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)

REPLY BRIEF

ORAL ARGUMENT REQUESTED

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I. Defendants Singled Out Plaintiffs for Adverse Treatment

Far from being an amateurish blog as Defendants imply, Utah Political Watch, Inc. ("UPW") is the Politico of Utah, covering statehouse and political news, local and national, with a Utah focus. Bryan Schott, an award-winning journalist who has covered the Utah legislature for over two decades, runs UPW. Schott and UPW break important news about Utah legislation and legislators.

After Schott left the Salt Lake Tribune and started UPW, Defendants altered their medial credentialing policy to prohibit "bloggers" and "independent journalists" from being credentialed. The policy defines neither term. UPW is not a blog. It is a multimedia political newsletter and podcast. Schott is not an independent/freelance journalist. He works for UPW.

Although Defendants denied Schott's application, they granted credentials to a two-person owned and run real estate development blog focused on Salt Lake City development, Building Salt Lake. App. Vol. I 94. Building Salt Lake is not focused on covering the statehouse. App.

Vol. IV 136. Defendants could not explain the disparate treatment other than saying, "I don't consider [Building Salt Lake] a blog." *Id*.

Defendants also granted credentials to reporters from *Utah News Dispatch* the same month it was formed. *Id*. at 60. They also issued credentials to Holly Richardson, the self-edited sole employee of *Utah Policy*. App. Vol. I 27. Becky Ginos, the self-edited lone employee of *Davis Journal* also was credentialed. Id.

This is all to say individuals similar to Schott, publications newer than UPW, and publications with less focus on covering the statehouse, were credentialed. Accordingly, Defendants do not apply their written policy consistently. The complaint plausibly alleged Defendants used their discretion to deny credentials to Schott due to animosity towards his reporting.

II. The Denial of Credentials Harmed Plaintiffs.

Defendants attempt to minimize the impact of their viewpoint discrimination by claiming the credentials are not needed to cover the legislature. But they cannot have it both ways. The selection of who gets media credentials cannot be so important that Defendants need to control which media outlets receive them, and so inconsequential that

not having a credential doesn't impact one's ability to report on the state legislature. Otherwise, there wouldn't be credentials at all.

To argue that credentials are inconsequential, Defendants ignore facts alleged in the complaint, the manner in which people interact in the real world, and methods of good, original reporting. But the harm they caused Schott and UPW when denying Schott credentials and access is a First Amendment injury.

This begins with the Defendants' claim, contra the complaint, that Schott has not been, and is not currently being, limited in the information he can gather. Def. Br. at 16. In the complaint, motion, and testimony, Schott and UPW explain how they are harmed by not having the same ability to access legislative sessions, hearings, press conferences, and even press releases, as other members of the media. App. Vol. I at 29. Schott is "obstructed from the same news gathering opportunities as are afforded to [his] colleagues in the media." *Id.* at 155.

Schott is unable to ask questions, to hear responses to questions, or to obtain video and audio recordings of interviews or hearings. *Id.* at 117-118. He cannot interact with legislators and staff as freely as

others. *Id*. at 118. This harms not only Schott and UPW, but also their readers, listeners and the public at large. *Id*. at 118.

Unlike those with credentials, Schott has been relegated to overflow rooms for hearings where he is limited in what he can see and hear by poor audio and video feeds. App. Vol. III at 87-89. Audio and video of media availabilities are also of poor quality, not focused on speakers, and sometimes posted after extended delay or not at all. *Id*. at 136-137. He isn't notified of press conferences or press releases. *Id*. at 138-139.

This all leads to Schott being unable to timely report on legislative happenings, and sometimes relegates him to the unenviable position of needing to rely on other media reports to formulate his own. *Id*. at 137. As Schott testified, "I would have to rely on somebody else's reporting to inform my reporting and I don't know what changes they've made, what things they've omitted, what things -- and what things that they have included. You can read two or three stories about the same press conference and get wildly different takeaways because reporters use their news judgment and decide what to include and not to include." *Id*.

The Defendants are simply wrong when they state everything Schott wants to cover is timely available to him via alternative means.

Besides, to best cover an event, a reporter needs to be in "The Room Where It Happens." One sees more, can interact with others present, have side conversations to learn more, and report quickly what is learned. Proximity breeds rapport and allows for insightful journalism. Defendants know this. That is why they offer daily reporter availabilities and other news conferences. Having access on par with other journalists is key to the success of UPW, which offers subscription-based news coverage. Subscribers want value for their fees.

The adverse effects on Schott's newsgathering activities and UPW's media business operations from the credential denial constitute actionable injuries. *Media Matters for Am. v. Paxton*, 138 F.4th 563, 579 (D.C. Cir. 2025). Besides, "it is proper [ ] to assume irreparable injury due to the deprivation of [ ] speech rights." *Utah Licensed Bev. Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (2001). It was improper for the district court to presume a lack of injury, at both the motion to dismiss and preliminary injunction stages.

III. Plaintiffs Credibly Alleged Viewpoint Discrimination

Most of the rest of Defendants' brief is premised on denying the credible allegations in the Complaint that Schott was targeted for denial based on the viewpoint he expresses.

For example, Defendants use the example of the White House expanding press passes to include bloggers and alternative media as a reason to justify excluding Schott. To the contrary, the White House including press corps to podcasters and bloggers shows the folly of Defendants adopting a policy that has resulted in the exclusion of only one reporter from receiving media credentials for Utah's capital. App. Vol. IV at 28. Defendants stated they have no concerns about space constraints or being inundated with applications as the basis of their policy. *Id*. at 54, 98.[1] Rather, their stated objection was to control the perceived quality of the reporting. *Id*. at 120, 122-125. This is impermissible viewpoint discrimination.

Even if the stated concern to have "professional journalists and established media maintain sufficient access," Def. Br. at 25, that

[1] Defendants cite to their attorney drafted declarations to claim the opposite. Def. Br. at 48. However, the Defendants' contradictory deposition testimony is the better, more reliable evidence.

doesn't square with excluding Schott, a professional journalist who has covered the Utah capital for over two decades. Where a policy change supposedly intended to ensure only established professional journalists results in the exclusion of only one individual, who is an established professional journalist, the stated goal isn't credible.

As alleged in the complaint, and established in the evidence, other "independent" news, including *Gephardt Daily*, *Utah Policy*, and *Utah News Dispatch,* and self-described "blogs," notably *Building Salt Lake*, were credentialed, showing that Defendants do not follow the written policies they have or the unwritten ones they claim. Rather, Defendants' open hostility towards Schott and his editorial stance led to Defendants denying Schott's media credentials. Plaintiffs credibly allege that Defendants apply their policies in a viewpoint discriminatory manner.

Defendants argue that "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.'" Def. Br. at 26 (citing *CLS v. Martinez*, 561 U.S. 661, 690 (2010)). However, Defendants omitted the

prefatory clause, that that rule only applies "when access barriers are viewpoint neutral … ." *CLS*, 561 U.S. at 690. Where "restrictions on access to a limited public forum are viewpoint discriminatory," as is the case here, "the ability of a group to exist outside the forum would not cure the constitutional shortcoming." *Id*.

Defendants repeat this selective quoting when claiming the ability to exclude "based on … speaker identity." Def. Br. at 32 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985)). Yet, they omit the clause "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id*. Where here, the distinctions are not viewpoint-neutral, because they are designed and applied to exclude an accomplished, reputable journalist based on his viewpoints.

Moreover, Defendants fail to meet their burden to establish that requiring a third-party supervising editor with the power to fire the reporter is reasonable in light of the forum they created to allow for newsgathering and reporting. A small independent shop like UPW can and does produce high-quality journalism without having a corporate structure. Defendants admit that Schott is a professional journalist,

App. Vol. IV 128, who passed Defendants' background check and took the required anti-harassment training. App.Vol.I at 148. Schott and UPW are insured. *Id*. at 144. Requiring Schott to be employed by a larger media organization is unreasonable. And this rule was not applied to the co-owner of *Building Salt Lake*, who is credentialled.

IV. A Nexus Exists Between Schott's Speech and Defendants' Denial of His Application

Defendants insist that Plaintiffs do not allege a nexus between Plaintiffs' protected speech and the denial of Schott's press credential application. However, Plaintiffs' allegations and submitted evidence include social media posts and written statements by Defendants, the Senate President and the House Speaker hostile to Schott and his reporting. Just a few days before Schotts' application was denied, Speaker Adams publicly labeling Schott a "former media member," and "someone who claims to be a journalist," accused Schott of "a lack of professionalism," and call a story Schott wrote on an ethics complaint filed against Adams "part of a troubling pattern of neglectful journalism that undermines the profession's integrity;" *See* App. Vol. I at 22; President Adams's X Post, Dec. 12, 2024, https://perma.cc/Q5JN-7ZCX.

Not only was Schott's speech proximate to the adverse governmental action, but so to was the government's expression of open hostility towards Schott and his reporting. This creates a sufficient nexus to find viewpoint discrimination.

Defendants cite links to X posts from other State Representatives disparaging Schott and calling for the *Salt Lake Tribune*'s exempt tax status to be investigated by the IRS based on Schott's reporting. Def. Br. at 39. While they pat themselves on the back for not revoking Schott's credentials earlier, the real message conveyed by these additional hostile tweets is the animus towards Schott that motivated the viewpoint discrimination when Defendants denied Schott credentials.

The message sent to other journalists by the hostility towards Schott and the subsequent denial of credentials to him is to dampen their coverage or be susceptible to the same punishment Schott receives.

The fact that Schott and these other journalists could predict that Defendants would use their policy change to deny credentials to Schott does not mean the policy is clear or consistently applied. It means Defendants are vindictive and targeted Schott.

V. Schott Continuing to Report Does Not Relieve Defendants of Liability

Defendants claim that they cannot be liable for retaliation because Schott and UPW still report on the legislature, therefore they haven't been chilled. However, Schott testified that there were events he did not report because he did not have access. Thus, his reporting was adversely impacted, constituting an injury for this retaliation claim. *Media Matters*, 138 F.4th at 579; *Suarez Corp. Industries v. McGraw*, 202 F. 3d 676, 686 (4th Cir. 2000).

Moreover, while Plaintiffs conduct may constitute "some evidence" of whether a person of ordinary firmness would be chilled, it cannot be conclusive, otherwise, the objective standard becomes subjective. *Smith v. Plati*, 258 F.3d 1167, 1177 (10th Cir. 2001) ("The focus, of course, is upon whether a person of ordinary firmness would be chilled, rather than whether the particular plaintiff is chilled"). The potential denial of credentials for critical reporting on the legislature would lead a person of ordinary firmness to self-censor in order to maintain access. Certainly, at the motion to dismiss phase, a court cannot conclude that Plaintiffs' continued reporting means there is no objective chill or other injury.

CONCLUSION

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

DATED: January 8, 2026

INSTITUTE FOR FREE SPEECH

/s/ Charles Miller
Charles Miller (admitted *pro hac vice*)

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I hereby certify on this 8h day of January, 2026 that:

1. This document complies with the length limit of Fed. R. App. P. 32(a)(7)(A), because the brief is 12 pages long, excluding the sections excludable under the rule.
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_/s/ *Charles Miller*
Charles M. Miller

CERTIFICATE OF SERVICE

I hereby certify on this 8th Day of January, 2026 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