.* at 26:4-24.

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. When asked about their “nondiscretionary policy” regarding blogs and independent media,

Musselman and Peterson could not definitively answer “yes” or “no” to several questions:

- Whether—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. *Id.* at 22:23-23:9; 137:4-12.
- “If there was a website with a single author that had journalism on it and no commentary, would that be a blog?” *Id.* at 26:18-20.
- “Would, in your mind, a website classifying itself as a blog cause you to deny an application?” *Id.* at 29:16-17.
- “So you can’t say whether having an editor who’s separate from the reporter is sufficient to make a publication not a blog?” *Id.* at 138:2-5.
- 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?” *Id.* at 32:8-24.
- “Would knowing that [UPW] has an editor check that box for that aspect of [Schott’s] application?” *Id.* at 46:11-16.
- 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. *Id.* at 61:3-9.
- How Defendants determine who is “reputable.” *Id.* at 19:1-9.
- What an “established track record” is for purposes of determining what qualifies an organization as “independent” or a “blog.” *Id.* at 17:9-13.

- “*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.” *Id.* at 130:19-25.
- If Tucker Carlson, who “has his own media organization[,] could . . . qualify for credentials?” *Id.* at 131:5-13.

Peterson could not explain the difference between “independent media” and a “blog” choosing instead to just say “it depends on the situation for each.” *Id.* at 130:3-7. Indeed, even though *Building Salt Lake* expressly identifies itself as a blog, Peterson insisted she would not deny their credential application because “*I don’t consider them a blog.*” *Id.* at 136:9-24 (emphasis added).

Musselman and Peterson admitted that neither space nor security concerns precipitated their modification of the Policy. *Id.* at 54:6-8 (“Q. . . . [S]pace limitations were not part of the contemplation? A. No.”); *id.* at 45:13-20 (stating her belief that Schott would use media credentials appropriately); *see also Id.* at 34:18-25 (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 was Peterson “concerned that [they] were going to start receiving more

applications then because there were more of those independent media out there[.]” *Id.* at 14:15-18.

*Schott’s Lack of Access During the 2025 Legislative Session*

During the 2025 Utah Legislative Session that ran from January 21, 2025, to March 7, 2025, Defendants denied Schott access to legislative areas and press-exclusive events equal to that of other press members. App. Vol. I. 28-29. Schott missed, and will continue to miss, press conferences, press releases, media availabilities and press briefings that other members of the press are invited to attend. *Id.* at 29. Unlike Schott, other reporters cover meetings, press conferences, and legislative actions in media-only areas, obtaining videos, photos, and audio Schott cannot. *Id.* They interact with legislators, witness actions closely, receive materials, and attend impromptu briefings, while Schott cannot. *Id.* Schott will also be denied access to likely special sessions. *Id.* No other applicant like Schott has been denied 2025 credentials. *Id.* at 25. Schott’s harm, and that to his audience, is ongoing. *Id.* at 28-29.

The access afforded to the credentialed media is important and significant to journalists and their audiences. *Id.* at 20. Attending events in person and live affords opportunities to newsgather and

report that those watching or listening remotely and/or on a delayed feed lack. *Id.*

Schott explained aspects of how he's disadvantaged from not having press credentials:

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. ... I cannot be in person at the governor's monthly televised press conference.

App. Vol. III at 138:4-139:24. Schott explained in detail how watching delayed video feeds isn't as good as being in the room where it happened:

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, ... 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. 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.

*Id.* at 136:12-137:22. Schott synthesized the result for his coverage of many Statehouse events: “I would have to rely on the news judgment of other reporters to inform my article should I try to write one.” *Id.* at 139:22-24.

### *Procedural History*

Plaintiffs brought this lawsuit in the United States District Court for the District of Utah on January 22, 2025, and moved for a temporary restraining order and preliminary injunction the same day. App. Vol. I at 1. The district court heard and denied the TRO motion on February 5, 2025. *Id.* at 6. Plaintiffs filed an amended complaint and amended motion for preliminary injunction on February 26, 2025. *Id.* at 12, 98. During a short discovery period, Defendants filed a motion to dismiss on April 8, 2025. *Id.* at 163. Briefing concluded on May 13, 2025. *Id.* at 10. Without holding a further hearing, the district court dismissed the case and denied the motion for preliminary injunction as moot on September 29, 2025.

The court ruled that “Plaintiffs have not alleged an infringement of an activity protected by the First Amendment,” App. Vol. II at 255,

holding that “there is no general First Amendment right of access to all sources of information within governmental control,” and that the press does not have a “special right of access to government information not available to the public.” *Id.* at 257 (quoting *Smith v. Plati*, 258 F.3d 1167, 1172 (10th Cir. 2001)). The district court found it salient that Smith alleged that Plati denied him “resources ‘routinely given to other media.’” *Id.* (quoting *Smith*, 258 F.3d at 1178). The district court concluded this meant *Smith* implied that “the First Amendment does not encompass a right to ‘resources . . . routinely given to other media.’” *Id.* at 258. It then footnoted several cases Schott and UPW cited from other circuits that conflict with its application of *Smith*. *Id.* at n.97.

The district court found the retaliation claim failed because Schott continued to report on legislative events, and found it “speculative” that persons of ordinary firmness would be chilled. *Id.* at 97. The district court also found that Schott had alternative means to gather information, and thus any harm from delay or unavailable information or inability to ask questions at press conferences was “trivial or de minimis.” *Id.* at 260-261.

The prior restraint claim failed, the district court reasoned, because “Plaintiffs have not alleged that the 2025 Policy restricts the content of their speech” and allegations of discrimination “are speculative.” *Id.* at 262-263. The vagueness claim failed “[b]ecause the 2025 Policy uses commonly-understood terms and Plaintiffs themselves anticipated they would be denied a media credential according to the Policy criteria.” *Id.* at 264.

Schott and UPW filed their appeal on September 30, 2025. App. Vol. III at 267.

#### SUMMARY OF THE ARGUMENT

1. The government may not deny credentials to a journalist based on the viewpoints he conveys. Viewpoint discrimination can take many forms, and is not limited only to political viewpoints. *Matal v. Tam*, 582 U.S. 218, 243 (2017) (“the term ‘viewpoint’ discrimination [is used] in a broad sense”). The First Amendment “protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses.” *Id.* at 249 (Kennedy, J., concurring). In this case, Defendants admittedly wrongfully discriminate against the viewpoint

perspective of “independent” journalism. This admitted discrimination is unconstitutional and reason enough to reverse the district court.

However, there is another layer. Although not necessary to prevail in this matter, Schott also showed that the real intent and effect of Defendants’ actions was to discriminate against the critical, left-leaning journalism he provides. The policy revisions resulted in only Schott being denied credentials and even telegraphed a warning of their intent to deny credentials to a previously credentialed journalist.

The media credentialing policy also fails because it is vague and applied inconsistently, and thus impermissibly allows for arbitrary decision-making and viewpoint discrimination.

Defendants’ decisions didn’t even follow the vague written policy. They inconsistently applied standards different than the written policy they claim originated from prior policies with the purpose and effect of denying credentials to Schott alone after he covered the Utah legislature for over twenty years.

Defendants engaged in patent viewpoint discrimination when adopting a policy that required a journalist to have a supervising editor with the authority to hire and fire the journalist, as it prohibited

journalists financially responsible for their own work from being credentialed. Similarly, the newly adopted policy prohibiting “independent” journalists, with the supposed purpose of preventing “stream-of-consciousness” reporting, unconstitutionally discriminates against “live” bloggers and “hot-take” journalism. Furthermore, the policy only selectively does so, because it does not prohibit journalists who receive credentials from posting hot-takes on their platforms or social media.

At the motion to dismiss phase, the Plaintiffs’ allegations should have been credited, and the case allowed to proceed. The district court erred by concluding the complaint failed to state a claim.

2. The District Court erred in not issuing a preliminary injunction. The evidence and testimony submitted more than supported a preliminary injunction, as the loss of First Amendment rights, even for a short period of time, is always irreparable.

Schott makes his living reporting Utah political news. The very name “Utah Political Watch” conveys this. Excluding Schott from press conferences, media availabilities, distribution list, and designated media workspaces abridges Schott’s Free Speech rights.

Musselman and Peterson admitted in their depositions that they had no pressing concerns about space limitations or being flooded by applicants if they hadn't restricted their policy. UPW would become only the 21<sup>st</sup> credentialed organization once Schott is credentialed. Defendants had no legitimate basis to block independent journalists in general, and Schott in particular, from receiving credentials. There is no compelling reason for the government to demand a reporter has a supervisor with the ability to fire or discipline him.

Defendants' viewpoint discrimination is yet more troubling considering they employed it to retaliate against Schott for hard-hitting coverage and breaking news that legislative leaders don't like. The district court erred in not issuing a preliminary injunction.

#### ARGUMENT

Musselman and Peterson modified the media credentialing policy for 2025 with one purpose, and one result: To exclude Bryan Schott, who'd been covering the legislature for over twenty years, from receiving credentials. The motivation was obvious from the criticism legislative leaders and staff leveled at Schott, calling him a "former journalist," questioning his ethics and tweeting that he was unprofessional. The

single-minded intent is also evident from the fact that reporters from similar media organizations received credentials.

When deposed about these discrepancies and the policy, Musselman and Peterson could not agree on what the policy meant or how it would apply in various scenarios. They could not explain why Schott's personal track record did not count. Nor were they able to say what changes Schott and UPW could make so that Schott could be credentialled, or whether UPW would be considered established enough by December 2025 so that Schott would be credentialed for the 2026 session. Other organizations established for less than six months, some just newly formed, have been credentialled. When the people who implement the policy cannot say what a term like "established" means, the policy is vague and its enforcement selective and arbitrary.

Yet, the district court denied Plaintiffs a preliminary injunction and dismissed the case because it answered the wrong question—whether a journalist is entitled to greater access to governmental information than the public—something Plaintiffs never contended. The issue here, rather, is whether a government can exclude a disfavored journalist from receiving credentials based on the viewpoints he expressed. The

First Amendment does not tolerate such viewpoint discrimination.

Accordingly, the District Court erred in denying the preliminary injunction and dismissing the case.

## **I. Standard of Review**

Dismissals for failure to state a claim are reviewed *de novo*. *Dry v. United States*, 235 F.3d 1249, 1252 (10th Cir. 2000) (“We review [Rule] 12(b)(6) dismissals *de novo*, applying the same standard used by the district court”). The refusal to grant a preliminary injunction carries a mixed standard of review. *Warner v. Gross*, 776 F.3d 721, 728 (10th Cir. 2015). Legal determinations are reviewed *de novo*, and factual findings are reviewed for clear error. *Id.*

## **II. This Case is About Viewpoint Discrimination, not Access in General**

Contrary to the district court holding, Schott and UPW do not seek “an unequivocal right to gather news.” App. Vol. II at 255. Schott and UPW seek to have Defendants apply a media credentialing policy that is not discriminatory, arbitrary, or retaliatory. App. Vol. I at 30-38.

The district court erred in concluding that *Smith v. Plati*, *supra*, controls this case. *Smith* addressed the situation where Theodore Smith, a pro se attorney, filed a shoddy complaint alleging false arrest

after being ticketed detained for trespassing in a University of Colorado building. *Smith v. Plati*, 258 F.3d at 1172. Smith also alleged David Plati, the university's media relations official, retaliated against Smith for maintaining "NetBuffs.com," an antiquated, but still currently active community bulletin-board website, allowing Colorado sports fans to post and interact on topics relating to university sports.<sup>2</sup> *Id.* A review of archives of the website indicates that while the site included links to articles from other publications, NetBuffs did not contain original journalism.<sup>3</sup>

Smith alleged Plati either charged for, or refused, Smith materials given to the public and media, would not treat Smith as a member of the media, denied Smith access to coaches and practices, and prevented Smith from distributing advertisements on campus. *Id.*

This court rejected Smith's theory "that exclusion from an area supported a claim of unlawful detention." *Id.* at n. 8. This court also found "Smith ... alleges little concrete, retaliatory action." *Id.* at n.9.

---

<sup>2</sup> The site, [www.netbuffs.com](http://www.netbuffs.com), remains active, but now redirects to [www.colorado.sportswar.com](http://www.colorado.sportswar.com) where it is currently hosted.

<sup>3</sup> See, e.g., <https://web.archive.org/web/20001211184800/http://netbuffs.com/text/newsnews.htm>

Smith did not allege that the Defendants lacked a right to copyright their materials or to exclude him from practices. *Id.* This court quoted the complaint as asserting what Smith called “some sort of right to newsgather.” *Id.* at 1177 (quoting Smith’s complaint). Defendants allegedly violated this right “by declining to provide him certain information about its varsity athletic programs,” *Id.* This third claim was no better articulated than the first two claims. There were no allegations the university issued media credentials, had a credentialing policy, or denied credentials to Smith. This Court quickly dispatched the claim by noting that “there is no general First Amendment right of access to all sources of information within governmental control,” and that applies equally to the press. *Id.* at 1178.

*Smith* involved a poorly pleaded complaint being properly dismissed. The holding in *Smith* is not in dispute and isn’t applicable here. Absent in *Smith*, but present here, is a written credentialing policy that is vague, ambiguous, and discriminatorily enforced; concrete allegations of viewpoint discrimination; and detailed factual allegations of harms that befell the plaintiffs. Schott does not allege a general entitlement to information. Rather, Schott seeks non-viewpoint-based access to

credentials that will allow him to have equal access as other media to fora Utah has created. Nonetheless, the district court concluded that “Plaintiffs have not alleged any infringement of an activity protected by the First Amendment.” App. Vol. II at 255.

This holding is plainly wrong. The Supreme Court has held that “the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.” *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

Schott does not seek superior access to other reporters. He seeks to remedy “elimination of some reporters from an area which has been voluntarily opened to other reporters for the purpose of news gathering.” *Consumers Union v. Periodical Correspondents’ Assoc.*, 365 F. Supp. 18, 25-26 (D.D.C. 1973), *rev’d on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975) (citations omitted). This scenario “presents a wholly different situation,” and “[a]ccess to news, if unreasonably or arbitrarily denied” violates the First Amendment. *Id.*; *see also AP v. Budowich*, No. 1:25-cv-00532, 2025 U.S. Dist. LEXIS 66994, at \*44 (D.D.C. Apr. 8, 2025) (“[T]he Government has chosen to open the doors of nonpublic

spaces for some journalists. The Government thus cannot exclude the AP from access based on its viewpoint”); *see also Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (finding journalist access may not be denied arbitrarily or for less than compelling reasons where “the White House has voluntarily decided to establish press facilities for correspondents who need to report therefrom”).

A recent D.C. Circuit decision shows the folly in the district court’s decision. The D.C. Circuit held the White House could not engage in viewpoint discrimination to exclude the Associated Press from receiving “hard pass” press credentials, or from attending fora, such as the East Room or the Brady Room, to newsgather and report. *AP v. Budowich*, No. 25-5109, 2025 U.S. App. LEXIS 13980, 2025 WL 1649265 (D.C. Cir. June 6, 2025). The order specifically stated “that the preliminary injunction [remains] applicable to the East Room.” *Id.* at \*2. A concurring opinion explained the order. “When 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). Schott alleges he was excluded for multiple impermissible viewpoint-based reasons—the policy as written is

viewpoint discriminatory and was written and enforced to discriminate against Schott alone.

### **III. Schott and UPW Properly Pled First Amendment Violations**

“To determine when and to what extent the Government may properly limit expressive activity on its property, the Supreme Court has adopted a range of constitutional protections that varies depending on the nature of the government property, or forum.” *Verlo v. Martinez*, 820 F.3d 1113, 1129 (10th Cir. 2016). “The [Supreme] Court has identified three types of speech fora: the traditional public forum, the designated public forum, and the nonpublic forum. *Id.* Additionally, “the government can create a limited public forum by allowing selective access to some speakers or some types of speech in a nonpublic forum, while not opening the property sufficiently to become a designated public forum.” *Id.* at n. 6 (cleaned up).

A limited public forum “exists where a government has reserved a forum for certain groups or for the discussion of certain topics.” *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215 (2015). When a forum is “generally available for the discussion of certain topics” and open to the public, “it is a limited public forum.”

*Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 145 (2d Cir. 2004).

To be sure, Plaintiffs’ primary expression occurs online, but that expression emerges from the statehouse, often “live” or nearly live. This ability to report contemporaneously all that can fully be seen, heard, and gathered in person has been restricted. The media spaces at issue in this case are limited public fora. The complaint alleges that the denial of access is unreasonable considering the forum’s purpose or is not viewpoint-neutral. *See Cornelius*, 473 U.S. at 806.

*A. The media credentialing policy is not reasonable.*

The reasonableness of a restriction “must be assessed in light of the purpose of the forum and all the surrounding circumstances.” *Cornelius*, 473 U.S. at 809. “Reasonableness” is typically a mixed question of fact and law inappropriate for disposition by a 12(b) motion.

The complaint alleges: “Defendants do not have space or security concerns that justify denying independent journalists or bloggers credentials or determining that they are not professional members of the media for a reputable news station.” App. Vol. I at 32. And the evidence shows Defendants’ *only* stated reason for denying credentials

to Schott was that “media credentials are currently not issued to blogs, independent, or other freelance journalists.” *Id.* at 24.

Beyond the written policy, Plaintiffs allege that Defendants exercise full discretion when applying their policy, demonstrated by the fact they apply different standards than those contained in policy. During litigation, Defendants provided a post hoc explanation that “independent” media was defined as an organization without an “editor,” and/or one devoid of “any institutional framework or a sufficiently established track record,” and defined “blog” as a publication containing articles written in a “stream of consciousness”—whatever that means. *Id.* at 26.

The amended complaint alleges that this post hoc reasoning did not appear to have been employed either because Defendants did not ask Schott if UPW had an editor before denying his application. *Id.* The application asks the applicant to identify a “supervisor,” not an editor. App. Vol. II 99. As owner and publisher of UPW, Schott correctly answered “self.” *Id.* at 101. Defendants have never explained what they perceive to be “stream of consciousness” reporting. App. Vol. I at 26. Defendants have never provided the specific threshold a journalist or

publication must meet to have “institutional framework” or an “established track record.” *Id.*

Defendants cannot have an ever-changing, amorphous, unwritten list of reasons to deny someone for being “independent” or a “blog” and simultaneously claim that their policy rids them of discretion.

Defendants’ use of prior policies to explain themselves shows that 2025 Policy doesn’t eliminate discretion.

The rest of the 2025 Policy – “the surrounding circumstances” (*Cornelius*, 473 U.S. at 809) – reflects Defendants’ desired discretion. As a brand-new addition to the policy in 2025, Defendants made sure to “reserve the right to limit the number of credentials allocated to any media organization” in their Policy. *Id.* at 69. Defendants also make clear that “credentials may be denied or revoked for *any* reason” that they deem appropriate. *Id.* at 71. Defendants exercise the sole discretion to determine who is a “professional member of the media” or “established reputable news organization.” *Id.* They can even force a media credential applicant to further “submit a letter of introduction” for subjective review. *Id.* The 2025 Policy affords ample discretion that

would not exist if eliminating discretion was the true intent of the change.

That Schott continues to do his work using various work arounds and second-best solutions does not demonstrate the reasonableness of Defendants' policy or exclusion of him. 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 v. Martinez*, 561 U.S. 661, 690 (2010). 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.* The district court failed to apply this Supreme Court precedent, wrongly dismissing the harm as trivial.

*B. The media credentialing policy is not viewpoint-neutral*

The government cannot "den[y] access to a speaker solely to suppress the point of view he espouses." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (quotation and citation omitted). Defendants openly expressed their viewpoint-based motives for denying Schott credentials. The legislative leadership publicly

voiced animus towards Schott because of his reporting. Echoing leadership, Defendant Peterson sent messages to Schott calling him a “former journalist” and criticizing the way he writes his stories. Defendants’ complaints about Plaintiffs’ lack of a separate editor and “stream of consciousness” reporting show they denied credentials based on Plaintiffs’ journalistic and editorial choices. *See App. Vol. I at 26.*

Journalists exercise discretion to communicate in various styles. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994). Defendants admit their policies are intended to deny credentials to UPW and Schott because of how they communicate their views to their audience in their desired style. “[T]he term ‘viewpoint’ discrimination [is used] in a broad sense.” *Matal*, 582 U.S. at 243. Defendants target the viewpoint of “stream of consciousness” reporting not subjected to third-party control. The First Amendment “protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses.” *Id.* at 249 (Kennedy, J., concurring). Defendants admittedly attempt to punish this right by demanding reporting happen through corporate structures where the journalist is subject to reprimand and termination. “[T]he public expression of ideas may not be prohibited

merely because the ideas are themselves offensive to some of their hearers,” including sensitive ears in the Utah legislature. *Id.* at 244.

What’s more, Defendants made no efforts to determine whether the factors they claim to have used were present *before* denying Schott’s application. App. Vol. I at 26. The application form asked if Schott had a supervisor, not an editor. UPW had an editor, but the editor was not Schott’s supervisor. The application did not ask about Schott’s in-depth reporting process. *Id.* at 22-23. This failure to inquire about the topics they claim to care about shows Defendants’ written and unwritten policies were mere pretext for viewpoint discrimination.

Other facts add credence to this conclusion. Five days before Schott’s application, Senate President Adams criticized him as a “former media member” undermining journalism’s integrity, and Defendant Peterson echoed this, calling UPW a “blog” and stating Schott is “not a journalist.” *Id.* Five days later, Defendants denied Schott’s credentials despite his 25 years of journalism and prior credentials, citing manufactured, post hac reasons not in the 2025 Policy. *Id.* at 23-26.

Defendants’ hostility and refusal to explain the denial or offer remedies further indicate viewpoint discrimination. *Id.* at 77-78. So too

does Defendants’ inconsistent application of their standards.

Defendants gave credentials to *Utah News Dispatch*, *Utah Policy*, and *Davis Journal*, despite similar or lesser institutional frameworks. *Id.* at 83-97. *Building Salt Lake* – a self-identified “blog” – received credentials, which shows an arbitrary application of what constitutes a “blog.” *Id.* at 27. Defendants do not question the journalistic reputations or the track record of other publications. And it stands to reason, that *if* Defendants’ metrics were consistently applied, Schott’s 25 years of experience and decade as a legislative press credential holder would have qualified him for credentials this year.

*C. Count II was properly pled in the alternative*

Courts are split as to when forum analysis applies. In several cases, courts consider the denial of reporters from government-created spaces without ever engaging in forum analysis. *See Sherrill*, 569 F.2d at 124; *see also Balt. Sun Co.*, 437 F.3d at 414.

As numerous cases explain, forum analysis is used to assess the constitutionality of limitations on *expressive* activities. *Price v. Garland*, 45 F.4th 1059, 1068 (D.C. Cir. 2022) (finding forum analysis); *Reed v. Bernard*, 976 F.3d 302, 324 n.13 (3d Cir. 2020) (“right-of-access

jurisprudence does not map neatly onto the forum analysis required by the Free Speech Clause”), *vacated due to subsequent dismissal*, No. 20-1632, 2021 WL 1897359 (3d Cir. May 4, 2021). The D.C. Circuit recently concluded forum analysis applies when evaluating press access to White House credentials, and access to events in the Brady and East rooms. *AP*, 2025 U.S. App. LEXIS 13980, at \*2. Government actors cannot employ viewpoint discrimination to bar access to a news gathering forum.

*D. Plaintiffs alleged an adequate injury on the Retaliation claim*

Schott alleged his work was impeded because he is denied access to various press conferences and hearings. *See Media Matters for Am. v. Paxton*, 138 F.4th 563, 579 (D.C. Cir. 2025) (plaintiffs injured by “retaliatory government actions that have adversely affected their newsgathering activities and media business operations”). There is no dispute that defendants denied media credentials to Schott and as a result he has been excluded from covering certain events in person. Schott also alleged a person of ordinary firmness would be chilled in their speech and modify their reporting because of potentially being denied credentials if their reporting displeases the legislature. App. Vol.

I at 37. The district court erred in concluding that Schott's injury wasn't substantial and the chilling effect allegation was "conclusory." But Schott suffered concrete repercussions because of his reporting. And a person of ordinary firmness would shade their coverage to avoid the same punishment.

The impact to Plaintiffs' ability to report and their First Amendment rights are hardly trivial or de minimus. "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). At the very least, the impact would be a question of fact that prevents Rule 12(b) dismissal.

*E. The Complaint alleged a cognizable prior restraint claim*

The district court's incorrect conclusion that Schott and UPW suffered no injury also impacted its decision to dismiss the prior restraint claim. Because the district court incorrectly concluded that lacking media credentials did not impact Schott's reporting, it also incorrectly concluded that the credentialing policy did not regulate speech.

“[I]n the area of free expression, a licensing statute placing unbridled discretion in the hands of government officials ... constitutes a prior restraint and may result in censorship.” *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988). “[T]he mere existence of the licensor’s unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused.” *Id.*

*Lakewood* concerned an ordinance that gave the mayor discretion to grant or deny annual licenses to place newspaper racks on public property. Two facts swayed the Court’s decision to condemn Lakewood’s scheme as an unlawful prior restraint. First, newspapers were required to constantly seek relicensing—and “[a] speaker in this position is under no illusion regarding the effect of the ‘licensed’ speech on the ability to continue speaking in the future.” *Id.* at 759-760.

Second, the licensing scheme was “directed narrowly and specifically at expression or conduct commonly associated with expression.” *Id.* at 760. “Such a framework creates an agency or establishes an official charged particularly with reviewing speech, or conduct commonly

associated with it, breeding an ‘expertise’ tending to favor censorship over speech.” *Id.*

Just like the distribution of newspapers in *Lakewood*, Plaintiffs’ newsgathering and live reporting are both either expression or commonly associated with expression. And as in *Lakewood*, the credentials application here must be filed every year. Schott knows that what he says today will impact his ability to renew his license tomorrow. *Lakewood* controls. Defendants cannot exercise “expertise” to decide that Schott, who is doing the same reporting he always has, is suddenly no longer a reputable journalist using proper technics.

*F. The complaint cognizably alleges the media access policy is unconstitutionally vague*

The district court ruled that Defendants’ credentialing policy is not vague because its terms were either “commonly understood” or were defined in earlier “iterations of the policy.” App. Vol. II at 264. This is wrong.

As the complaint alleges, terms like ‘established,’ ‘reputable,’ ‘blog,’ ‘freelance,’ and ‘independent media,’ may have general meanings, but that doesn’t stop them from being vague. Defendants’ implementation of the policy demonstrates this vagueness. Organizations that were

established for less than six months, sometimes for less than 2 months, have been credentialed. This strains both ‘established,’ and ‘reputable.’ Organizations that expressly claim to be ‘independent’ or ‘blogs’ were credentialed, because Defendants didn’t view them as such for purposes of applying the policy.

“Independent media” has many common definitions. Many news organizations, including the *Salt Lake Tribune*, self-identify as “independent media.” This could mean independent of government control. It can mean independent of larger media organizations. It can mean a news publication that has its own editorial control regardless of ownership. Defendants claim, *post hoc*, to use none of these definitions. This is the very essence of vagueness. The district court erred in concluding, as a matter of law, that the terms are unambiguous and that the policy isn’t vague. Plaintiffs pled sufficient facts to, at a minimum, create a question of fact.

Nor does looking back for “defining characteristic” in prior policies, that contain different language and were not even referenced or made available to applicants under the 2025 policy, “‘provide fair notice to the public’ of what the requirements are [or] ensure the Policy is not

administered arbitrarily.” App. Vol. II at 264. The definitions were not meaningfully available to the public. Defendants arguing “trust us, we are following our policy as we intend it” is no policy at all.

\* \* \*

The Complaint alleged cognizable claims that Defendants violated the First Amendment when denying media credentials to Bryan Schott. The complaint adequately alleges that the written policy impermissibly discriminates against independent journalist and bloggers; the policy language is vague; the policy was not applied as written; and Defendants’ denial of credentials to Schott was viewpoint-based discrimination both because of his viewpoint as an independent journalist and because of his left-leaning political viewpoints. The dismissal should be reversed.

#### **IV. The District Court Erred by Not Issuing a Preliminary Injunction**

Schott and UPW bring this First Amendment suit under 42 U.S.C. § 1983 to challenge Defendants’ Media Credentialing Policy, which governs media access to designated press areas within the Utah State Capitol and is being used to block Schott from receiving credentials. A preliminary injunction will issue where “(1) the movant will suffer

irreparable injury unless the injunction issues; (2) the threatened injury . . . outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood of success on the merits.” *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003).

*A. Plaintiffs are likely to succeed on the merits*

The Supreme Court has long recognized a First Amendment right to news gather. *Branzburg v. Hayes*, 408 U.S. 665, 728 (1972). News gathering is “entitled to First Amendment protection because [it is] an important stage of the speech process that ends with the dissemination of information about a public controversy.” *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021) (citation omitted). Without “protection for seeking out the news, freedom of the press could be eviscerated.” *Branzburg*, 408 U.S. at 681.

Defendants have asserted their policy ensures professional journalists and established media maintain sufficient access. But freedom of press belongs to every journalist, not just those who work for “established” corporate-owned news organizations with deep pockets

and multiple stages of editorial review. “When the Framers thought of the press, they did not envision the large, corporate newspaper and television establishments of our modern world. Instead, they employed the term ‘the press’ to refer to the many independent printers who circulated small newspapers or published writers’ pamphlets for a fee.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring). The Supreme Court has long recognized that “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); *Branzburg*, 408 U.S. at 705 (“informative function” of the “organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists”). The recent resurgence in independent media brings us closer to the press environment the founders experienced and protected. Moreover, contrary to their written arguments, Defendants testified that they have no space limitations or concerns about overcrowding.

“First Amendment protection should not depend on whether the criticism is in the form of speech by a private individual or publication

by the institutional press.” *Garcia v. Bd. of Educ.*, 777 F.2d 1403, 1410 (10th Cir. 1985). This Court is not alone in holding that the extent of a journalist’s free press rights is not based on whether he writes for an independent or mainstream media organization. *See, e.g., Obsidian Fin. Group, LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014) (“The protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others’ writings, or tried to get both sides of a story”); *Snyder v. Phelps*, 580 F.3d 206, 219 n.13 (4th Cir. 2009), *aff’d*, 562 U.S. 443 (2011) (“Any effort to justify a media/nonmedia distinction rests on unstable ground, given the difficulty of defining with precision who belongs to the ‘media’”); *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000) (“a distinction drawn according to whether the defendant is a member of the media or not is untenable”); *In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986) (“To recognize the existence of a First Amendment right and yet distinguish the level of protection accorded that right based on the type of entity involved would be incompatible with the fundamental first

amendment principle that [the value of speech is not speaker dependent]”) (citation omitted).

Thus, all members of the media have an equal right to news gather regardless of the number of financial backers or corporate oversight they have. “Once there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media, or the rights of the First Amendment would no longer be tenable.” *Am. Broad. Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977).

Segregating media seating or press briefings into “preferred” and “unpreferred” viewing sections is not equal access and is unconstitutional. *See TGP Communs., Ltd. Liab. Co. v. Sellers*, No. 22-16826, 2022 U.S. App. LEXIS 33641, at \*15 (9th Cir. Dec. 5, 2022). “[G]ranting favorable treatment to certain members of the media. . . allows the government to influence the type of substantive media coverage that public events will receive.” *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986).

The right to report news includes the right to exercise independent editorial judgment. The Supreme Court “held that ‘the choice of

material . . . and the decisions made as to limitations on the size and content . . . and treatment of public issues . . .-whether fair or unfair-constitute the exercise of editorial control and judgment’ upon which the State cannot intrude.” *Id.* at 575 (internal quotation marks omitted). The choice to include or exclude a separate editor in the writing process or write in a “stream of consciousness” style is protected from government oversight or mandate and cannot serve as a criterion for granting access.

*B. Defendants’ restrictions fail forum analysis.*

To the extent that forum analysis may apply, the media spaces at issue in this case are limited public fora. In both nonpublic and limited public fora, regulations must be reasonable in light of the forum’s purpose and be viewpoint neutral. *See Cornelius*, 473 U.S. at 806(nonpublic forum); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001) (limited public forum); *see also McDonough v. Garcia*, 116 F.4th 1319, 1322-25 (11th Cir. 2024) (detailing evolution of Supreme Court’s forum analysis). The challenged restrictions fail forum analysis on both prongs.

1. *The restrictions are unreasonable considering the forum's purpose*

Defendants have not identified any space constraints (only twenty organizations have credentialed staff) or security concerns that make it reasonable to exclude independent, self-edited, or “non-reputable” media. Defendants’ stated reason for the policy—to “eliminate discretion”—is unavailing. Their policy provides Defendants various discretionary decisions, such as what constitutes a “blog” or “independent” media, how a journalist “adheres to a professional code of ethics,” or what makes a journalist “reputable” or a part of “established” media. The ascendancy of independent media should be a reason to welcome, not exclude it. Moreover, because Defendants are not up against space constraints, there is no justification to “eliminate discretion” in a way that reduces access to professional press. Limiting discretion does not justify viewpoint discrimination.

2. *The restrictions are not viewpoint-neutral*

“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.” *Tex. v. Johnson*, 491 U.S. 397, 414 (1989). “The government must abstain from

regulating speech when the specific motivating ideology or the opinion or *perspective* of the speaker is the rationale for the restriction.”

*Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (emphasis added).

Defendants’ viewpoint-based discrimination happens in several ways. First, as explained *supra*, Defendants’ post-hoc complaints that Plaintiffs do not have an editor and report a “stream of consciousness” shows that Defendants denied Plaintiffs’ credentials based on their use of editorial discretion to present their news pieces in a particular way. By “exercising editorial discretion” journalists “seek to communicate messages on a wide variety of topics and in a wide variety of formats.” *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994). Defendants’ policy ensures that Plaintiffs are barred access based on their editorial choices. This is viewpoint discrimination.

Moreover, Defendants made no efforts to determine whether the reasons they proffered in their declarations were applicable before denying Schott’s application. To be sure, they were not valid. The application asked about supervision, not content-editing. Nor was there a question about writing style or editing processes. Defendants’ failure

to inquire or validate their post-litigation reasons before denying Schott's application indicates these reasons are merely pretext.

Other facts surrounding Defendants' denial of Plaintiffs' press credentials further point to viewpoint discrimination. Prior to this legislative session, Schott easily obtained press credentials from the first year credentials issued. But Schott's reporting on the majority-Republican legislature was not always favorable and in early 2024, Defendants and their colleagues put Schott on notice that he fell out of favor of the legislature. Once Schott left the safety of a large news organization and established his own independent news site, Defendants altered their policy to ensure independent journalists were not allowed credentials. This policy change only impacted Plaintiffs.

Moreover, only five days before Schott applied for credentials, Senate President Adams criticized him, expressing anger about Schott's reporting on Adams' campaign finance disclosure. App. Vol. I 149. And Defendant Peterson followed, accusing Plaintiffs of wrongdoing, including "lack of professionalism," "disregard for accurate reporting and ethical standards," and being merely a "blog." *Id.* at 73-75, 149.

Five days later, Peterson and the other Defendants denied Schott press credentials.

These instances make clear that those in power dislike the focus, editorial slant, and techniques Plaintiffs use to report on the legislature. But they cannot deny Plaintiffs' importance and relevance as a member of the media when they respond to Plaintiffs' stories so strongly, immediately, and passionately, both publicly and privately.

The open hostility and stonewalling evidence clear viewpoint discrimination. Defendants did not like Plaintiffs' "pattern" of prior coverage of the majority of the Utah Legislature and are punishing Plaintiffs as a result.

Defendants have not treated similar news media in this way when they apply for credentials as "independent" media. *Utah News Dispatch*, for example, launched just days before the 2024 session started, yet all of its staff were credentialed for the 2024 session. *Utah Policy*, a news aggregator, received credentials for the 2025 legislative session, and their organization consists of one full-time employee/editor and interns. *The Davis Journal* also has one employee/editor, and it, too, received 2025 credentials. *The Daily Utah Chronicle* also purports to be

“independent” news and is run entirely by a staff of college students at the University of Utah, including its editor. Plaintiffs do not question their journalistic reputations. Schott, with his 25 years of experience and decade as a legislative press credential holder, would be considered reputable under any objective measure. Defendants apply their policies arbitrarily, as pretext.

3. *Alternatively, Defendants’ restrictions fail strict scrutiny.*

Of course, “[t]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.” *Branzburg*, 408 U.S. at 684. And so, “reporters are not cloaked with automatic ‘strict scrutiny protection’ merely because they are members of the press.” *Evers*, 994 F.3d at 612. But once the state denies press credentials for content- or viewpoint-based reasons, strict scrutiny applies. *See id.* at 613 (distinguishing from cases where “the court applied strict scrutiny, not simply because the plaintiffs were members of a free press, but because the press in those cases were being subject to differential treatment,” including “differential treatment based on content”).

Defendants’ policy, which distinguishes between speakers based on the content of their reporting and editorial process, is viewpoint based. The Supreme Court has urged courts to recognize that “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.” *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). When the Government applies a policy that “identifies certain preferred speakers” – such as “established” media journalists versus bloggers – it commits “a constitutional wrong.” *Id.* Such a policy “draws distinctions based on the message a speaker conveys[,]” even if that is not “obvious” at first blush. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015). While some policies “define regulated speech by particular subject matter, . . . others are more subtle, defining regulated speech by its function or purpose.” *Id.* Regardless, though, “[b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.” *Id.*

Defendants’ policy is content- and viewpoint-based. By prohibiting “independent” journalists and “bloggers” from the State Capitol but allowing in other corporate, “established reputable” media, Defendants make a clear distinction based on the function and purpose of each

journalist's reporting. Those who function without an editor or in a "stream of consciousness" reporting-style are banned. Those who serve the purpose of reporting on behalf of an independent or blog media source are banned. That is content and viewpoint discrimination. The vast political disagreement on which news organizations are reputable alone renders the policy hopelessly subjective.

Content-based restrictions are subject to strict scrutiny, which "requires a state to show that its law is narrowly tailored to serve a compelling interest." *Rodgers v. Bryant*, 942 F.3d 451, 456 (8th Cir. 2019). And the First Amendment provides even stronger protection against viewpoint discrimination, which is "an egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829. Because Defendants' policy is content- and viewpoint-based, it is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reyes*, 2024 U.S. Dist. LEXIS 163294, at \*28 (quoting *Reed*, 576 U.S. at 163). Defendants bear the burden of meeting this "demanding standard." *Id.*

In *Evers*, the Court stated "reporters are not cloaked with automatic 'strict scrutiny protection' merely because they are members of the

press,” but “the court applied strict scrutiny, not simply because the plaintiffs were members of a free press, but because the press in those cases were being subject to differential treatment....” *Id.* at 613.

To survive strict scrutiny, Defendants must “articulate a compelling government interest warranting the [policy’s] intrusion on [Plaintiffs’] First Amendment rights.” *Reyes*, 2024 U.S. Dist. LEXIS 163294, at \*28. They cannot do so. Defendants lack a compelling state interest justifying the challenged policy’s enforcement. Defendants acknowledge their exclusion of certain categories of journalists, but they never “specifically identify an ‘actual problem’ in need of solving.” *Id.* (quoting *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011)).

Even assuming the existence of an “‘actual problem in need of solving,’ the [policy] fails strict scrutiny because Defendants have not shown it is ‘carefully tailored to achieve those ends.’” *Reyes*, 2024 U.S. Dist. LEXIS 163294 at \*34 (quoting *Sable Commc’ns of Cal. Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989)). First, Defendants have no way of showing that a complete barring of “independent” media and “blogs” or those they deem to not be “reputable” is the least restrictive means to accomplish whatever post-hoc problem they identify. Prior policies

allowed independent media and bloggers. And they point to no issues with non-journalists being credentialed.

Second, the policy is “underinclusive or overinclusive” when judged against any State interest. *See Reyes*, 2024 U.S. Dist. LEXIS 163294 at \*35. It is overinclusive in that it bars *all* media that is independent or a blog regardless of any other criteria met. Independent journalism has such a growing influence and role in news media that the White House has created seats in its press room just to accommodate them. And influential blogs and independent journalists abound in this country – *Law360*, *Daily Wire*, *The Volokh Conspiracy*, Ben Shapiro, and Taegan Goddard, to name a few. But, based on Defendants’ policy, they would *all* be denied the ability to hold a press credential in the Utah State Capitol building. Certainly, Defendants cannot identify a problem that would warrant barring entire categories of media personnel.

The policy is also potentially underinclusive if avoiding discretion was the goal. If Defendants were truly concerned about the use of discretion when granting press credentials, they would not permit their media designees to determine whether journalists were “established” or “reputable” or “adher[ing] to a professional code of ethics.” But they do.

In depositions, Peterson and Musselman could not answer many questions about whether certain individuals and organizations would qualify for credentials. Nor could they state whether making various changes to the structure and operations of UPW would cause them to grant credentials to UPW; nor how long UPW has to operate before they would consider it “established” or “reputable.” *See, supra* at 14-16. If the officials issuing credentials cannot say what changes UPW and Schott can make to become credentialed, the policy is hopelessly ambiguous. Additionally, the policy is underinclusive because it does not prohibit credentialed media from conducting “stream-of-consciousness” reporting through social media posts or otherwise.

Thus, the over- and underinclusive nature of this policy should cause the Court to do as it has before: have “serious doubts about whether the government [was] in fact pursuing the interest it invoke[d], rather than disfavoring a particular speaker or viewpoint.” *Reyes*, 2024 U.S. Dist. LEXIS 163294 at \*35 (quoting *Brown*, 564 U.S. at 802).

Given this combination of shortcomings Defendants cannot meet their burden. Defendants’ policy fails strict scrutiny and Plaintiffs are likely to prevail.

*C. Plaintiffs have suffered and will suffer irreparable harm if this Court permits Defendants to continue to deny them their free press rights.*

Plaintiffs have been, and will continue to be, irreparably harmed by Defendants' arbitrary and discriminatory denial of press credentials. Schott was denied credentials for the 2025 legislative session. He was not allowed to attend Governor Cox's monthly press conferences for credentialed media. 61. He was not allowed to attend the daily meetings with Senate leadership in the Senate President's office, media availabilities with the Speaker of the House, and House or Senate rules committee meetings. ¶62. Schott was not sent legislative press releases. *Id.* ¶60. He was denied use of the privileged areas for media in the Capital building. Defendants are about to review applications for the 2026 session. Should they not be enjoined from applying their discriminatory policy, they are likely to deny credentials to Schott for a second year because of his reporting content and viewpoint.

Courts cannot grant access retrospectively. This viewpoint discrimination as to in-person access to such areas designated for the news media is not a de minimis injury. *TGP Communs.*, 2022 U.S. App. LEXIS 33641, at \*16. The Supreme Court has acknowledged that “[t]he

loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

*D. The Public Interest and Balance of Equities Favor Plaintiffs<sup>4</sup>*

The balance of harms favors Plaintiffs, and an injunction serves the public interest. On the one hand, Plaintiffs face the prospect of continued unconstitutional exclusion in violation of the First Amendment. On the other hand, allowing Plaintiffs access imposes no discernible harm on Defendants. “It is always in the public interest to prevent the violation of a party’s constitutional rights.” *Pryor v. Sch. Dist. No. 1*, 99 F.4th 1243, 1254 (10th Cir. 2024) (internal quotation marks omitted).

It is “[n]ot only newsmen and the publications for which they write, but also the public at large [that] have an interest protected by the [F]irst [A]mendment in assuring that restrictions on newsgathering be no more arduous than necessary, and that individual newsmen not be

---

<sup>4</sup> The balance of equities and public interest factors “merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).

arbitrarily excluded from sources of information.” *Sherrill v. Knight*, 569 F.2d 124, 129-30 (D.C. Cir. 1977).

\* \* \*

The district court erred by not entering an injunction prohibiting the Defendant from denying media credentials based on the applicant being “independent media,” a “blog” operator, not having a supervising editor, not being “established reputable,” or having written news stories critical of the Utah legislature or its members.

#### CONCLUSION

The district court’s judgment should be reversed, and the case remanded with instructions to grant Plaintiffs’ preliminary injunction motion.

DATED: November 10, 2025

**INSTITUTE FOR FREE SPEECH**

/s/ Charles Miller

Charles Miller (admitted *pro hac vice*)

**KUNZLER BEAN & ADAMSON, PC**

Robert P. Harrington

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

## STATEMENT REGARDING ORAL ARGUMENT

Oral argument would aid the Court because the case raises important questions regarding the right of Free Speech, which is at the core of the First Amendment, and whether a preliminary injunction should issue to protect those rights.

## CERTIFICATE OF TYPE-VOLUME LIMIT, AND TYPEFACE AND TYPE-STYLE REQUIREMENTS

I hereby certify on this 10<sup>h</sup> day of November, 2025 that:

1. This document complies with the length limit of Fed. R. App. P. 32(a)(7)(A), because the brief is 11,448 words long, excluding the sections excludable under the rule.
2. This document complies with the typeface and type-style requirements of Fed R. App. P. 32(a)(5)-(6), because the document is in a proportionally spaced font using Microsoft Word in a 14-point Century Schoolbook font.

/s/ Charles Miller  
Charles M. Miller

CERTIFICATE OF SERVICE

I hereby certify on this 10<sup>th</sup> Day of November that I electronically filed this document with the Tenth Circuit using its ECF system, which automatically served this document on counsel of record.

/s/ Charles Miller  
Charles M. Miller

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

---

UTAH POLITICAL WATCH, INC., and  
BRYAN SCHOTT,

Plaintiffs,

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.

**JUDGMENT IN A CIVIL CASE**

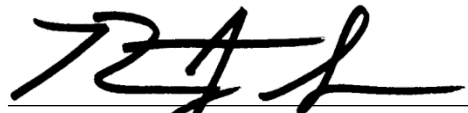
Case No. 2:25-cv-00050-RJS

Chief District Judge Robert J. Shelby

Per the Order entered on September 29, 2025, the court dismisses with prejudice the  
above-captioned case, and the Clerk of Court is directed to close the case.

SO ORDERED this 29th day of September 2025.

BY THE COURT:



ROBERT J. SHELBY  
United States Chief District Judge

---

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

---

UTAH POLITICAL WATCH, INC., and  
BRYAN SCHOTT,

Plaintiffs,

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.

**MEMORANDUM DECISION  
AND ORDER**

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

Chief District Judge Robert J. Shelby

Now before the court are Plaintiffs Utah Political Watch, Inc. and Bryan Schott's Amended Motion for Preliminary Injunction,<sup>1</sup> and Defendants Alexa Musselman, Andrea Peterson, Abby Osborne, and Mark Thomas' Motion to Dismiss.<sup>2</sup> For the reasons stated below, the court GRANTS Defendants' Motion to Dismiss and DENIES as moot the Preliminary Injunction Motion.

---

<sup>1</sup> Dkt. 37, *Amended Motion for Preliminary Injunction (Preliminary Injunction Motion)*.

<sup>2</sup> Dkt. 53, *Motion to Dismiss Plaintiffs' First Amended Complaint (Motion)*.

## FACTUAL BACKGROUND<sup>3</sup>

### A. Brian Schott and Utah Political Watch

Plaintiff Bryan Schott is a journalist who has been involved in media reporting in different capacities since 1993.<sup>4</sup> After working for various radio stations for fifteen years, Schott joined an independent news organization, UtahPolicy.com, as a reporter and editor until 2020.<sup>5</sup> Schott also hosted a political podcast and operated several websites covering Utah and Idaho politics from 2014 to 2020.<sup>6</sup> In 2020, the Salt Lake Tribune (Tribune), a Utah daily newspaper, hired Schott as a political correspondent.<sup>7</sup> In this capacity, Schott covered local news related to Utah politics and the Utah legislature.<sup>8</sup> On September 9, 2024, a Tribune employee emailed the Utah legislature media designees stating, “Journalists share what media organization they are working for when applying for the credentials, and . . . and the news outlet is printed on the pass. I am unsure how this impacts his press pass, but I wanted you both to be aware that [Schott] no longer represents the Tribune.”<sup>9</sup> Schott subsequently founded Utah Political Watch, Inc. (UPW) in October 2024.<sup>10</sup>

---

<sup>3</sup> The following facts are set forth as alleged in the Amended Complaint and the parties’ briefing, including the attached exhibits, with any factual disputes resolved in Plaintiffs’ favor. *See Bell Helicopter Textron, Inc. v. Heliquwest Int’l, Ltd.*, 385 F.3d 1291, 1295 (10th Cir. 2004) (“When the evidence presented on a motion to dismiss consists of affidavits and other written materials the . . . district court must resolve all factual disputes in favor of the plaintiff.”) (citation omitted); *Grynberg v. Ivanhoe Energy, Inc.*, 490 F. App’x 86, 90 (10th Cir. 2012) (“We accept as true any allegations in the complaint not contradicted by the defendant’s affidavits, and resolve any factual disputes in the plaintiff’s favor.”).

<sup>4</sup> Dkt. 36, *Amended Complaint* ¶ 9.

<sup>5</sup> *Id.* ¶ 12.

<sup>6</sup> *Id.* ¶ 14.

<sup>7</sup> *Id.* ¶ 15.

<sup>8</sup> *Id.*

<sup>9</sup> Dkt. 55-15, *Email from Jeff Parrott, Salt Lake Tribune, to Aundrea Peterson and Alexa Musselman* (Sep. 9, 2024, 08:00 MST) (*Tribune Email*); Dkt. 36-10, *Amended Complaint Exhibit 10, December 2024 Letter to Bryan Schott* (*December Letter*), at 1. Neither the email nor the parties’ briefing provides any explanation for why Schott no longer worked for the Tribune.

<sup>10</sup> *Amended Complaint* ¶ 16.

UPW is a website that provides a free daily newsletter on Utah politics and additional content with a paid subscription.<sup>11</sup> Schott is UPW's sole reporter, and UPW employs an editor to review Schott's work.<sup>12</sup> Schott and UPW also produce a podcast where Schott discusses Utah politics, including the Utah legislative sessions.<sup>13</sup> In addition to UPW's newsletter and podcast, Schott also posts videos about Utah politics on TikTok.<sup>14</sup>

## **B. Utah Legislature Media Coverage**

The Utah legislature is open to the public.<sup>15</sup> Any person may observe the legislative action from the chamber galleries where the media workspaces are located.<sup>16</sup> Additionally, all official legislative action is livestreamed and archived on the legislature's website, including, but not limited to, committee and sub-committee meetings, debates, and votes.<sup>17</sup> Similarly, members of the public may also speak with legislators and their staff in public spaces or through other private channels.<sup>18</sup>

Although the legislative session is open to the public, legislative staff formalized in 2018 a media credentialing policy establishing criteria for journalists to obtain additional privileges.<sup>19</sup> Media credential benefits included designated parking, access to workspace in the house and

---

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* ¶ 18. UPW's editor is Malissa Morrell. *Id.*

<sup>13</sup> *Id.* ¶ 20.

<sup>14</sup> *Id.* ¶ 24.

<sup>15</sup> *December Letter* at 1.

<sup>16</sup> *Motion* at 11–12; *see also* Dkt. 55-4, *Declaration of Aundrea Peterson Ex. 4, Chamber Gallery Photographs*.

<sup>17</sup> *December Letter* at 1–2; *Motion* at 11–12; Dkt. 55, *Declaration of Aundrea Peterson* ¶¶ 3–5.

<sup>18</sup> *Motion* at 11–12; *see also Amended Complaint* ¶¶ 53, 59.

<sup>19</sup> *Amended Complaint* ¶ 26.

senate galleries, access to the press room, and access to the senate chamber floor when it is adjourned.<sup>20</sup>

The initial 2018 credentialing policy provided that reporters must be associated with institutions possessing, at a minimum, the following characteristics: (1) it hires and fires employees, and can be held responsible for actions, including lawsuits for libel; (2) it maintains editors to whom the reporters are responsible; (3) it requires employees to have some degree of education and/or professional training in journalism; (4) it adheres to a defined professional code of ethics; (5) it has been in business for a period of time and has a track record; and (6) it is not a lobbyist organization or a political party.<sup>21</sup> The 2018 credentialing policy also designated criteria for people who were not eligible credentials.<sup>22</sup> These included blog site owners with little or no editorial oversight, individuals who had little or no institutional framework, organizations with no history or track record, institutions or reporters whose main purpose seems to be lobbying or pushing a particular point of view, and organizations not bound by a journalistic code of ethics.<sup>23</sup> Additionally, the 2018 Policy stated characteristics of reporters and media institutions change over time and noted the credentialing requirements would “likely change as the characteristics of the media industry evolve and become more clear.”<sup>24</sup>

As anticipated, the credentialing policy was periodically updated. The 2019 revision permitted blog owners or organizations “not bound by a code of ethics” to obtain credentials subject to revocation if they signed a document attesting they would “abide by the journalistic

---

<sup>20</sup> Dkt. 36-1, 2018 Utah Capitol Media Credentialing Policy (*2018 Media Policy*).

<sup>21</sup> Dkt. 55-5, *2018 Utah Capitol Media Credentialing Policy (2018 Policy)*.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

code of ethics.”<sup>25</sup> The 2020 Policy officially incorporated the requirements that applicants must: (1) be a professional journalist; (2) present a background check; (3) adhere to a professional code of ethics; (4) represent news organizations or publications that have a track record; and (5) complete unlawful harassment prevention training.<sup>26</sup>

The credentialing policy was updated again in 2021 and 2022. The 2021 Policy expanded credential privileges to include access to “designated areas of the Senate and House chambers,” workspace in committee rooms during committee hearings, and the ability to conduct interviews “in the lounge area.”<sup>27</sup> The 2021 Policy also included a statement that “[b]loggers representing a legitimate independent news organization may become credentialed under some circumstances.”<sup>28</sup> The 2022 Policy remained largely unchanged, but added that credentials could be denied or revoked if an “[a]pplicant does not represent a professional media organization,” or “does not regularly cover the Legislature in person at the Capitol.”<sup>29</sup>

The 2023 and 2024 Policies further restricted media credentials for bloggers. Where bloggers were previously able to obtain media credentials in “some circumstances,” the updated Policies stated bloggers would be able to obtain media credentials only in “rare circumstances.”<sup>30</sup>

In November 2024, the media credentialing policy was again updated for the 2025 legislative session.<sup>31</sup> The 2025 Policy categorically excluded “blogs, independent media or other

---

<sup>25</sup> Dkt. 55-6, *2019 Utah Capitol Media Credentialing Policy (2019 Policy)*.

<sup>26</sup> Dkt. 55-7, *2020 Utah Capitol Media Credentialing Policy (2020 Policy)*.

<sup>27</sup> Dkt. 55-8, *2021 Utah Capitol Credentialing Policy (2021 Policy)*.

<sup>28</sup> *Id.*

<sup>29</sup> Dkt. 55-9, *Utah Capitol Media Access and Credentialing Policy 2022 (2022 Policy)*.

<sup>30</sup> *Compare 2021 Policy & 2022 Policy with Dkt. 55-10, Utah Capitol Media Access and Credentialing Policy Revised October 2022 (2023 Policy); Dkt. 55-11, Utah Capitol Media Access and Credentialing Policy Revised October 2023 (2024 Policy)*.

<sup>31</sup> Dkt. 55-12, *Utah Capitol Media Access and Credentialing Policy Revised November 2024 (2025 Policy)*.

freelance media.”<sup>32</sup> Prior to the 2025 legislative session, 134 media credentials were issued to applicants representing media organizations with disparate views on Utah politics.<sup>33</sup>

Additionally, one media credential was issued to Building Salt Lake, a “locally owned, independent” website “founded in 2014 to cover urban real estate development in the Salt Lake City region.”<sup>34</sup>

### **C. Bryan Schott’s 2025 Legislative Session Credentials Application**

Bryan Schott reported on the 2024 legislative session as a media-credentialed employee of the Salt Lake Tribune.<sup>35</sup> During the 2024 session, Schott posted a photo of staffers on X.com and stated, “Staffers have been struggling to set up the backdrop for at least 10 minutes and never got it completely straight #utpol.”<sup>36</sup> In response to Schott’s post, Defendant Osborne commented, “Bryan, you are a dick! As a reporter, I can’t believe you think it’s okay to blast staff for doing their job. You could have got up and helped, but you chose to just tweet about it. #classless.”<sup>37</sup> Schott continued to report on the Utah legislature throughout the rest of 2024 session in a manner Schott describes as “critical of the Utah Legislature or its leaders.”<sup>38</sup>

On September 9, 2024, a correspondent for the Salt Lake Tribune informed the Osborne and Musselman that Schott was no longer employed with the Salt Lake Tribune.<sup>39</sup>

---

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Building Salt Lake, <https://perma.cc/WYG3-P7UY> (last visited Sep. 11, 2025); *see also Amended Complaint* ¶¶ 68–69; *Declaration of Aundrea Peterson* ¶¶ 45–48.

<sup>35</sup> *Amended Complaint* ¶¶ 13, 45, 56–57.

<sup>36</sup> *Id.* ¶ 50; *see also Dkt. 56-9, Declaration of Alexa Musselman Ex. 9, Schott Message and Photograph.*

<sup>37</sup> *Amended Complaint* ¶ 50.

<sup>38</sup> *Id.* ¶ 136.

<sup>39</sup> *Tribune Email.*

On December 12, 2024, Schott published a story on UPW stating a local nonprofit group had filed a complaint against Senate President Stuart Adams alleging President Adams had violated campaign disclosure laws.<sup>40</sup> That same day, President Adams posted on X.com referring to Schott as a “former media member” and stated Schott’s story was “part of a troubling pattern of neglectful journalism that undermines the profession’s integrity.”<sup>41</sup> President Adams disclaimed any misconduct and stated Schott “failed to include information from the Lt. Governor’s Office or those in the story before publishing the blog” and called the story inaccurate and misleading.<sup>42</sup> President Adam’s Deputy Chief of Staff, Aundrea Peterson, also criticized Schott’s conduct in publishing the story without Peterson’s comment and accused Schott of lacking professionalism, being irresponsible, and disregarding “accurate reporting and ethical standards.”<sup>43</sup>

On December 17, 2024, Schott applied for a media credential for the 2025 legislative session.<sup>44</sup> Schott did not disclose Morrell’s editorial role with UPW in his 2025 application.<sup>45</sup> Legislative staff rejected Schott’s application stating, “Utah Capitol media credentials are currently not issued to blogs, independent, or other freelance journalists.”<sup>46</sup>

Schott appealed this denial and on December 26, 2024, Defendants Osborne and Thomas upheld the denial, explaining Schott failed to meet the requisite criteria of “[b]eing a professional

---

<sup>40</sup> *Amended Complaint* ¶¶ 51–52.

<sup>41</sup> *Id.*

<sup>42</sup> Dkt. 36-9, *Amended Complaint Ex. 9, Text Exchange Between Bryan Schott and Aundrea Peterson*.

<sup>43</sup> *Id.*

<sup>44</sup> *Amended Complaint* ¶ 56.

<sup>45</sup> *Id.* ¶ 19; *Motion to Dismiss* at 4.

<sup>46</sup> *Amended Complaint* ¶ 60.

member of the media associated with an established, reputable news organization or publication” and that “[b]logs, independent media outlets or freelance media do not qualify for credentials.”<sup>47</sup>

On January 22, 2025, Plaintiffs filed a Complaint<sup>48</sup> asserting four claims for § 1983 violations of the First and Fourteenth Amendments against Defendants Mark Thomas, Utah Senate Chief of Staff; Abby Osborne, Utah House of Representatives Chief of Staff; Aundrea Peterson, Utah Senate Deputy Chief of Staff; and Alexa Musselman, Utah House of Representatives Communications Director and Media Liaison. Plaintiffs also filed a Motion for a Temporary Restraining Order<sup>49</sup> requesting that Defendants be ordered to grant Plaintiffs media credentials to the 2025 Utah Legislative Session.<sup>50</sup>

On February 5, 2025, the court heard oral argument, denied Plaintiffs’ TRO Motion without prejudice, and granted Schott leave to file an amended complaint.<sup>51</sup> On February 26, 2025, Plaintiffs filed an Amended Complaint and an Amended Motion for a Preliminary Injunction.<sup>52</sup> Plaintiffs assert five claims under 42 U.S.C. § 1983 for violations of the First and Fourteenth Amendments of the United States Constitution: (1) unreasonable and viewpoint-based denial of press credentials<sup>53</sup>; (2) content and viewpoint discrimination<sup>54</sup>; (3) retaliation<sup>55</sup>;

---

<sup>47</sup> Dkt. 36-10, *Amended Complaint Ex. 10, Letter from Legislative Staff to Bryan Schott* (Dec. 26, 2024).

<sup>48</sup> Dkt. 2, *Complaint for Declaratory, Injunctive, and Other Relief (Complaint)*.

<sup>49</sup> Dkt. 3, *Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction and Memorandum in Support (TRO Motion)*.

<sup>50</sup> *See Complaint* at 22–23, *TRO Motion* at 26.

<sup>51</sup> Dkt. 31, *Minute Entry*.

<sup>52</sup> *See Amended Complaint; Preliminary Injunction Motion*.

<sup>53</sup> *Amended Complaint* ¶¶ 103–20.

<sup>54</sup> *Id.* ¶¶ 121–33.

<sup>55</sup> *Id.* ¶¶ 134–39.

(4) prior restraint<sup>56</sup>; and (5) vagueness.<sup>57</sup> On April 8, 2025, Defendants filed their Motion to Dismiss, arguing Plaintiffs failed to state claims upon which relief can be granted.<sup>58</sup> The Motions are fully briefed.<sup>59</sup> Having carefully considered the relevant filings, the court finds that oral argument is not necessary and decides this matter based on the written memoranda and accompanying exhibits.<sup>60</sup>

### LEGAL STANDARD

Under Rule 8 of the Federal Rules of Civil Procedure, a complaint “must contain a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>61</sup> To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”<sup>62</sup> “The plausibility standard is not akin to a ‘probability requirement.’”<sup>63</sup> A plaintiff must allege “more than [the] sheer possibility that a defendant has acted unlawfully”; a complaint that pleads facts “merely consistent with a defendant’s liability . . . stops short of the line between possibility and plausibility of entitlement to relief.”<sup>64</sup> To “nudge” a complaint “across the line from conceivable to plausible” requires more than “the mere metaphysical

---

<sup>56</sup> *Id.* ¶¶ 140–44.

<sup>57</sup> *Id.* ¶¶ 145–55.

<sup>58</sup> *Motion* at 14–32; *see also* Fed. R. Civ. P. 12(b)(6).

<sup>59</sup> Dkt. 59, *Plaintiffs’ Response to Defendants’ Motion to Dismiss (Opposition)*; Dkt. 62, *Reply in Support of Defendants’ Motion to Dismiss Plaintiffs’ First Amended Complaint (Reply)*; Dkt. 54, *Defendants’ Response in Opposition to Plaintiffs’ Amended Motion for Preliminary Injunction (Preliminary Injunction Opposition)*; Dkt. 61, *Plaintiffs’ Reply in Support of Amended Motion for Preliminary Injunction (Preliminary Injunction Reply)*.

<sup>60</sup> *See* DUCivR 7-1(g).

<sup>61</sup> Fed. R. Civ. P. 8(a)(2).

<sup>62</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

<sup>63</sup> *VDARE Found. v. City of Colo. Springs*, 11 F.4th 1151, 1159 (10th Cir. 2021) (cleaned up).

<sup>64</sup> *Id.* (cleaned up).

possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims.”<sup>65</sup>

Rather, “the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.”<sup>66</sup>

“The court’s function on a Rule 12(b)(6) is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff’s complaint alone is legally sufficient to state a claim for which relief may be granted.”<sup>67</sup> The court begins “by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.”<sup>68</sup> The court then determines whether the remaining well-pleaded factual allegations, accepted as true, “plausibly give rise to an entitlement to relief.”<sup>69</sup> “The nature and specificity of the allegations required to state a plausible claim will vary based on context,”<sup>70</sup> but “the court need not accept conclusory allegations without supporting factual averments.”<sup>71</sup>

### ANALYSIS

Plaintiffs assert five claims under § 1983 for violations of their constitutional rights under the First and Fourteenth Amendments. “To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.”<sup>72</sup> “The First Amendment provides that Congress shall make no law . . . abridging the freedom [of speech, or]

---

<sup>65</sup> *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (cleaned up).

<sup>66</sup> *Id.* (emphasis in original).

<sup>67</sup> *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991).

<sup>68</sup> *Ashcroft*, 556 U.S. at 679.

<sup>69</sup> *VDARE Found.*, 11 F.4th at 1159.

<sup>70</sup> *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 878 (10th Cir. 2017) (cleaned up).

<sup>71</sup> *VDARE Found.*, 11 F.4th at 1159 (cleaned up).

<sup>72</sup> *West v. Atkins*, 487 U.S. 42, 48 (1988).

of the press,” and this “liberty [is] safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.”<sup>73</sup> Plaintiffs allege the 2025 Policy constitutes unreasonable and viewpoint discrimination, content and viewpoint discrimination, retaliation, prior restraint, and vagueness. The court addresses the claims in turn.

### **Claims I & II: Unreasonable Content and Viewpoint Discrimination**

In Claims One and Two, Plaintiffs allege that by denying Schott a media credential, Defendants: (1) unreasonably “denied him equal access” to media-designated areas based on his “affiliation” with independent media,<sup>74</sup> and (2) discriminated against him because his “stream-of-consciousness reporting” “offend[ed] the refined sensibilities of the government actors” and criticized members of the legislature.<sup>75</sup> Defendants argue Plaintiffs have not alleged an infringement of an activity protected by the First Amendment.<sup>76</sup> The court agrees with Defendants.

At the heart of Plaintiffs’ claims is an assertion of an unequivocal right to gather news. However, the First Amendment “does not invalidate every incidental burdening of the press that may result from the enforcement of [governmental policies] of general applicability.”<sup>77</sup> Further, “[t]here is no constitutional right to have access to particular government information.”<sup>78</sup> The First Amendment is concerned with “freedom of the media to *communicate* information once it is obtained”; the Constitution does not “*compel*[ ] the government to provide the media with

---

<sup>73</sup> *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 556 (1976) (cleaned up).

<sup>74</sup> *Amended Complaint* ¶¶ 103–20.

<sup>75</sup> *Id.* ¶¶ 121–33.

<sup>76</sup> *Motion* at 9 (cleaned up).

<sup>77</sup> *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972).

<sup>78</sup> *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978).

information or access to it on demand.”<sup>79</sup> “This applies equally to both the public and press, for the press, generally speaking, do not have a special right of access to government information not available to the public.”<sup>80</sup> Some government restrictions may impinge on the “flow of information,” but not all restrictions implicate the First Amendment. As Justice Warren stated in *Zemel v. Rusk*:

There are few restrictions on actions which could not be clothed by the ingenious garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen’s opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.<sup>81</sup>

Following the guidance of the Supreme Court, the Tenth Circuit has adopted a three-step framework for analyzing First Amendment activity on government property.<sup>82</sup> The court first considers whether the activity at issue is protected by the First Amendment.<sup>83</sup> If it is not, the inquiry ends.<sup>84</sup> Plaintiffs assert Defendants violated Plaintiffs’ right to gather news by denying Schott a media credential to cover the legislative session. The Tenth Circuit addressed a similar issue in *Smith v. Plati*.

The plaintiff in *Smith* maintained a non-profit website that “provide[d] information, pictures, chat rooms, and message boards covering men’s and women’s athletic teams at the

---

<sup>79</sup> *Id.* at 9 (emphasis in the original).

<sup>80</sup> *Smith v. Plati*, 258 F.3d 1167, 1178 (10th Cir. 2001).

<sup>81</sup> *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965).

<sup>82</sup> *See Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1138 (10th Cir. 2001).

<sup>83</sup> *Id.* (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)).

<sup>84</sup> *Cornelius*, 473 U.S. at 797 (stating that if the activity is not protected by the First Amendment “we need go no further”). If the activity is protected, then courts “identify the nature of the forum,” and “assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard.” *Id.*

University of Colorado.”<sup>85</sup> It appears that, for some time, the plaintiff had access to “resources . . . routinely given to other media,” but then the defendant began to hinder his access and “d[id] everything possible to interfere with it.”<sup>86</sup> Specifically, the plaintiff alleged the University media liaison ticketed him for trespassing in a hallway, denied him resources given to other media and other fans, denied him treatment as “media” or “press,” prevented him from “talking to coaches, excluded him from football practices, . . . and kept him from distributing [his website’s] advertisements at a University athletic event.”<sup>87</sup> The plaintiff asserted a § 1983 claim for violating “his First Amendment right to ‘gather news’ from the University,” and retaliating against him for exercising the same.<sup>88</sup> The Tenth Circuit held the defendant had not violated any protected First Amendment right because “there is no general First Amendment right of access to all sources of information within governmental control,” and the press does not have a “special right of access to government information not available to the public.”<sup>89</sup> Further, the Circuit did not modify or qualify this rule even though the plaintiff sought access to resources that were “routinely given to other media.”<sup>90</sup>

Plaintiffs have made very similar allegations in this case. Plaintiffs contend Defendants “deprived [them] of their First Amendment rights to news gather and exercise editorial judgment” based on Schott’s status as an “independent reporter for a blog.”<sup>91</sup> Defendants argue

---

<sup>85</sup> *Smith*, 258 F.3d at 1172.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1173. The plaintiff also asserted other claims not addressed here. *See id.* at 1173.

<sup>89</sup> *Id.* at 1178. *See also Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (stating the First Amendment does not “guarantee the press a constitutional right of special access to information not available to the public generally”) ; *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“The right to speak and public does not carry with it the unrestrained right to gather information.”).

<sup>90</sup> *Smith*, 258 F.3d at 1172, 1177–78.

<sup>91</sup> *Amended Complaint* ¶¶ 107, 111, 122, 132.

this is not a protected First Amendment activity,<sup>92</sup> and Plaintiffs do not respond to this argument.<sup>93</sup> Defendants further maintain that denying Schott a credential has not impinged on Plaintiffs' First Amendment rights because they still have access to government information available to the public.<sup>94</sup> Plaintiffs do not contend they lack access to all government information available to the public. Instead, Plaintiffs respond that the 2025 Policy violates Plaintiffs' constitutional rights because it denies them access "equal to the rights of other credentialed media representatives."<sup>95</sup> However, as *Smith* demonstrates, the First Amendment does not encompass a right to "resources . . . routinely given to other media,"<sup>96</sup> and Plaintiffs do not "do[] not point to any Supreme Court or Tenth Circuit precedent establishing the right of access [they] seek[]." <sup>97</sup> Accordingly, Plaintiffs have failed to plausibly allege a First Amendment violation in Claims One and Two.

---

<sup>92</sup> See *Motion* at 9–15.

<sup>93</sup> See generally, *Opposition* (failing to address whether media have a right of access to information not generally available to the public).

<sup>94</sup> *Motion* at 10 ("Committee meetings, legislative floor debates, agenda items, and materials are readily accessible on the legislative website, and everyone is welcome to attend committee meetings and floor time.").

<sup>95</sup> *Opposition* at 7.

<sup>96</sup> *Smith*, 258 F.3d 1167, 1177–78.

<sup>97</sup> *Id.* at 1178. Plaintiffs instead reference a handful of cases from the D.C., Second, and Ninth Circuits. See *Opposition* at 7–10 (citing *Consumers Union v. Periodical Correspondents' Assoc.*, 365 F. Supp. 18 (D.D.C. 1973), *rev'd*, *Consumers Union v. Periodical Correspondents' Assoc.*, 515 F.2d 1341 (D.C. Cir. 1975) (reversing the District of D.C. decision as nonjusticiable and ordering dismissal); *Associated Press v. Budowich*, 2025 WL 1649265 (D.C. Cir. Jun. 6, 2025) (granting a partial stay of a preliminary injunction because the space was not "opened for private speech and discussion"); *Sherrill v. Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977) (addressing the need for "procedural requirements of notice of the factual bases" for denying a press credential); *TGP Commc'ns, LLC v. Sellers*, 2022 WL 17484331 (9th Cir. Dec. 5, 2022) (granting a preliminary injunction because the press pass denial was likely based on viewpoint discrimination); *Am. Broadcast Companies, Inc. v. Cuomo*, 570 F.2d 1080 (2d. Cir. 1977). (determining whether enforcement of a criminal trespass statute against a news organization attempting to cover post-election activities at campaign headquarters not generally available to the public should be enjoined)).

## II. Claim III: Retaliation

Plaintiffs also assert Defendants violated Plaintiffs' First Amendment rights by denying Schott a media credential in retaliation for his prior unfavorable reporting.<sup>98</sup> For a retaliation claim, Plaintiffs must plausibly allege: (1) that they were "engaged in [a] constitutionally protected activity"; (2) Defendants' "actions caused [Plaintiffs] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity"; and (3) Defendants' "adverse action was substantially motivated as a response to [Plaintiffs'] exercise of constitutionally protected conduct."<sup>99</sup> "[T]he second element—the person of ordinary firmness element—is a vigorous standard" that is "assessed objectively."<sup>100</sup> Additionally, "a trivial or de minimis injury" is insufficient to support a First Amendment retaliation claim.<sup>101</sup>

Plaintiffs' allegations are insufficient to infer a denial of a media credential would "chill a person of ordinary firmness from continuing" unfavorable reporting. To support their retaliation claim, Plaintiffs incorporate the prior allegations and allege the elements of a retaliation claim.<sup>102</sup> Although it is not clear what prior allegations Plaintiffs intend to support their retaliation claim, the court assumes Plaintiffs refer to the allegations that "Schott's reporting drew the ire of

---

<sup>98</sup> See *Amended Complaint* ¶¶ 134–39.

<sup>99</sup> *Trant v. Oklahoma*, 754 F.3d 1158, 1169–70 (10th Cir. 2014).

<sup>100</sup> *VDARE Found.*, 11 F.4th at 1172.

<sup>101</sup> See *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1203 (10th Cir. 2007) (stating that when a "plaintiff alleges that the defendant's action was taken in retaliation for protected speech, . . . a trivial or de minimis injury will not support a retaliatory prosecution claim"); see also *Eaton v. Meneley*, 379 F.3d 949, 955 (10th Cir. 2004) ("[W]hen [a] plaintiff alleges that the defendant's action was taken in retaliation for protected speech, our standard for evaluating that chilling effect on speech is objective, rather than subjective. The harm must be of the type that would chill a person of ordinary firmness from continuing to engage in the protected speech. Thus, although the objective standard permits a plaintiff who perseveres despite governmental interference to bring suit, 'a trivial or de minimis injury will not support a retaliatory prosecution claim.'" (quoting *Poole v. Cnty. of Otero*, 271 F.3d 955, 960 (10th Cir. 2001) (cleaned up)).

<sup>102</sup> See *Amended Complaint* ¶¶ 134–39.

legislative leaders”<sup>103</sup> and that Defendants subsequently denied his media credential application.<sup>104</sup> But it is unclear why these allegations support an inference that a person of ordinary firmness would be chilled when Plaintiffs in fact reported on the 2025 legislative session without a media credential.<sup>105</sup> Plaintiffs contend that their continued reporting is due to Schott’s “persistence” and “Defendants actions would [objectively] chill and adversely affect any person of ordinary firmness from exercising their First Amendment speech rights.”<sup>106</sup> But this a speculative conclusion not supported with factual allegations in the Amended Complaint and “not entitled to the assumption of truth.”<sup>107</sup>

Plaintiffs also maintain they “have been actually chilled and adversely impacted” because they are “unable to report on in-the-room context and publish breaking news in real time.”<sup>108</sup> But all proceedings of the legislative session are open to the public. Any person may observe the legislative action from the chamber galleries where the media workspaces are located,<sup>109</sup> and all official legislative action is livestreamed and archived on the Legislature’s website.<sup>110</sup> Plaintiffs also remain able to speak with legislators and their staff in public spaces or through other private

---

<sup>103</sup> *Id.* ¶ 46.

<sup>104</sup> *Id.* ¶¶ 46, 60.

<sup>105</sup> *Motion* at 11–13; *Opposition* at 18–19; *see also Washington v. Martinez*, No. 19-cv-00221-MEH, 2020 WL 209863, at \*6 (D. Colo. Jan. 14, 2020) (“[P]ersistence in speech is some evidence that the defendant’s actions would not prevent such speech.”).

<sup>106</sup> *Opposition* at 18–19.

<sup>107</sup> *Ashcroft*, 556 U.S. at 679.

<sup>108</sup> *Opposition* at 19.

<sup>109</sup> *Motion* at 11–12; *see also Dkt. 55-4, Declaration of Aundrea Peterson Ex. 4, Chamber Gallery Photograph*.

<sup>110</sup> *Id.* at 11–13.

channels.<sup>111</sup> Accordingly, the court concludes that any injuries Plaintiffs allege are trivial or de minimis injuries and inadequate to support a retaliation claim.<sup>112</sup>

### III. Claim IV: Prior Restraint

Plaintiffs also assert the 2025 Policy constitutes an unlawful prior restraint because “[b]y requiring that all applicants obtain press credentials from [the] Utah Legislature, the policy establishes a regime that gives the government unbridled discretion to permit the exercise of First Amendment rights, without any immediate judicial review,”<sup>113</sup> and this “unbridled discretion” “deprives Plaintiffs of their free speech and press rights.”<sup>114</sup>

Prior restraint is “[a] governmental restriction on speech or publication before its actual expression” or “formal censorship before publication.”<sup>115</sup> The Supreme Court has held that “in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.”<sup>116</sup> However, not every licensing law involving discretion constitutes prior restraint.<sup>117</sup> “The law must have a close enough nexus to expression, or to conduct commonly associated with

---

<sup>111</sup> *Id.* at 20; *see also Amended Complaint* ¶¶ 53, 59.

<sup>112</sup> *See Shero*, 510 F.3d at 1204 (concluding the defendant’s actions in denying access to council packets prior to city council meetings was at best a de minimis injury); *see also Smith*, 258 F.3d at 1177 (concluding a reporter did not “suffer an injury that would chill a person of ordinary firmness from continuing to publish an internet site” because “alternative avenues to information remained open,” and the plaintiff retained “the ability to speak freely about any political, social or other concern”); *The Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006) (“Having access to relatively less information than other reporters on account of one’s reporting is so commonplace as to allow [the publication] to proceed on its retaliation claim addressing that condition would plant the seed of a constitutional case in virtually every interchange between public office and press. Accordingly, . . . no actionable retaliation claim arises when a government official denies a reporter access to discretionally afforded information.”) (cleaned up)).

<sup>113</sup> *Amended Complaint* ¶ 141.

<sup>114</sup> *Id.* ¶ 143.

<sup>115</sup> *Prior Restraint*, BLACK’S LAW DICTIONARY, 12th ed. 2024.

<sup>116</sup> *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

<sup>117</sup> *Id.* at 759.

expression, *to pose a real and substantial threat of the identified censorship risk.*”<sup>118</sup> “[L]aws of general application that . . . do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken” or “who may speak and who may not” are not unconstitutional.<sup>119</sup>

The 2025 Policy for media credentials does not regulate who may speak or what a reporter may or may not publish. Any reporter has access to the legislative session and is not restricted in the content of any potential publication. A media credential permits access to the press room, workspaces in the senate and house galleries, designated parking, and press events with elected officials.<sup>120</sup> However, members of the public have access to the chambers galleries and may observe committee meetings and legislative floor debates.<sup>121</sup> Additionally, legislative agenda items and other materials are posted on the legislature’s website, and all official legislative action is livestreamed and archived on the legislature’s website.<sup>122</sup> Plaintiffs have not alleged that the 2025 Policy restricts the content of their speech or that the 2025 Policy will somehow censor their speech in the future.<sup>123</sup> Indeed, as explained above, Plaintiffs reported on the 2025 legislative session without a media credential, and Plaintiffs have not alleged the Policy impacted the content of what they reported.<sup>124</sup> Further, to the extent Plaintiffs allege Defendants may potentially wield the 2025 Policy in a discriminatory way, these allegations are

---

<sup>118</sup> *Id.* at 760–61, 763 (emphasis added).

<sup>119</sup> *Id.* at 763.

<sup>120</sup> *See 2025 Policy.*

<sup>121</sup> *Motion* at 2.

<sup>122</sup> *Id.* at 11–13.

<sup>123</sup> *See generally, Amended Complaint.*

<sup>124</sup> *Motion* at 13.

speculative.<sup>125</sup> Accordingly, the court concludes Plaintiffs have not asserted an actionable prior restraint claim.

#### **IV. Claim V: Vagueness**

Finally, Plaintiffs claim the 2025 Policy is unconstitutionally vague.<sup>126</sup> In their Motion, Defendants argue the void-for-vagueness doctrine does not apply and, even if it did, the Policy is not vague.<sup>127</sup> The court agrees that Plaintiffs have not plausibly alleged the 2025 Policy is vague.

The vagueness doctrine is rooted in the Due Process Clause of the Fifth Amendment, not the First Amendment.<sup>128</sup> It addresses the due process concerns “that regulated parties should know what is required of them so they may act accordingly” and is meant to ensure laws are not enforced “in an arbitrary or discriminatory way.”<sup>129</sup> A statute is unconstitutionally vague “if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits” and “if it authorizes or . . . encourages arbitrary and discriminatory enforcement.”<sup>130</sup> However, language is inherently imprecise, so “mathematical certainty” is not required.<sup>131</sup>

Plaintiffs argue the 2025 Policy is vague because certain criteria are not defined. Specifically, Plaintiffs contend (1) “[i]t is unclear what is meant by ‘established,’ ‘reputable,’ ‘blog,’ ‘freelance,’ or ‘independent’ media”; (2) the 2025 Policy does not define what ethics

---

<sup>125</sup> *See id.* ¶¶ 140–44.

<sup>126</sup> *Amended Complaint* ¶¶ 145–55.

<sup>127</sup> *Motion* at 28–32.

<sup>128</sup> *See United States v. Williams*, 553 U.S. 285, 304 (2008).

<sup>129</sup> *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1233 (10th Cir. 2023).

<sup>130</sup> *Id.*

<sup>131</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

journalists must adhere to; (3) the 2025 Police “create[s] ever-shifting goal posts for compliance”; and (4) “Plaintiffs cannot understand how they could qualify for a press credential under these vague criteria.”<sup>132</sup> Defendants counter that these terms “are commonly understood in the English language” and are well understood in context.<sup>133</sup> The court agrees the 2025 Policy does not include terms that are not commonly understood. Further, the 2018 and 2019 Policies included additional “defining characteristics,” some of which were incorporated in later iterations of the policy.<sup>134</sup> The credentialing criteria are sufficient to “provide fair notice to the public” of what the requirements are and ensure the Policy is not administered arbitrarily.<sup>135</sup> Indeed, Plaintiffs acknowledged on social media that the new credentialing criteria could “shut [Schott] out” prior to Defendants’ credentialing decision.<sup>136</sup> Because the 2025 Policy uses commonly-understood terms and Plaintiffs themselves anticipated they would be denied a media credential according to the Policy criteria, the court concludes Plaintiffs have not plausibly alleged the Policy is unconstitutionally vague.

## CONCLUSION

For the reasons stated above, the court concludes the Amended Complaint does not contain sufficient well-pleaded factual allegations, accepted as true, to “plausibly give rise to an entitlement to relief” under any of their claims.<sup>137</sup> Accordingly, the court

---

<sup>132</sup> *Amended Complaint*, ¶¶ 149–50, 152.

<sup>133</sup> *Motion* at 30.

<sup>134</sup> *Compare 2018 Policy; with 2019 Policy; and 2025 Policy*.

<sup>135</sup> *See Wyo. Gun Owners*, 83 F.4th at 1233.

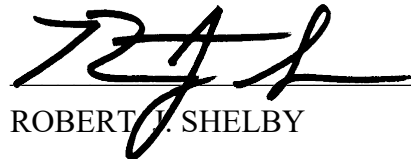
<sup>136</sup> *See* <https://perma.cc/SV5K-XTWW> (containing a post by Schott stating “On Tuesday, the Utah Legislature begins the process of issuing media credentials for the 2025 session. In the last month, they revised the criteria for obtaining a credential, and many of those new requirements will likely be weaponized against me and were likely designed to shut me out.”).

<sup>137</sup> *VDARE Found.*, 11 F.4th at 1159.

GRANTS<sup>138</sup> Defendants' Motion to Dismiss and DENIES<sup>139</sup> as moot Plaintiffs' Amended Motion for Preliminary Injunction.

SO ORDERED this 29th day of September 2025.

BY THE COURT:

  
\_\_\_\_\_  
ROBERT J. SHELBY  
United States Chief District Judge

---

<sup>138</sup> Dkt. 53.

<sup>139</sup> Dkt. 37.