

No. 25-4124

United States Court of Appeals for the Tenth Circuit

Utah Political Watch, Inc., and Bryan Schott,

Plaintiffs-Appellants,

v.

Alexa Musselman, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Utah, No. 2:25-cv-00050
Honorable Robert J. Shelby

**Brief for Amici Curiae States of Utah and Oklahoma
in Support of Petition for Panel or En Banc Rehearing**

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Introduction and Interest of Amici Curiae

State government, agencies, and officials recognize the importance of a free press and free speech. Functioning media fosters informed citizens and good government. But neither press nor speech rights are absolute. In particular, the First Amendment does not require media access to all government information nor guarantee equal access among media members. These principles have long been settled by the Supreme Court and this Court.

Per these First Amendment guidelines, State governments and public entities have established viewpoint-neutral media-credentialing policies to provide access and information to the qualifying media members in government-created forums. The Utah Legislature limits credentials to “professional member[s] of the media [who are] part of an established, reputable news organization or publication,” not including blogs, independent media, or other freelance media.

Plaintiffs, Mr. Schott and his self-run independent news blog, claimed the legislature’s policy violates their First Amendment rights to gather news on an equal basis with credentialed media members. The district court dismissed those claims based on Supreme Court precedent. The panel reversed after mis-applying the proper analytical framework to create a new right to viewpoint-neutral access to a government-created forum for journalists.

The panel’s ruling not only destabilizes settled law, it calls into question similar credentialing policies in Utah and other states. Amici curiae States of Utah and Oklahoma (Amici States), have an interest in properly defined and applied First Amendment requirements and in removing the uncertainty the panel decision has created.

Argument

The Amici States did not file an amicus brief at the panel merits stage. The district court had applied straightforward precedent to reach the correct outcome—Plaintiffs’ alleged right of equal access to newsgathering did not state a First Amendment claim and was therefore properly dismissed. Pet. Reh’g at 5-7 (quoting Plaintiffs’ allegations). The appeal seemed headed towards affirmance.

But the panel’s decision took an unexpected turn. It creates a new First Amendment right of access to a forum that calls into question neutral media-credentialing policies across public entities within the Circuit.

I. The panel decision upends long-standing Supreme Court and Tenth Circuit precedent.

The panel cites relevant cases and identifies the controlling three-step analysis. But the panel’s application quickly goes off course from the well-trodden legal path laid down by the Supreme Court’s and this Court’s cases.

Tracking Supreme Court caselaw, this Court has repeatedly articulated the three-part framework for analyzing speech regulations on government property. *Wells v. City and Cnty. of Denver*, 257 F.3d 1132, 1138-39 (10th Cir. 2001) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)). Initially, courts must determine whether the First Amendment even protects the speech at issue. If not, the analysis ends. But if First Amendment rights are at stake, the second step requires courts to identify the nature of the forum because that fixes the appropriate level of scrutiny. And third, the court must then decide whether the justifications for the challenged regulation satisfy the applicable level of scrutiny. *Id.*; *see also Verlo v. Martinez*, 820 F.3d 1113, 1128 (10th Cir. 2016) (citing *Cornelius*); *Summum v. Callaghan*, 130 F.3d 906, 913 (10th Cir. 1997) (citing *Cornelius*).

There should be no question that the first, threshold, inquiry is distinct from, and antecedent to, steps two and three. If the alleged speech “is not protected the analysis ends [t]here” at step one. *Summum*, 130 F.3d at 913. In other words, the Court “need go no further.” *Cornelius*, 473 U.S. at 797. That does not leave any room for courts to determine step one by commingling it with steps two or three. Panel Op. at 14, 16-17; Pet. Reh’g at 8-11. Yet that’s what the panel did. “Before addressing whether the speech at issue is protected by the First Amendment,” the panel “first consider[ed] the nature of the forum . . . because it inform[ed]” the panel’s “analysis of the first

prong.” Panel Op. at 14. The panel then crafted the alleged First Amendment right in terms of the forum’s level of scrutiny: “access to a state-created forum under reasonable and viewpoint-neutral criteria.” *Id.* at 18 (emphasis removed).

Weaving three distinct steps into each other to create this new First Amendment right poses at least two problems. First, it defies Supreme Court holdings on media newsgathering rights. The Court has stated “[t]here is no constitutional right to have access to particular government information.” *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality op.); *see also Pell v. Procunier*, 417 U.S. 817, 833 (1974). This “applies equally to both public and press.” *Smith v. Piti*, 258 F.3d 1167, 1178 (10th Cir. 2001) (citing Supreme Court cases). The First Amendment concerns the “freedom of the media to communicate information once it is obtained” not a right to the “information or access to it on demand.” *Houchins*, 438 U.S. at 9 (emphasis removed). So too, “the First Amendment *does not guarantee physical access to facilities*,” even when “First Amendment activity [i]s the motive for access[.]” *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1237 (10th Cir. 2021) (citing *Houchins*, 438 U.S. at 15, 16) (emphasis added); *see also* Pet. Reh’g at 11-12.

Second, the panel’s apparent attempt to distinguish between mere access and news gathering is a distinction without a difference in this context. Panel Op. at 16 (stating Mr. Schott is not asserting a right to

newsgathering or equal access to information; he is asserting the legislature “blocked his access to a government-created forum because of his viewpoint”). The panel itself recognized the forum is for *journalists*. Panel Op. at 20 (describing the right as “viewpoint-neutral equal access to a government-created forum for journalists”). Journalists, by definition, gather news. Here, Plaintiffs are not seeking access for the sake of mere physical presence at the forum, as if Mr. Schott just wants to idly stand around in the same places credentialled media have access to. To the contrary, Plaintiffs expressly allege they want equal access to *gather news*. Pet. at 6 (quoting Plaintiffs’ allegations that they are deprived equal access to gather news).

There can be, and is, no legal or logical difference between a journalist’s alleged right to access a forum reserved for gathering news and the journalist’s alleged right to gather the news. Otherwise, any plaintiff could create a First Amendment right to access a forum regardless of whether they engage in the activity for which the forum was created. That is not the law. The State, “no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (noting states “may reserve the forum for its intended purposes, communicative or otherwise”).

The Court should rehear this case to correct the panel’s analysis and reject its newly created right of access for access’s sake.

II. The panel decision undermines recurring viewpoint-neutral media-credentialing policies.

The Court should also rehear the case because the panel’s decision will have far-reaching effects. The media-credentialing policy at issue here is not unique. It says, in relevant part, the credentials are for “professional member[s] of the media [who are] part of an established, reputable news organization or publication,” and that blogs, independent media, or other freelance media do not qualify. Panel Op. at 7; Utah Capitol Media Access and Credentialing Policy.¹

Likewise, the Oklahoma Legislature limits credentials to “bona fide resident correspondent[s] of reputable standing, giving their chief attention” to news gathering and reporting, and who are employed by “newspapers, periodicals, online, television, radio or other news services” that regularly publish news about Oklahoma state government. State of Oklahoma, Legis. Serv. Bureau, Media Credential Guidelines.²

¹ https://le.utah.gov/press/MediaCredentialingPolicy_2025_12_01.pdf.

² <https://mediapass.oklegislature.gov/MediaCredentials-Guidelines.pdf>.

In Colorado, legislative floor access is similarly limited to “bona fide correspondents of repute in their profession,” who are full-time paid correspondents employed by a qualifying news organization; while freelancers must apply through a sponsoring qualifying news organization. Rules Governing the Colorado Capitol Press Ass’n.³

Similar media-credential policies are found well beyond state capitol buildings and legislatures. The petition for rehearing highlights three state universities limiting media credentials to “recognized” or “legitimate” media organizations. Pet. Reh’g at 16 (citing Utah State University athletics, Oklahoma State University football, and Kansas State University policies). The University of Utah athletics policy also gives credentials “only to an accredited agency” whose representative “must be working on a specific assignment for a legitimate news organization.” Univ. of Utah, Communications and Media, Media and Credential Use Conditions Agreement.⁴

The University of Colorado athletics department issues credentials to “working media from recognized outlets,” including online-only outlets affiliated with a national or regional media company or producing consistent

³ https://content.leg.colorado.gov/sites/default/files/associationrules_0.pdf.

⁴ <https://utahutes.com/sports/2023/7/27/communications-and-media>.

coverage of Colorado athletics with at least one full-time journalist creating original content. Univ. of Colorado Athletics Credential Policies.⁵

These common restrictions do not “not reference viewpoints in any way” or infuse “unbridled discretion into the credentialing process.” *Ateba v. Leavitt*, 133 F.4th 114, 124-25 (D.C. Cir. 2025); *id.* at 120 (rejecting facial First Amendment challenge to policy essentially limiting credentials to “bona fide correspondents of repute in their profession”). Rather, these types of policies serve the “viewpoint-neutral goal[s]” of “increasing journalistic integrity” and “increasing the journalistic impact of the” government speaker’s messages by limiting access to media with “longevity in the business” and “the ability to craft newsworthy stories.” *John K. MacIver Inst. For Public Policy, Inc. Evers*, 994 F.3d 602, 610-11 (7th Cir. 2021); *see id.* at 605-06 (rejecting a First Amendment challenge to the Wisconsin governor’s media-access policy that limited access to “bona fide correspondent[s] of repute in their profession” and “affiliated with an organization whose principal business is news dissemination” and has “published news continuously for at least 18 months”).

But that seems no longer true in Tenth Circuit states. By the panel’s reckoning, all the foregoing policies and however many more like them

⁵ <https://cubuffs.com/sports/2023/7/31/university-of-colorado-athletics-credential-policies>.

throughout the Circuit are now suspect viewpoint restrictions. They are ripe for challenge by anyone asserting the panel's right to access the same locations as other newsgatherers based on alleged viewpoint discrimination.

States, state officials, public universities, and other government entities need clarity on whether they may still maintain policies limiting media credentials to recognized, reputable, established media outlets on a viewpoint neutral basis while at non-public or limited-public fora. The First Amendment does not bar these commonsense requirements. But the panel decision now does. The Court should grant rehearing to review and correct the panel's judgment and affirm the district court's dismissal of Plaintiffs' complaint.

Conclusion

The Court should grant panel rehearing or rehearing en banc.

Respectfully submitted,

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Certificate of Compliance with Rule 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 24(b)(4) because:

[x] this brief contains 1760 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b).
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s/ Stanford Purser

ECF Certifications

Pursuant to the Court's CM/ECF User's Manual, the undersigned certifies that:

1. all required privacy redactions have been made;
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s/ Stanford Purser

Certificate of Service

I hereby certify that on 21 July 2026, a true, correct, and complete copy of the foregoing brief was filed with the Court and served on all counsel of record via the Court's ECF system.

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