Tyler Green, Utah Bar No. 10660
Consovoy McCarthy PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
(703) 243-9423
tyler@consovoymccarthy.com
Counsel for Defendants Alexa Musselman, Aundrea Peterson, Abby Osborne, and Mark Thomas

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH - CENTRAL DIVISION

UTAH POLITICAL WATCH, INC., and BRYAN SCHOTT, *Plaintiffs*, v. ALEXA MUSSELMAN, Utah House of Representatives Communications Director and Media Liaison Designee; AUNDREA PETERSON, Utah Senate Deputy Chief of Staff and Media Liaison Designee; ABBY OSBORNE, Utah House of Representatives Chief of Staff; and MARK THOMAS, Utah Senate Chief of Staff, in their official and individual capacities; *Defendants*.	Case No. 2:25-cv-00050-RJS-CMR Hon. Robert J. Shelby Hon. Cecilia M. Romero

<u>Defendants' Response in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction</u>

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

BACKGROUND 2

A. Open access to the Capitol and the Legislature 2

B. The Legislature's media credentialing policy 2

C. The denial of Schott's credentialing application 7

LEGAL STANDARD 8

ARGUMENT 9

I. Plaintiffs have not shown a substantial likelihood of success on the merits. 9

A. Plaintiffs proffer the wrong framework for their First Amendment claim 9

B. Plaintiffs have not shown a protected First Amendment right of newsgathering or equal access to information. 11

C. The credentialing policy is reasonable and viewpoint neutral. 16

D. The credentialing policy is not a prior restraint. 25

E. The credentialing policy is not unconstitutionally vague. 27

II. Plaintiffs' alternative channels for newsgathering and delay in seeking relief undermines any suggestion of irreparable harm. 30

III. The equities and public interest favor Defendants 32

IV. Plaintiffs' desired relief would disturb the status quo. 32

CONCLUSION 33

WORD COUNT CERTIFICATION 34

TABLE OF AUTHORITIES

Cases

Alaska Landmine, LLC v. Dunleavy,
514 F. Supp. 3d 1123 (D. Alaska 2021) 10, 27

Am. Ass'n of People with Disabilities v. Herrera,
580 F. Supp. 2d 1195 (D.N.M. 2008) 32

Ark. Educ. Television Comm'n v. Forbes,
523 U.S. 666 (1998) 23

Ateba v. Jean-Pierre,
706 F. Supp. 3d 63 (D.D.C. 2023) 17-19, 24, 26, 28

Att'y Gen. of Okla. v. Tyson Foods, Inc.,
565 F.3d 769 (10th Cir. 2009) 9, 33

Balt. Sun Co. v. Ehrlich,
437 F.3d 410 (4th Cir. 2006) 15

Beltronics USA, Inc. v. Midwest Inventory Distribution,
562 F.3d 1067 (10th Cir. 2009) 33

Benisek v. Lamone,
585 U.S. 155 (2018) 31

Boutilier v. INS,
387 U.S. 118 (1967) 28

Bralley v. Albuquerque Pub. Sch. Bd. of Educ.,
No.13-cv-768, 2015 WL 13666482 (D.N.M. Feb. 25, 2015) 26

Branzburg v. Hayes,
408 U.S. 665 (1972) 11, 14

CFTC v. Reed,
481 F. Supp. 2d 1190 (D. Colo. 2007) 27

CLS v. Martinez,
561 U.S. 661 (2010) 18

Clyma v. Sunoco, Inc.,
594 F.3d 777 (10th Cir. 2010) 14

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,
473 U.S. 788 (1985) 9-11, 16-17, 19-20, 25

Courthouse News Serv. v. Smith,
__ F.4th __, 2025 WL 259980 (4th Cir. 2025) 11

Danielson v. Huether,
355 F. Supp. 3d 849 (D.S.D. 2018) 13

Detroit Free Press v. Ashcroft,
303 F.3d 681 (6th Cir. 2002) 26

Griffin v. Bryant,
30 F. Supp. 3d 1139 (D.N.M. 2014) 27

GTE Corp. v. Williams,
731 F.2d 676 (10th Cir. 1984) 31

Harmon v. City of Norman,
981 F.3d 1141 (10th Cir. 2020) 8

Hawkins v. City & Cnty. of Denver,
170 F.3d 1281 (10th Cir. 1999) 21

Heideman v. S. Salt Lake City,
348 F.3d 1182 (10th Cir. 2003) 31

Houchins v. KQED, Inc.,
438 U.S. 1 (1978) 12

Int'l Soc. for Krishna Consciousness, Inc. v. Lee,
505 U.S. 672 (1992) 19

Integrated Bus. Plan. Assocs. v. Operational Results, Inc.,
No.2:22-cv-00733, 2024 WL 2862420 (D. Utah June 6, 2024) 28

John K. MacIver Inst. for Pub. Pol'y, Inc. v. Evers,
994 F.3d 602 (7th Cir. 2021) 10-11, 16, 18, 24, 28, 32

Johnson v. Cache Cnty. Sch. Dist.,
323 F. Supp. 3d 1301 (D. Utah 2018) 31

Kelly v. Lightfoot,
No.22-cv-4533, 2022 WL 4048508 (N.D. Ill. Sept. 2, 2022) 33

Okla. Hosp. Ass'n v. Okla. Pub. Co.,
748 F.2d 1421 (10th Cir. 1984) 12

Pahls v. Thomas,
718 F.3d 1210 (10th Cir. 2013) 20

Pell v. Procunier,
417 U.S. 817 (1974) 12

Pen Am. Ctr., Inc. v. Trump,
448 F. Supp. 3d 309 (S.D.N.Y. 2020) 15

Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n,
460 U.S. 37 (1983) 18-19, 21, 25

Potts v. Ctr. for Excellence in Higher Educ.,
908 F.3d 610 (10th Cir. 2018) 29

Raycom Nat'l, Inc. v. Campbell,
361 F. Supp. 2d 679 (N.D. Ohio 2004) 13

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980) 26

Saxbe v. Wash. Post Co.,
417 U.S. 843 (1974) 12

Schrier v. Univ. of Colo.,
427 F.3d 1253 (10th Cir. 2005) 32

Smith v. Plati,
258 F.3d 1167 (10th Cir. 2001) 12

Snyder v. Ringgold,
133 F.3d 917, 1998 WL 13528 (4th Cir. 1998) 14-15

Taylor v. Roswell Indep. Sch. Dist.,
713 F.3d 25 (10th Cir. 2013) 25

TGP Commc'ns, LLC v. Sellers,
No.22-16826, 2022 WL 17484331 (9th Cir. Dec. 5, 2022) 10, 16, 27

United States v. Kokinda,
497 U.S. 720 (1990) 17

Utah Gospel Mission v. Salt Lake City Corp.,
316 F. Supp. 2d 1201 (D. Utah 2004) 31-32

Vidal v. Elster,
602 U.S. 286 (2024) 20-21

Voter Reference Found. v. Torrez,
727 F. Supp. 3d 1014 (D.N.M. 2024) 26

W. Watersheds Project v. Michael,
869 F.3d 1189 (10th Cir. 2017) 12

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 27

Wells v. City & Cnty. of Denver,
257 F.3d 1132 (10th Cir. 2001) 9

Wyo. Gun Owners v. Gray,
83 F.4th 1224 (10th Cir. 2023) 27-28

Zemel v. Rusk,
381 U.S. 1 (1965) 11

Other Authorities

@schotthappens, Instagram (Dec. 17, 2024),
https://bit.ly/4gkJpkv 30

@SchottHappens, Twitter,
https://x.com/SchottHappens 22

@schotthappens.com, Bluesky (Dec. 16, 2024, at 6:40 PM),
https://perma.cc/SV5K-XTWW 30

Blog, Merriam-Webster,
https://bit.ly/4hgheo5 28

Bryan Schott, *Podcast: The most feared journalist in Utah*,
Utah Political Watch (Dec. 20, 2024),
https://bit.ly/3EwGqIs 31

Bryan Schott, *Utah Legislature quietly changes press rules, shutting out independent media*, Utah Political Watch (Dec. 17, 2024),
https://perma.cc/5B9S-UM6N 32

Editorial policies and ethics, Salt Lake Trib.,
https://perma.cc/M8GN-VGDR 30

Eli Stokols, *Trump briefing begins with pledge to boost outside media*,
Politico (Jan. 28, 2025),
https://bit.ly/4jG7S71 16

Freelancer, Merriam-Webster,
https://bit.ly/40TW1KW 29

House - 2025 General Session - Day 1,
Utah State Legis.,
https://bit.ly/3EsB9BK 13

Mary Margaret Olohan, *White House Receives Over 7,400 New Media Requests Within 24 Hours*,
Daily Wire (Jan. 29, 2025),
https://perma.cc/HL5A-FTT7 16

Senate - 2025 General Session - Day 1,
Utah State Legis., https://bit.ly/4aDcqqo 13

Utah Senate, *Utah Senate Media Availability – Day 1 – 2025 General Session*, Facebook (Jan. 21, 2025),
https://bit.ly/4gmkE7w 13

INTRODUCTION

Bryan Schott's leaving the *Salt Lake Tribune* to launch Utah Political Watch had immediate consequences for his Utah Capitol media credential. The Utah Legislature has long limited credentials to "professional member[s] of the media" who are "part of an established reputable news organization or publication." And for the last two years, it was the Legislature's policy that "[b]loggers representing a legitimate independent news organization may become credentialed under limited, rare circumstances." Schott's newly formed, self-run news blog wouldn't clear that standard. The Legislature then revised its policy to eliminate any discretion of its staff and to implement clearer, more definite standards—a revision unrelated to Schott. Even so, he sued, contending that the revision was made "with the intent of excluding him" (Mot.2) and asking this Court to order legislative staff to give him a media credential.

Plaintiffs' theory is wrong, is unsupported by evidence, and fails under the First Amendment. Defendants' evidence demonstrates the Legislature revised the policy without regard to Schott, his publications, or his viewpoints. And legislative staff denied him a credential for the sole reason that he did not satisfy the policy's objective, neutral criteria. The Court should deny Plaintiffs' motion.

BACKGROUND

A. Open access to the Capitol and the Legislature

The Utah Legislature strives to maintain a government accessible and open to the people and press. Peterson-Decl. ¶3. The Capitol is open to all. Any person can attend and observe from the chamber galleries the proceedings on the Senate and House floors. *Id.* Senate and House committee and subcommittee meetings are also open to the public. *Id.*

Beyond that, every official action taken by the Legislature is livestreamed and archived on the Legislature's website. That includes committee and subcommittee meetings and general floor time, which includes debates, votes on bills, and other matters. *Id.* ¶4. Press releases, blog posts, and additional communications are publicly available on the House and Senate websites. *Id.* ¶5. The House and Senate also maintain accounts on numerous social media platforms. *Id.* ¶6.

B. The Legislature's media credentialing policy

The Legislature has maintained a formal media credentialing policy since at least 2018. *Id.* ¶7. Legislative staff review and update the policy annually, typically in the fall before the next year's legislative general session. *Id.* ¶9. As part of this review, staff consider and incorporate feedback from the existing established media. *Id.* They have expressed appreciation for the Legislature's formal credentialing policy, explaining that it helps them maintain their legitimacy. *Id.*

1. Credentialed media receive certain benefits at the Capitol. They have access to a limited number of designated media parking spaces. *Id.* ¶11. They also have access to workspace with about 20 desks in the press room in the Capitol's basement. *Id.* ¶12. Committee chairs may permit credentialed media—generally photographers and videographers, not reporters—to access a designated area behind the dais in committee rooms. *Id.* ¶15.

Credentialed media have access to designated workspaces, or press boxes, in the public galleries of the Senate and House chambers. *Id.* ¶13. These workspaces are immediately adjacent to the public seating in each chamber's public gallery:

Id. ¶13 & Exs.3-4. Because there are a limited number of media workspaces (six in the Senate, eight in the House), credentialed media may cover Senate and House proceedings in the gallery's general seating open to the public. *Id.* ¶13.

Credentialed media also receive invitations to certain press events, including the Governor's monthly news conferences, the Senate President's daily in-office media briefings, and the House Speaker's weekly in-office briefings. *Id.* ¶14. Recordings of those press events are publicly available online. *Id.* Credentialed media are included in

the House and Senate e-mail circulation lists for press releases, which are also available online. *Id.* ¶¶5, 16.

2. Since formalizing the media credentialing policy in 2018, legislative staff have applied objective, neutral criteria to determine whether applicants qualify for credentials. *Id.* ¶17. Building on prior practice, the 2018 policy set forth "[d]efining characteristics" of eligible reporters: "represent institution that hire and fire, can be held responsible for actions, sued for libel"; "have editors, to whom they are responsible," "aren't the final arbiter and executioners of their own stories," and "don't just represent their own stream of consciousness"; "have some degree of education and/or professional training in journalism"; "adhere to a defined professional code of ethics"; and "represent institutions with a track record," *i.e.*, "have been in the business for a period of time and have established they are not lobbyist organizations, political parties, or flash-in-the-pan charlatans with blog sites." *Id.* ¶¶19-20 & Ex.5. "Characteristics of ineligible reporters included "[b]log site owners" where "[t]he writing is essentially their own stream of consciousness, with little or no editorial oversight"; "[o]rganizations with no history or track record," "[l]ittle or no institutional framework," and "not bound by a journalistic code of ethics"; and "[i]nstitution and reporters whose main purpose seems to be Lobbying or pushing a particular point of view." *Id.* ¶21. The 2018 policy recognized that "these defining characteristics can be debated," but "[f]or practical purposes, we need to create a clear definition, so this is the starting point. These characteristics

will likely change as the characteristics of the media industry evolve and become more clear." *Id.* ¶22.

The legislature made incremental changes over the years. The 2019 policy maintained the same criteria as the 2018 policy. *Id.* ¶23 & Ex.6. The 2020 policy listed as credentialing criteria that an applicant "[b]e a professional journalist" and "[r]epresent news organizations or publications that have a track record," among other things. *Id.* ¶25 & Ex.7. The 2021 policy required that an applicant "[b]e a professional journalist" and "[r]epresent an established, reputable news organization or publication," among other things. *Id.* ¶26 & Ex.8. The 2022, 2023, and 2024 policies did not change in these respects. *See id.* ¶¶27-29 & Exs.9-11. Legislative staff consistently applied the "defining characteristics" set forth in the 2018 and 2019 policies. *Id.* ¶¶25-29.

With respect to bloggers and independent media, the 2019 policy added a note suggesting that "a blog site owner or organization not bound by a code of ethics" could potentially receive a credential upon signing a document agreeing to abide by an ethics code. *Id.* ¶23 & Ex.6. The 2021 and 2022 policies provided: "Bloggers representing a legitimate independent news organization may become credentialed under some circumstances." *Id.* ¶¶26-27. The 2023 and 2024 policies narrowed that availability: "Bloggers representing a legitimate independent news organization may become credentialed *under limited, rare circumstances*." *Id.* ¶¶28-29 & Exs.10-11 (emphasis added).

3. Directionally consistent with prior revisions, the 2025 policy further revised the standard for bloggers: "Blogs, independent media or other freelance media do not qualify for a credential." *Id.* Ex.1. The primary reason for this revision was to establish objective, black-and-white criteria and eliminate any discretion of the House and Senate media liaison designees. *Id.* ¶32. It was believed this revision would improve consistency and predictability for members of the media, eliminating the possibility of some bloggers or independent media receiving credentials but others not. *Id.* The revision also partly anticipated an uptick in nontraditional, independent media and thus increased inquiries about credentials from nonqualifying individuals. *Id.*; *see id.* ¶42. The change comported with the Legislature's position back to 2018 that characteristics of qualifying journalists "will likely change as the characteristics of the media industry evolve and become more clear." *Id.* ¶¶22, 32.

C. The denial of Schott's credentialing application

Schott most recently possessed media credentials as an employee of the *Salt Lake Tribune*. *Id.* ¶48. In September 2024, the *Tribune* politics editor advised legislative staff that Schott "no longer works at" and "no longer represents The Tribune," considering this may "impact[] his press pass." *Id.* Under standard practice, staff revoked his media credential. *Id.* ¶49. According to Schott, he launched UPW after his departure. Schott-Decl. ¶9.

On December 17, 2024, Schott applied for a media credential. Musselman-Decl. ¶4. Upon review of UPW's website, legislative staff concluded that he and UPW—as a blog, independent media, or other freelance media—did not meet the credentialing policy's requisite criteria. *Id.* Staff concluded that Schott is not responsible to an editor and is the final arbiter and executioner of his stories. *Id.* Staff also concluded that the three-month-old UPW did not have any institutional framework or a sufficiently established track record. *Id.* Legislative staff denied Schott's appeal, explaining the decision not to issue a credential was "in accordance with clearly established, and consistently applied, policies." *Id.* ¶7 & Ex.5. Staff assured Scott that "nothing prevents individuals from reporting on the proceedings of the Utah Legislature, regardless of whether they hold a media credential," as information on legislative action is "readily accessible on the legislative website," and "everyone is welcome to attend committee meetings and floor time." *Id.*

LEGAL STANDARD

Plaintiffs cannot get a preliminary injunction unless they show that (1) they are "substantially likely to succeed on the merits," (2) they will suffer irreparable harm absent relief, (3) their threatened injury outweighs any harm to Defendants, and (4) the injunction is in the public interest. *Harmon v. City of Norman*, 981 F.3d 1141, 1146 (10th Cir. 2020). The Tenth Circuit "caution[s] courts against granting injunctions that alter the status quo or that require the 'nonmoving party to take affirmative action.'" *Att'y*

Gen. of Okla. v. Tyson Foods, Inc., 565 F.3d 769, 776 (10th Cir. 2009). Such "disfavored" injunctions—like the one Plaintiffs seek here—require a "heightened showing" of the four factors. *Id.*; *infra* IV.

ARGUMENT

I. Plaintiffs have not shown a substantial likelihood of success on the merits.

Plaintiffs analyze their First Amendment claim under the wrong legal standard. Because they seek to engage in alleged First Amendment activity on government property, their claims are subject to forum doctrine, which they do not address. Under the correct standard, even if Plaintiffs can show a burden on protected First Amendment activity, the Legislature's credentialing policy withstands scrutiny because it is reasonable and viewpoint neutral. Nor does the policy impose a prior restraint; Plaintiffs remain free to publish at their pleasure. And the credentialing criteria Plaintiffs challenge are not unduly vague.

A. Plaintiffs proffer the wrong framework for their First Amendment claim.

Plaintiffs' challenge the denial of a Capitol media credential. That implicates alleged First Amendment activity "on government property," triggering a well-established "three-step framework." *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1138-39 (10th Cir. 2001). First, Plaintiffs must show that their activities are protected by the First Amendment. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). Second, the court "must identify the nature of the forum, because the extent to which

the Government may limit access depends on whether the forum is public or nonpublic." *Id.* Third, the court "must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id.*

Plaintiffs ignore this settled framework—even though they cite cases (Mot.15-16, 20-21) squarely recognizing that a government's denial of a press pass and restrictions on media access "are analyzed under the three-step framework of the public forum doctrine." *Alaska Landmine, LLC v. Dunleavy*, 514 F. Supp. 3d 1123, 1130 (D. Alaska 2021); *see TGP Commc'ns, LLC v. Sellers*, No.22-16826, 2022 WL 17484331, at *4 (9th Cir. Dec. 5, 2022) (unpublished). Yet they do not even bother to address that standard. Their failure to do so is reason enough to hold that they have not carried their burden for a preliminary injunction.

Plaintiffs instead argue for "equal access inherent in the freedom of the press" and "strict scrutiny." Mot.14, 16-17. The Seventh Circuit squarely rejected this theory in upholding the exclusion of certain reporters from gubernatorial press events. *See John K. MacIver Inst. for Pub. Pol'y, Inc. v. Evers*, 994 F.3d 602, 612 (7th Cir. 2021). "[R]eporters are not cloaked with automatic 'strict scrutiny protection' merely because they are members of the press." *Id.* Instead, forum doctrine "addresses who has the right of access to government property to engage in various expressive pursuits," including "gathering information for news dissemination." *Id.* at 611-12. Plaintiffs' "argument that the First Amendment provides a guarantee of 'equal access' among members of the media rests

on cases that pre-date modern forum analysis or cases with such unique facts as to have no relevance here." *Id.* at 612. This Court should likewise reject Plaintiffs' equal-access theory and the "havoc" and "chaos" it invites. *Id.* at 612, 614.

B. Plaintiffs have not shown a protected First Amendment right of newsgathering or equal access to information.

At step one of the forum analysis, Plaintiffs must show an infringement of activity "protected by the First Amendment." *Cornelius*, 473 U.S. at 797. "It is helpful first to identify the nature of the right allegedly infringed" because "the asserted right is more narrowly defined" than Plaintiffs claim. *Courthouse News Serv. v. Smith*, __ F.4th __, 2025 WL 259980, at *2 (4th Cir. 2025). Defendants do not dispute that Schott generally engages in protected First Amendment activity when he gathers news, but their denial of Schott's media credential does not limit any protected First Amendment activity.

1. Plaintiffs assert a sweeping "First Amendment right to news gather." Mot.13. But "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). Half a century ago, the Supreme Court recognized that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). And it has long rejected the notion that "the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally."

Pell v. Procunier, 417 U.S. 817, 834 (1974); *accord Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974).

To be sure, the Tenth Circuit has recognized that "the First Amendment provides at least some degree of protection for gathering news and information, particularly news and information about the affairs of government." *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1197 (10th Cir. 2017). But "there is no general First Amendment right of access to all sources of information within governmental control." *Smith v. Plati*, 258 F.3d 1167, 1178 (10th Cir. 2001). This limitation "applies equally to both public and press, for the press, generally speaking, do not have a special right of access to government information not available to the public." *Id.* (collecting cases). So "whatever the extent of protection warranted newsgathering, it is no greater than the right of the general public to obtain information." *Okla. Hosp. Ass'n v. Okla. Pub. Co.*, 748 F.2d 1421, 1425 (10th Cir. 1984).

Here, denying Schott's media credential has not deprived Plaintiffs of any publicly accessible government information. Plaintiffs' claim boils down to where and how—not whether—they access information. Plaintiffs complain about their inability "to view and report … *from the designated media areas* throughout the Capitol." Schott-Decl. ¶¶48-49 (emphasis added). But "the media have no special right of access … different from or greater than that accorded the public generally." *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (plurality op.). And Plaintiffs here are "not being denied access

to information available to the public generally." *Raycom Nat'l, Inc. v. Campbell*, 361 F. Supp. 2d 679, 684 (N.D. Ohio 2004) (denying preliminary injunction). Legislative floor debates and committee meetings are available to view in person and online, press credential or not. Peterson-Decl. ¶¶3-4. Agenda items, press releases, and other materials are publicly accessible online, press credential or not. *Id.* ¶5.

Plaintiffs claim their lack of a credential has hampered their ability to gather news in several ways. But each source is freely available to the public and thus to Plaintiffs even without a credential:

- Alleged inability to cover the Governor's and the House's press conferences (Schott-Decl. ¶46): The Governor's press conferences are livestreamed and archived online, and video of House press conferences is available online. Peterson-Decl. ¶14.

- Alleged inability to cover the opening addresses by the Senate President and Speaker of the House (Schott-Decl. ¶47): These addresses were livestreamed and archived online, *see Senate - 2025 General Session - Day 1*, Utah State Legis., https://bit.ly/4aDcqqo; *House - 2025 General Session - Day 1*, Utah State Legis., https://bit.ly/3EsB9BK, and Plaintiffs could have viewed them live and in person from the chamber gallery—the *very place* where designated press boxes are located. Peterson-Decl. ¶¶3-4, 13, Exs.3-4

- Alleged inability to cover the Senate President's "remarks at a media gathering" after his opening address (Schott-Decl. ¶47): That gathering was recorded and archived online. Utah Senate, *Utah Senate Media Availability – Day 1 – 2025 General Session*, Facebook (Jan. 21, 2025), https://bit.ly/4gmkE7w.

- Alleged inability to receive legislative press releases (Schott-Decl. ¶46): These press releases are publicly available online. Peterson-Decl. ¶¶5, 16; *see Danielson v. Huether*, 355 F. Supp. 3d 849, 868 (D.S.D. 2018) (rejecting First Amendment claim to "receive notifications of press releases … normally sent to the media" where plaintiff could "learn of [them] from other sources").

- Alleged inability to attend daily briefings in the Senate President's office and weekly briefings in the House Speaker's office (Schott-Decl. ¶48): Recordings of these private events are available online. Peterson-Decl. ¶14.

- Alleged inability to cover House or Senate rules committee meetings (Schott-Decl. ¶48): These meetings are open to the public. Peterson-Decl. ¶4.

- Alleged inability to speak to legislators and their staff or ask them questions (Schott-Decl. ¶49): Nothing prevents Plaintiffs from doing so in public spaces or through private channels. *See, e.g.*, Peterson-Decl. ¶¶48-49 & Exs.15-16 (Schott e-mailing staff); Musselman-Decl. ¶¶3, 5 & Exs.1-2 (Schott texting staff).

In short, Plaintiffs have not shown a constitutionally cognizable restriction on their ability to gather news.

2. Plaintiffs also assert a First Amendment "right of equal access" as "a member of the press." Mot.1, 14; *see* Schott-Decl. ¶51 (claiming Plaintiffs cannot "gather news or information on equal footing with other reporters"). But Plaintiffs' asserted "right of 'equal access' … cannot be limited to members of the media without conferring a privileged First Amendment status on the press, and the Supreme Court has affirmed that the press does not enjoy special First Amendment rights that exceed those of ordinary citizens." *Snyder v. Ringgold*, 133 F.3d 917, 1998 WL 13528, at *4 (4th Cir. 1998) (unpublished) (citing *Branzburg*, 408 U.S. at 684-85); *see Clyma v. Sunoco, Inc.*, 594 F.3d 777, 780 (10th Cir. 2010) ("the media does not have a special right of access to information unavailable to the public"); *supra* pp.11-12. Plaintiffs' "asserted right would require that, in each and every circumstance where the government made news available,

it would have to give access to that information to *everyone* on equal terms." *Snyder*, 1998 WL 13528, at *4. If that were so, the Legislature could not possibly continue to hold in-office briefings with the Senate President and House Speaker or other private media events. Courts have rightly rejected such a "broad rule" as "untenable." *Id.*

Plaintiffs' theory also "flies in the face of so much well settled practice." *Id.* "Public officials routinely select among reporters when … providing access to nonpublic information." *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 417 (4th Cir. 2006). "By giving one reporter or a small group of reporters information or access, the official simultaneously makes other reporters, who do not receive discretionary access, worse off." *Id.* at 418. Plaintiffs' view of unbridled "equal access" would categorically "preclude the White House's practice of allowing only certain reporters to attend White House press conferences, even though space constraints make it impractical to open up the conference to all media organizations." *Snyder*, 1998 WL 13528, at *4; *see Pen Am. Ctr., Inc. v. Trump*, 448 F. Supp. 3d 309, 328 (S.D.N.Y. 2020) (noting president's "significant discretion over White House press credentials and reporters' access to the White House"). Accepting Plaintiffs' theory "would 'plant the seed of a constitutional case' in 'virtually every' interchange between public official and press." *Balt. Sun*, 437 F.3d at 418.

Events at the White House this week confirm that Plaintiffs' "equal access" theory is unworkable. The president's press secretary announced Tuesday that the administration would extend access beyond "legacy media" to "less traditional outlets and

even independent bloggers." Eli Stokols, *Trump briefing begins with pledge to boost outside media*, Politico (Jan. 28, 2025), https://bit.ly/4jG7S71. Within 24 hours, the White House received over 7,400 requests for access to the briefing room. Mary Margaret Olohan, *White House Receives Over 7,400 New Media Requests Within 24 Hours*, Daily Wire (Jan. 29, 2025), https://perma.cc/HL5A-FTT7. Surely the First Amendment does not mandate conferring credentials on all 7,400 applicants. As the Seventh Circuit held in rejecting this same "equal access" theory, government officials need not "grant every media outlet access to every press conference." *Evers*, 994 F.3d at 614. The court emphasized the "chaos that might ensue if every gubernatorial press event had to be open to any 'qualified' journalist" and how "no one's needs would be served if the government were required to allow access to everyone or no one at all." *Id.* The Court should reject Plaintiffs' theory and the "havoc" that would ensure. *Id.* at 612.

C. The credentialing policy is reasonable and viewpoint neutral.

Even if Plaintiffs have shown that the lack of a credential limits protected First Amendment activity, the Legislature's "justifications" for denying Schott credentials and his "exclusion from the relevant forum satisfy the requisite standard." *Cornelius*, 473 U.S. at 797. The restricted areas to which Plaintiffs seek access are either a "nonpublic forum" or a "limited public forum." *See Evers*, 994 F.3d at 610 (classifying governor's "limited-access press conference" as nonpublic forum); *Sellers*, 2022 WL 17484331, at *4 (classifying "press conferences" at "County facilities" as "limited public forum[]");

Ateba v. Jean-Pierre, 706 F. Supp. 3d 63, 80 (D.D.C. 2023) (classifying White House press area as "nonpublic or limited public" forum).

Regardless of whether the restricted media spaces are a nonpublic or limited public forum, the standard of review is the same. *See United States v. Kokinda*, 497 U.S. 720, 730 (1990). Control over access "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806. The credentialing policy is both reasonable and viewpoint neutral.

1. The credentialing policy is reasonable considering the forum's purpose.

"The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Id.* at 808. Reasonableness "must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Id.* at 809.

The Legislature's credentialing policy and criteria are reasonable considering the forum's purpose. The policy "is designed to give professional journalists and media representatives from reputable organizations access to cover the Legislature and other significant events at the Utah State Capitol." Peterson-Decl. Ex.1. It also "aims to support informed reporting while maintaining the integrity … of the Capitol." *Id.* For this reason, the policy requires applicants be "a professional member of the media" who "is part of an established reputable news organization or publication" and excludes

"[b]logs, independent media or other freelance media." *Id.* Denying credentials to bloggers and other independent media reasonably ensures professional journalists and established media maintain sufficient access.

Similarly, in *Evers*, the credentialing policy required an individual applicant to be "a bona fide correspondent of repute in their profession" and "employed by or affiliated with an organization whose principal business is news dissemination." 994 F.3d at 606. The policy further required news organizations to have "published news continuously for at least 18 months" and have "a periodical publication component or an established television or radio presence." *Id.* The Seventh Circuit held these were "reasonably related to the viewpoint-neutral goal of increasing the journalistic impact of the Governor's messages by including media that focus primarily on news dissemination, have some longevity in the business, and possess the ability to craft newsworthy stories." *Id.* at 610; *see Ateba*, 706 F. Supp. 3d at 84 (agreeing). The same is true here.

The reasonableness of the credentialing policy "is also supported by the substantial alternative channels that remain open" for news gathering. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 53 (1983). When considering forum "access barriers," the Supreme Court has "counted it significant that other available avenues for the [plaintiff] to exercise its First Amendment rights lessen the burden created by those barriers." *CLS v. Martinez*, 561 U.S. 661, 690 (2010). As shown above, Plaintiffs have several other available avenues to obtain the information on which they seek to report.

Supra pp.13-14. In other words, Plaintiffs are "assured of equal access to all modes of communication." *Perry*, 460 U.S. at 53. They have not shown their "ability" to news gather "is seriously impinged by the restricted access" to credential holders. *Id.* Even if those other channels are not Plaintiffs' preferred means to gather news, "[t]he First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means" to engage in First Amendment activity. *Cornelius*, 473 U.S. at 809.

The "surrounding circumstances" confirm the reasonableness of the Legislature's policy revision. *Id.* The Legislature's "primary reason" for revising the policy was to "eliminate any discretion of the House and Senate media liaison designees" and thus "improve consistency and predictability." Peterson-Decl. ¶32. So "[i]nstead of employing discretion in determining which journalists are eligible to hold a [press] pass," the Legislature now employs "clear and definite standards that are not amenable to discretionary judgments." *Ateba*, 706 F. Supp. 3d at 84 (holding White House credentialing policy was "facially reasonable"). Confirming the point, the Legislature has seen an increase in bloggers, independent media, and freelance journalists inquiring about press passes. Peterson-Decl. ¶32. The Legislature's limiting press credentials to established news organizations also reasonably helps the press corps maintain its legitimacy amid the rise in nontraditional media. *Id.* ¶9; *cf. Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 685 (1992) (finding concerns over "incremental effects" reasonable).

Having failed to apply the correct standard, Plaintiffs do not even contest the reasonableness of the credentialing policy. They accordingly have not carried their burden to show the policy is unreasonable.

2. The credentialing policy is viewpoint neutral.

Viewpoint discrimination occurs when the government targets "particular views taken by speakers on a subject." *Vidal v. Elster*, 602 U.S. 286, 293 (2024). Government discriminates based on viewpoint "when it denies access to a speaker solely to suppress the point of view he espouses." *Cornelius*, 473 U.S. at 806. The credentialing policy is viewpoint neutral, both on its face and as applied.

On its face, the policy "draws no distinctions based upon the … viewpoint of the speaker, and there is no reason to think that, in application, it would tend to 'favor some viewpoints or ideas at the expense of others.'" *Pahls v. Thomas*, 718 F.3d 1210, 1234 (10th Cir. 2013). None of the credentialing criteria or the standards used in applying them are "based on the specific motivating ideology or the opinion or perspective of the speaker." *Vidal*, 602 U.S. at 294. In assessing whether a news organization or publication is "established" or "reputable," Peterson-Decl. Ex.1, legislative staff consider whether it has "a track record," has "been in the business for a period of time," and "can be held responsible for actions," *id.* ¶20. And whether journalists are considered "[b]logs, independent media or other freelance media," *id.* Ex.1, turns on whether they "have editors, to whom they are responsible," "aren't the final arbiter and

executioners of their own stories," and "don't just represent their own stream of consciousness," *id.* ¶20. These criteria are "based on the *status* of the respective" organization or journalist "rather than their views." *Perry*, 460 U.S. at 49. The credentialing policy excludes these reporters "[n]o matter the message [they] want[] to convey." *Vidal*, 602 U.S. at 293-94.

Beyond that, the Legislature "did not apply the policy in this case to the plaintiffs on the basis of their viewpoint." *Hawkins v. City & Cnty. of Denver*, 170 F.3d 1281, 1288 (10th Cir. 1999); *see* Musselman-Decl. ¶8. The Legislature denied Schott's credentialing application because "Schott and Utah Political Watch did not meet the requisite criteria under the 2025 credentialing policy as a blog, independent, or other freelance journalist" or "an established, reputable news organization or publication." Musselman-Decl. ¶¶4, 7. Application of those objective criteria did not turn on Plaintiffs' viewpoint. By the plain terms of the criteria, it mattered not that Schott is "a left-leaning journalist" or that he has "often reported critically on the right-leaning majority in the Utah legislature." Mot.1. There is "no indication" that the Legislature "intended to discourage one viewpoint and advance another." *Perry*, 460 U.S. at 49.

Plaintiffs claim the Legislature "altered [its] policy to ensure independent journalists were not allowed credentials" for the purpose of excluding Schott given his unfavorable "reporting on the majority-Republican legislature." Mot.18. That is pure speculation and belied by the record. "The Legislature changed the 2025 credentialing policy

to exclude '[b]logs, independent media or other freelance media' without any consideration of Mr. Schott." Peterson-Decl. ¶34. It made the revision "to establish objective, black-and-white criteria and eliminate any discretion of the House and Senate media designees" and in light of "the uptick in nontraditional, independent media" and "increased inquiries from nontraditional media." *Id.* ¶32. The revision reflected "the Legislature's longstanding position going back to 2018 that characteristics of qualifying journalists 'will likely change as the characteristics of the media industry evolve and become more clear.'" *Id.* And the revision logically followed the Legislature's prior revision to limit credentials issued to bloggers, narrowing the policy from "under some circumstances" in 2021 and 2022 to "under limited, rare circumstances" in 2023 and 2024. *Id.*

Plaintiffs' proffered evidence of viewpoint discrimination does not change that conclusion. Plaintiffs first cite a tweet of Ms. Osborne from January 2024—nearly a year before the policy revision and denial of Schott's application. Schott-Decl. ¶29. They do so out of context and without providing Mr. Schott's initial tweet to which Ms. Osborne responded—which Schott deleted. Musselman-Decl. ¶9 & Ex.6. What Schott calls "a lighthearted post … poking a little fun," Schott-Decl. ¶29, was a public mocking of junior staffers to his 14,000 Twitter followers, *see* Musselman-Decl. ¶9 & Ex.7; @SchottHappens, Twitter, https://x.com/SchottHappens. In any event, Ms. Osborne's tweet was unrelated to any viewpoints expressed in Schott's reporting.

Plaintiffs next cite a spat with Senate President Adams and Ms. Peterson. Mot.18-19; *see* Schott-Decl. ¶¶30-36; Mot.Ex.C. But that spat occurred one month *after* the Legislature revised its credentialing policy, so it could not have motivated the policy revision. And the Legislature denied Schott's application because he did not meet the policy's objective credentialing criteria. Musselman-Decl. ¶¶4, 7. "Credentialing decisions are … made without regard to news organizations' or individual journalists' past coverage critical of the Legislature." Peterson-Decl. ¶45. Sworn declaration testimony explains that neither Schott's reporting nor the viewpoints expressed therein played any role in the revision of the policy or the denial of his application. *Id.* ¶¶24, 53; Musselman-Decl. ¶8; *see Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998) (holding exclusion from forum was viewpoint neutral where official "testified [plaintiff's] views had 'absolutely' no role in the decision to exclude him").

The Legislature's credentialing history and the composition of the list of credentialed journalists confirms the absence of viewpoint discrimination. The Legislature has repeatedly credentialed journalists notwithstanding their personal or their organizations' past coverage critical of the Legislature—including Schott when he wrote for the *Salt Lake Tribune*. *See* Peterson-Decl. ¶¶45-47. And journalists of organizations with varying viewpoints—from the *Salt Lake Tribune* to *Deseret News*—have consistently received credentials. *Id.* ¶44. The current list of credentialed media includes organizations viewed as conservative and liberal and journalists who have praised and criticized the Legislature.

Id. ¶¶41, 44-46. "[T]he inclusion of a broad range of media outlets on both sides of the political spectrum certainly diminishes any claim that the list is based on political ideology." *Evers*, 994 F.3d at 611.

Plaintiffs' contrary arguments miss the mark. First, Plaintiffs have not shown any "inconsistent application of a policy." *Contra* Mot.17. Schott's supplemental submission shows that all other official denials of credentials were self-supervised blogs, independent media outlets, or freelance journalists who publish without editorial oversight. *See* Suppl.-Schott-Decl. Ex.F at 11. And many other applicants have been denied credentials unofficially for the same reasons. Peterson-Decl. ¶42. The record shows only even-handed application of the Legislature's neutral, objective criteria.

Second, credentialing decisions are not left "to the unbridled discretion of a government official." Mot.17. The Legislature revised its policy to exclude blogs, independent media, and freelance journalists to "*eliminate any discretion* of the House and Senate media designees." Peterson-Decl. ¶32 (emphasis added). Prior versions of the policy could result in "some bloggers or some journalists outside the traditional media establishment receiving credentials and others not." *Id.* Now, rather than "employing discretion in determining which journalists are eligible for credentials," the Legislature employs "clear and definite standards that are not amenable to discretionary judgments." *Ateba*, 706 F. Supp. 3d at 84. This revision "reduces the risk" that officials "might allocate" credentials "based on the views of certain … reporters." *Id.*

Third, Plaintiffs claim the Legislature's "focus on the nature of the publication" indicates "discriminatory motive." Mot.18. It does not. Governments may limit access to nonpublic forums "based on subject matter and speaker identity." *Cornelius*, 473 U.S. at 806. Indeed, such "distinctions … are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *Perry*, 460 U.S. at 49.

Finally, Plaintiffs are wrong to say "Defendants have not treated other news media in this way when they apply for credentials as 'independent' media," namely *Utah News Dispatch*. Mot.19. But UPW and *Utah News Dispatch* are very different. *Utah News Dispatch* satisfied the policy's credentialing criteria: it has an editorial process and oversight, has capacity to make hiring and firing decisions, is part of a nationally established media group, and employs an editor and multiple journalists. Peterson-Decl. ¶52. UPW, on the other hand, is a blog or independent media self-run without those characteristics. Plaintiffs have not shown viewpoint discrimination.

D. The credentialing policy is not a prior restraint.

In a single paragraph, Plaintiffs argue that the credentialing policy is an unlawful prior restraint on their "publications." Mot.20-21. It is not. "[A] 'prior restraint' restricts speech in advance on the basis of content … ." *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 42 (10th Cir. 2013). Here, Plaintiffs have not been "prohibited from speaking or publishing about" the Legislature. *Bralley v. Albuquerque Pub. Sch. Bd. of Educ.*, No.13-

cv-768, 2015 WL 13666482, at *4 (D.N.M. Feb. 25, 2015) (unpublished). "[P]ress gallery regulations" do not impose "a prior restraint on the publication of news articles." *Ateba*, 706 F. Supp. 3d at 85; *see Bralley*, 2015 WL 13666482, at *4 (rejecting claim that "denial of [plaintiff's] press pass constituted a prior restraint … as a member of the press" as supported by "no authority—much less Supreme Court or Tenth Circuit authority"). As the policy explains, "nothing prevents individuals from reporting on the proceedings of the Utah Legislature, regardless of whether they hold a media credential." Peterson-Decl. Ex.1. And this is not the rare case where "*news gathering* (as opposed to speech)" has been "unreasonably restricted in advance" because Plaintiffs maintain access to all the information they seek. *See Bralley*, 2015 WL 13666482, at *3 (finding no prior restraint from denial of press pass where government did not "thwart[] any other attempt to attend the debate"); *supra* pp.13-14.

Plaintiffs cite three out-of-circuit cases, none of which even mentions "prior restraint," and all of which are inapposite. Mot.20-21. *Detroit Free Press v. Ashcroft* concerned access to deportation proceedings, relying on a line of cases about access to judicial proceedings. 303 F.3d 681, 694-96 (6th Cir. 2002) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 584 (1980)). But "[t]he Tenth Circuit has limited the *Richmond Newspapers* … line of cases" to apply only "in relation to the Sixth Amendment right to a fair and public trial," which makes it irrelevant here. *Voter Reference Found. v. Torrez*, 727 F. Supp. 3d 1014, 1184 (D.N.M. 2024). The Ninth Circuit's unpublished

Sellers order found viewpoint discrimination in part because "the County ha[d] not denied any other requests for a press pass on any basis similar to the reasons articulated here." 2022 WL 17484331, at *5 n.4. Not so here, as several applicants have been denied for the same reason as Plaintiffs. Peterson-Decl. ¶42; Suppl.-Schott-Decl. Ex.F at 11. And *Alaska Landmine* declined to address the First Amendment claim of content-based discrimination. *See* 514 F. Supp. 3d at 1134.

E. The credentialing policy is not unconstitutionally vague.

Plaintiffs argue that the credentialling policy is unconstitutionally vague because the terms "established," "reputable," "blog," "independent," and "freelance" are "not clearly defined." Mot.21-23. It is not necessary for the policy to define these terms because each term is "commonly understood in the English language." *CFTC v. Reed*, 481 F. Supp. 2d 1190, 1199 (D. Colo. 2007). And when considered in context, the terms have well-understood meanings. They are not unconstitutionally vague.

"The void-for-vagueness doctrine requires that statutory commands provide fair notice to the public." *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1233 (10th Cir. 2023). Yet "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). "The void-for-vagueness doctrine is primarily a criminal doctrine." *Griffin v. Bryant*, 30 F. Supp. 3d 1139, 1173 (D.N.M. 2014). To void a civil statute on vagueness grounds, it must be "so vague and indefinite as really to be no rule or standard at all." *Boutilier v.*

INS, 387 U.S. 118, 123 (1967). "If persons of reasonable intelligence can derive a core meaning from a civil statute, it is not unconstitutionally void for vagueness." *Integrated Bus. Plan. Assocs. v. Operational Results, Inc.*, No.2:22-cv-00733, 2024 WL 2862420, at *9 (D. Utah June 6, 2024) (unpublished).

Here, Plaintiffs target the terms "established," "reputable," "blog," "independent," and "freelance" in the abstract. Plaintiffs' "narrow focus" on these terms "removes the important context of the credentialing rules." *Ateba*, 706 F. Supp. 3d at 83; *see Gray*, 83 F.4th at 1234 (considering terms in "context" amid "the surrounding words and phrases"). Viewed in context, the terms have "a core meaning." *Operational Results*, 2024 WL 2862420, at *9. Thus, courts have upheld similar credentialing policies that require a journalist to be "reputable" or "of repute." *See Ateba*, 706 F. Supp. 3d at 83 (rejecting argument that White House "requirement that journalists be 'bona fide ... reporters of reputable standing'" was "standardless and susceptible to abuse"); *Evers*, 994 F.3d at 606-07, 610-11 (holding that "bona fide correspondent of repute in their profession" was a reasonable criterion).

Plaintiffs claim "blog" is vague because "it is unclear what qualifies as a 'blog' and whether it is only journalists who report exclusively on a 'blog,' as opposed to in conjunction with other media formats, [who] cannot have credentials." Mot.22. But "blog" has a well-known, ordinary meaning. *See* Blog, Merriam-Webster, https://bit.ly/4hgheo5 ("a website that contains online personal reflections, comments,

and often hyperlinks, videos, and photographs provided by the writer"). Read in context of the policy, a reasonable person can easily distinguish a blogger from a "professional member of the media" who "is part of an established reputable news organization or publication." Peterson-Decl. Ex.1. And no reasonable person would think a "professional member of the media" becomes ineligible because he also operates a blog. *Contra* Mot.22. The same is true for freelancers—a journalist who is "regularly employed" by a publication is plainly eligible for a credential *on behalf of that publication* even if he separately does freelance work for "another publication." *Contra* Mot.22.

Plaintiff also challenge the terms "independent media or other freelance media." Mot.22. These terms "are associated in a context suggesting that the words have something in common" and so "they should be assigned a permissible meaning that makes them similar." *Potts v. Ctr. for Excellence in Higher Educ.*, 908 F.3d 610, 614 (10th Cir. 2018). A cursory dictionary search shows the term "freelancer" already bears a meaning similar to "independent." *See* Freelancer, Merriam-Webster, https://bit.ly/40TW1KW ("a person who acts independently without being affiliated with or authorized by an organization"). And the policy's use of "other" before "freelance" confirms they should be read similarly. *See Potts*, 908 F.3d at 615.

Schott also misunderstands the criterion that applicants "[a]dhere to a professional code of ethics." Mot.22. The policy does not require adherence to any specific code. *See* Peterson-Decl. Ex.1. *Contra* Mot.22. Schott must know what it means for a

journalist to "[a]dhere to a professional code of ethics," having worked at an outlet that professes to do so. *See* Schott-Decl. ¶8; *Editorial policies and ethics*, Salt Lake Trib., https://perma.cc/M8GN-VGDR.

Finally, Plaintiffs cannot seriously claim vagueness when Schott knew all along he did not meet the policy's credentialing criteria. The day before he applied for a credential, Schott posted on a social media platform expressing concerns that he would not qualify and trying to plant the seeds for his (false) narrative that the policy has been "weaponized against" him. *See* @schotthappens.com, Bluesky (Dec. 16, 2024, at 6:40 PM), https://perma.cc/SV5K-XTWW. He then posted a video to Instagram documenting his experience applying for a credential, which begins, "Come with me while I get denied a press credential for the first time ever." @schotthappens, Instagram (Dec. 17, 2024), https://bit.ly/4gkJpkv.[1]

II. Plaintiffs' alternative channels for newsgathering and delay in seeking relief undermines any suggestion of irreparable harm.

Even if Plaintiffs were substantially likely to succeed on the merits, they have not shown irreparable harm given the alternative channels for newsgathering and their 11-week delay in seeking relief. Irreparable harm is "often presumed where a violation of

---

[1] Schott started building his false narrative before the Legislature published the 2025 policy, which suggests he knew he would not qualify for a credential under the 2024 policy. On November 4, Schott asked Ms. Musselman when she did not immediately respond to him, "does this mean you're not planning to issue me credentials for the 2025 session?" Musselman-Decl. ¶3 & Ex.1.

First Amendment rights is shown." *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1220 (D. Utah 2004). But this "presumption is not absolute." *Johnson v. Cache Cnty. Sch. Dist.*, 323 F. Supp. 3d 1301, 1314 (D. Utah 2018). The Court still must "consider the specific character of the First Amendment claim." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003). "Injunctive relief is not necessary" when a burden on expressive activity is "minimal" and "leaves ample capacity" for protected activity. *Johnson*, 323 F. Supp. 3d at 1314. What's more, a plaintiff seeking preliminary relief "must generally show reasonable diligence." *Benisek v. Lamone*, 585 U.S. 155, 159 (2018) (per curiam). Thus, "delay is an important consideration in the assessment of irreparable harm for purposes of a preliminary injunction." *GTE Corp. v. Williams*, 731 F.2d 676, 679 (10th Cir. 1984).

As shown, Plaintiffs have ample capacity to gather news and continue reporting on the Legislature without a credential. *Supra* pp.13-14. They have not shown that the denial of a credential is "great" or "substantial." *Johnson*, 323 F. Supp. 3d at 1316. Furthermore, Plaintiffs waited 11 weeks to seek relief. The Legislature posted the 2025 policy on November 5, Peterson-Decl. ¶35, though Schott seemingly knew he would not qualify for a credential before then, *supra* n.1. Instead of seeking relief, Schott waited, cataloging his experience on social media and his blog. *Supra* p.30; Bryan Schott, *Podcast: The most feared journalist in Utah* at 48:40-59:46, Utah Political Watch (Dec. 20, 2024), https://bit.ly/3EwGqIs; Bryan Schott, *Utah Legislature quietly changes press rules,*

shutting out independent media, Utah Political Watch (Dec. 17, 2024), https://perma.cc/5B9S-UM6N. Plaintiffs' "unnecessary" 11-week delay is "inconsistent with a claim that [they are] suffering great injury'" and undermines any suggestion of irreparable harm. *Utah Gospel Mission*, 316 F. Supp. 2d at 1221; *see, e.g.*, *Am. Ass'n of People with Disabilities v. Herrera*, 580 F. Supp. 2d 1195, 1246 (D.N.M. 2008) (two-week delay "considerably undercuts" irreparable harm).

III. The equities and public interest favor Defendants.

Granting Plaintiffs a preliminary injunction would harm the Legislature and the public. Accepting Plaintiffs' equal-access theory and requiring the Legislature to issue a press credential to Schott would open the pressroom doors to anyone who sought access. The Legislature would be left powerless to turn away any future blogger, freelance journalist, or even social media "influencer" who sought equal access. This is precisely the "havoc" and "chaos" the Seventh Circuit foresaw. *Evers*, 994 F.3d at 612, 614. An influx of credential holders would make it impossible for the Senate President and House Speaker to continue to hold their in-office briefings, resulting in less access for the press and thus less newsworthy information for Utahns.

IV. Plaintiffs' desired relief would disturb the status quo.

Plaintiffs "misunderstand the legal distinction between injunctions that disturb the status quo and those that do not." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1260 (10th Cir. 2005). "An injunction disrupts the status quo when it changes the 'last peaceable

uncontested status existing between the parties before the dispute developed.'" *Beltronics USA, Inc. v. Midwest Inventory Distribution*, 562 F.3d 1067, 1070-71 (10th Cir. 2009).

Plaintiffs misrepresent the status quo here. It is *not* Schott holding press credentials. *Contra* Mot.25. Schott's media credential was revoked upon his exit from the *Salt Lake Tribune* in September 2024. Peterson-Decl. ¶¶48-49. Schott was without a credential for two months before the Legislature revised its policy and any dispute developed. The relief Schott seeks—a preliminary injunction "ordering Defendants [to] grant[] Plaintiffs press credentials," Mot.26—would mandate action and alter the status quo. *See Kelly v. Lightfoot*, No.22-cv-4533, 2022 WL 4048508, at *4 (N.D. Ill. Sept. 2, 2022) (unpublished) (holding TRO for defendants "to reinstate" plaintiff's "press credential" was "mandatory injunctive relief" and would disrupt status quo). That "disfavored" remedy requires a "heightened showing," which Plaintiffs have not made. *Tyson Foods*, 565 F.3d at 776.

CONCLUSION

The Court should deny Plaintiffs' motion for a TRO or preliminary injunction.

Dated: January 31, 2025

Respectfully submitted,

/s/ Tyler R. Green

Tyler R. Green (Utah Bar No. 10660)
Consovoy McCarthy PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
(703) 243-9423
tyler@consovoymccarthy.com

Daniel M. Vitagliano (pro hac vice)
Julius Kairey (pro hac vice)
Consovoy McCarthy PLLC
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
(703) 243-9423
dvitagliano@consovoymccarthy.com
julius@consovoymccarthy.com

Counsel for Defendants

WORD COUNT CERTIFICATION

I certify that this Response in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction contains 7,733 words and thus complies with DUCivR 7-1(a)(4).

/s/ Tyler R. Green