

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' RESPONSE TO PETITION FOR REHEARING

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INTRODUCTION

The panel opinion and concurrence carefully and correctly analyze the viewpoint discrimination claims that Defendants want reheard. Defendants and their amici, however, ask the court to create a rule that expressly allows for viewpoint discrimination in media access policies. They want cart blanche to exclude those who write negative stories, whose investigations uncover inconvenient facts, or whose editorial slant does not align with those in power. Thankfully, the First Amendment, ample precedent, and now this panel’s decision, stand in their way.

ARGUMENT

I. The First Amendment protects equal access to forums the government opens to journalists.

Defendant Utah legislative officials argue that the panel decision “misreads *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983), and conflicts with *Weise v. Casper*, 593 F.3d 1163 (10th Cir. 2010).” Pet. 1. This is false.

Defendants criticize reliance on *Perry* because in *Perry* “there was ‘no question that constitutional interests [we]re implicated....’” *Id.* at 9. Defendants’ effort to distinguish *Perry* was limited to noting that the

First Amendment activity there involved “use of the interschool mail system.” Pet. 9. Of course, Supreme Court decisions are not limited to their facts.

The panel correctly noted that *Perry* “explain[ed] that by forming ‘a “limited” public forum’ the government creates a ‘constitutional right of access’ that ‘extend[s] to other entities of a similar character.’” Op. 17. Here, Defendants created a limited public forum when they created a media credentialing program for journalists, like Plaintiff Bryan Schott, to obtain heightened access to the legislature and its members. Op. 18-19 (relying on five decisions from four circuits, including a parenthetical quoting *Perry*). It is difficult to see how the panel “misread” *Perry*, where the panel applies *Perry* the same as other circuits do, and Defendants offer no argument other than a factual distinction.

Defendants’ attempt to manufacture a conflict with *Weise* fails no better. Defendants quote *Weise* as saying “ ‘the government ordinarily cannot discriminate based on viewpoint,’ but before the First Amendment bars viewpoint discrimination, ‘the speaker’s activity in question must be (1) speech and (2) protected.’ ” Pet. 10 (*quoting Weise*, 593 F.3d at 1168). The *Weise* plaintiffs were not speakers, but mere

attendees at a speech. *Id.* (citing *Weise* at 1168-69). That distinguishes this case where Schott is a professional journalist for whom the forum to which he seeks admission was created.

As part of this argument, Defendants assert that the panel erred by considering the nature of the forum when concluding a First Amendment right was implicated. Pet 1, 10. Defendants assert this is “*contra Cornelius*” [*v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797, 799-800 (1985)]. *Id.* at 10. According to Defendants, because there is no free-floating right to newsgather, newsgathering cannot be a basis to access any forum—even one created expressly for newsgathering. *Id.* at 11.

Cornelius states that the first step in determining whether a First Amendment right is implicated is to look at context. “We must first decide whether [activity] in the context of the [forum] is speech protected by the First Amendment.” *Cornelius*, 473 U.S. at 797. After evaluating “solicitation in the abbreviated context of the [Combined Federal Campaign (i.e., forum)],” the Court concluded that the solicitation “deserve[d] First Amendment protection,” because “the nexus between solicitation and the communication of information and

advocacy of causes [was] present.” *Id.* at 799. Thus, the panel was correct to consider the context of the forum to determine whether a speech right was implicated.

Here, the nexus between newsgathering through a media credentialing process and the communication of information through Plaintiffs journalism is present. By using media credentials, journalists communicate with legislators and gather news to report, and often report live from the statehouse. The panel decision tracks *Cornelius*.

Utah’s amicus brief expressly states the Defendants’ underlying objection. They object “to viewpoint-neutral access to a government-created forum for journalists.” Amicus Br. 1. But this brazen argument runs into a First Amendment wall, which guarantees just such viewpoint-neutral access. Op. 18-19; Op. 40-42 (Tymkovich, J., concurring).

II. Governments cannot engage in viewpoint discrimination when denying access to journalistic fora

Defendants claim that the panel’s opinion conflicts with “Supreme Court decisions upholding restrictions on access to nonpublic fora against First Amendment newsgathering claims.” Pet. 1. Defendants cite to several cases, including *Perry*, for the proposition that “the press,

generally speaking, do not have a special right of access to government information not available to the public.” Pet. 12. The panel, however, correctly addressed this argument in the opinion

“We disagree with this assessment of the right Schott seeks to vindicate. Schott asserts neither a right to newsgathering nor a right of equal access to all information the Legislature provides other media. Rather, he alleges the Legislature blocked his access to a government-created forum (for professional journalists such as Schott) because of his viewpoint.” Op. 16. In this forum, “speaker-based speech restrictions must be both viewpoint neutral and ‘reasonable in light of the purpose served by the forum’” Op. 15 (*quoting Cornelius*, 473 U.S. at 806). The complaint adequately alleged the policies governing which journalists would be allowed access to the forum were not viewpoint neutral or reasonable, both facially and as-applied. Op. 3.

Thus, Defendants are flatly wrong to say “the panel never considered whether the newsgathering activities for which Schott seeks a credential fall within the First Amendment’s ambit.” Pet. 12 (cleaned up). It did just that and concluded that the activities are within the

context of the forum Schott seeks access. Op. 3, 22, 28. Defendants simply turn a blind-eye to what the panel wrote.

III. The cases Defendants cite do not allow viewpoint discrimination

Defendants claim that the panel’s opinion conflicts with D.C. and Seventh Circuit decisions. The D.C. Circuit opinion distinguished itself from this case, and from those upon which the panel relied, because there “the inconvenience of not having a hard pass that assures preferential access differs significantly from the burden imposed by licensing schemes that preclude some speakers from using a forum altogether.” *Ateba v. Leavitt*, 133 F.4th 114, 121 (D.C. Cir. 2025). *Ateba* expressly distinguished *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977), because that case “concern[ed] the denial of a hard pass for security reasons that resulted in ‘exclusion . . . from White House press facilities.’” *Ateba* also distinguished *Karem v. Trump*, 960 F.3d 656, 665 (D.C. Cir. 2020), which “concern[ed] a ‘month-long loss of . . . White House access’.” *Ateba*, 133 F.4th at 121.

From the D.C. Circuit, the panel correctly relied on *Karem*, 960 F.3d at 665 (“The denial of a hard pass implicates important first amendment rights”), and the more recent *AP v. Budowich*, No. 25-5109,

2025 WL 1649265, at *1 (D.C. Cir. June 6, 2025) (“Because the White House has opened these press facilities to all bona fide Washington-based journalists, hard passes may not be denied arbitrarily or based on the content of a journalist’s speech”) in reaching its decision here.

The panel also properly dispatched Defendants’ argument that its decision conflicts with the Seventh Circuit’s decision in *John K. MacIver Inst. for Pub. Pol’y, Inc. v. Evers*, 994 F.3d 602 (7th Cir. 2021). “[T]he government may regulate access [to a press conference] provided the regulations are reasonable and ‘not an effort to suppress expression merely because public officials oppose the speaker’s view.’” Op. at 18 (*quoting Evers*, 994 F.3d at 610). And it rejected Defendants’ argument about the case’s significance. “[A]lthough the Seventh Circuit in *Evers* did reject the plaintiff’s broad ‘equal access’ theory ‘that any restriction on someone acting as a member of the press member of the press must be subject to strict scrutiny,’ it also concluded the press event was a nonpublic forum where the government could not engage in viewpoint discrimination as a means of selective access.” Op. at n. 6 (*quoting Evers*, 994 F.3d at 612). “Accordingly, neither case clashes with the protected speech Schott seeks to vindicate here.” *Id.*

Again here, Defendants failed to address the panel's treatment of these cases.

IV. Factual disputes do not warrant reconsideration

The remainder of the petition is dedicated to litigating factual issues and the proper weight and interpretation that should be given to Defendants' documented antipathy towards Schott. Pet. 12-15. Defendants' attempts to recast their behavior and motives are not credible. More importantly, those factual issues are to be resolved on remand, not on appeal from a 12(b)(6) dismissal.

V. The First Amendment's bar on viewpoint discrimination is not calamitous

Bryan Schott is a well-known journalist who has covered the legislature for over 25 years. He continues to do so as the proprietor of an online publication with both wide circulation and cachet among Salt Lake insiders, including state legislators. Defendants stipulated in open court to Schott's professional bona fides. As noted in Judge Tymkovich's concurrence, Scott would be credentialed under any reasonable policy. Op at 41-42.

Thus, the parade of horrors Defendants and amici try to assemble never forms. Plaintiff Utah Political Watch ("UPW") would qualify as an

established media outlet that adheres to accepted journalistic standards under the policies Defendants mention. Pet. 16. UPW likewise would be recognized as a legitimate media organization (barring any viewpoint discrimination). *Id.*

Likewise, Schott would easily meet Oklahoma’s test of whether he is a “ ‘bona fide resident correspondent[s] of reputable standing, giving their chief attention’ to news gathering and reporting, and who are employed by ‘...online, ... or other news services’ that regularly publish news about [Utah] state government.” Amici Br. at 6. He would also qualify under Colorado’s more succinct “bona fide correspondents of repute in their profession” standard. *Id.* at 7. Schott would also meet the University of Colorado’s policy “including online-only outlets ... producing consistent coverage of [the institution] with at least one full-time journalist creating original content.” *Id.* at 7-8. Covering the state house is the bulk of what Schott does.

All the above policies are objective and focus on credentialing professional journalists instead of picking between them. Nor do these examples afford the broad discretion Defendants have wielded to afford disparate treatment to seemingly similar outlets. The Utah legislature

should consider using any of these standards when drafting its next credentialing policy.

The crisis of which Defendants complain is caused by their policy and actions, not the panel's decision.

CONCLUSION

The petition should be denied.

DATED: July 27, 2026

INSTITUTE FOR FREE SPEECH

/s/ Charles Miller

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

I hereby certify on this 27th day of July, 2026 that:

1. This document complies with the length limit of Fed. R. App. P. 40, because the response is 1,727 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