No. 21-388

IN THE

Supreme Court of the United States

JOHN K. MACIVER INSTITUTE FOR PUBLIC POLICY, INC. AND WILLIAM OSMULSKI,

Petitioners,

v.

TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the government's selective exclusion of members of the press implicates the equal treatment guarantee of the First Amendment's Press Clause, as the First, Second, and D.C. Circuits have held, or instead should be analyzed under the Speech Clause's forum analysis, as the Seventh Circuit below and the Fourth Circuit have held.

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INTRODUCTION

The premise of respondent's opposition is that the MacIver journalists are not actually members of the press, so their exclusion does not implicate the freedom of the press. But the courts below and respondent himself agreed that the MacIver journalists *are* "bona fide" press members. The question below, and here, is how to analyze the selective exclusion of such undisputed press members. The government may not invoke its own definition of "the press" to argue that an exclusion of particular journalists does not implicate the First Amendment's Press Clause. The entire point of the Constitution's protections is that they do not turn on legislative or executive whim.

All agree that, as the district court explained, "the MacIver News Service . . . investigates and reports on what is happening in state and local institutions of government." App. 30 (cleaned up). These journalists were credentialed as press members by the Wisconsin State Legislature. *Id.* at 5; *see* BIO 5 n.2. And they were excluded by the Governor's office following a change in administration and a determination by a political appointee based on "a non-exhaustive list of factors." App. 4–5.

Thus below, respondent himself summarized the issue as follows: "Even accepting that MacIver and its staff are 'press,' the question is still whether the First Amendment guarantees them access to the Governor's limited-access press events, or, conversely, whether the Governor may impose reasonable and viewpoint neutral standards to limit access." Brief of Defendant-Appellee 15, 2020 WL 4453659 (7th Cir. July 23, 2020); *see id.* (calling it "irrelevant" whether

MacIver is "a member of 'the press'"). It is too late for respondent to change the issue presented. And he may not now pretend that the MacIver journalists are not members of the press simply because he has decreed that they may not attend his office's press events. Because this case comes to the Court on the assumption that the MacIver journalists are press members, it does not require the Court to resolve questions about the scope of "the press."

Once respondent's mistaken premise is corrected, nothing else of substance remains in the opposition. The question presented is whether the government's selective exclusion of press members should be analyzed under the equal treatment guarantee of the First Amendment's Press Clause or using the Speech Clause's forum analysis. Respondent's answer to the cases requiring equal access depends on his characterization of the MacIver journalists as not "bona fide" press members. Again, that premise is wrong, so the conflict among the Courts of Appeals is squarely presented. This case would have been resolved differently had it been decided in the First, Second, or D.C. Circuits.

On the merits, respondent offers little defense of importing the Speech Clause's forum analysis into an issue involving selective press exclusion. He does not meaningfully distinguish this Court's precedents forbidding, for example, differential tax treatment of certain media outlets from this case. Instead, he rests on the supposed inconvenience to the government of having to justify its selective press exclusions in Court. But that is how constitutional rights work, especially the First Amendment, which sought to promote a free press so that the citizenry could hold

their government accountable. To vindicate that vital interest, the Court should grant the writ.[1]

REASONS FOR GRANTING THE WRIT

I. The decision below squarely presents a 2-3 conflict among the Courts of Appeals.

Under the decision below and Fourth Circuit precedent, unequal press access (at least in nonpublic fora) need only be reasonable and viewpoint neutral. Pet. 10, 17–19. That holding conflicts with decisions from the First, Second, and D.C. Circuits, which hold that unequal press access should be subject to strict scrutiny. *Id.* at 11–17. Those circuits adhere to the rule that "once there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable." *Am. Broad. Companies, Inc. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977).

Respondent's efforts to wish away this conflict are unavailing. First, he claims that the Second Circuit's decision in *Cuomo* "hinged on two components that are lacking here: a claimant who the government unquestionably considered bona fide press, and discriminatory treatment of the claimant in relation to others in that group." BIO 20. Once again, all have agreed throughout this litigation that the MacIver journalists are, generally speaking, press members. *See infra* Part III. Allowing the government to define the First Amendment's press protections by reference to the government's own exclusionary policy is

[1] Pending before this Court is another case raising similar issues, *Green v. Pierce County*, No. 21-614. If the Court grants the petition in *Green*, it should grant both cases or hold this case.

nonsensical. And because the MacIver journalists were excluded while other press members were admitted, there is the same "discriminatory treatment" as in *Cuomo*.

Respondent also argues that the "central question" in *Cuomo* "was not whether ABC itself had a constitutional right to access the campaign events" but whether the rights of the "viewing public" required such access. BIO 21 (quoting a few words pages apart). *Cuomo* itself, however, was clear that it was considering "the First Amendment rights of ABC and of its viewing public." 570 F.2d at 1083.

Here too, excluding the MacIver journalists threatens the interests of the public. As the district court recognized, "Because they are excluded, MacIver journalists must rely on the reporting of others and on after-the-fact press releases to cover the Evers administration. They have no opportunity to ask questions." App. 37. This deprives both MacIver and the public of information—and First Amendment rights. *See* Pet. 19–20, 26.

Finally, respondent says in a footnote that *Cuomo* "predated this Court's modern forum decisions." BIO 21 n.7. Respondent does not suggest that *Cuomo* has been overruled. And respondent's argument was prebutted: "the equal access rule remains good law" in three circuits "and is regularly applied by courts around the country." Pet. 15; *see id.* at 15–17 (collecting cases and scholarly consensus). Respondent has no answer, other than a footnote cross-reference to a brief filed below that does not address most of the cases and academic writing cited here. *See* BIO 22 n.8 (citing a brief that does not mention *Bratton*, *Baldeo*, *Danielson*, *Nicholas*,

Connolly, *Planet*, or any academic article, *see* Pet. 16–17). That respondent has nothing else to say about an important conflict—one recognized by many scholars, Pet. 17—is revealing.

Next, respondent dismisses the Second Circuit's decision in *Huminski v. Corsones* as "simply appl[ying] this Court's longstanding precedents requiring broad access to courts and court papers." BIO 22. But *Huminski* found no precedent analyzing the "right of access to court proceedings" "in the context of the exclusion of an identified individual member of the public or press." 396 F.3d 53, 83 (2d Cir. 2005). Thus, it analyzed the case as akin to the "[e]xclusion of an individual reporter," applying *Cuomo*, *Anderson*, and *Sherrill*. *Id.* at 84. As already explained, "[h]ad the Seventh Circuit's approach been applied to *Huminski*, the case would have been easily resolved in favor of the Vermont officials: a courthouse is surely a nonpublic forum for speech purposes." Pet. 13. Respondent has no answer.

Respondent also tries to distinguish the First Circuit's *Anderson v. Cryovac, Inc.* decision as "involv[ing] access to court documents." BIO 22. But the relevant portion of *Anderson* was not about general denial of access to court documents; the court has already broadly upheld the district court's protective orders. 805 F.2d 1, 8 (1st Cir. 1986). Then, in a section entitled "Selective Application of Protective Orders," the court invalidated the unequal access "to designated media entities" because the government "may not selectively exclude news media from access to information otherwise made available." *Id.* at 9 (citing *Cuomo*).

Respondent tries to distinguish the D.C. Circuit's decisions by noting that *Sherrill v. Knight* "emphasized the importance of 'notice, opportunity to rebut, and a written decision.'" BIO 23. But that came in an different part of the opinion from the section applying "the protection afforded newsgathering under the first amendment guarantee of freedom of the press." 569 F.2d 124, 129 (D.C. Cir. 1997). The D.C. Circuit held that "[g]iven these important first amendment rights implicated by refusal to grant White House press passes to bona fide Washington journalists, such refusal must be based on a compelling governmental interest." *Id.* at 130. Only after finding this First Amendment right did the court go on, in another section, to consider "what process is due." *Id.* at 130–31 (cleaned up). And respondent does not dispute that the D.C. Circuit reiterated and readopted *Sherrill*'s First Amendment principles just last year in *Karem v. Trump*, 960 F.3d 656, 660 (D.C. Cir. 2020).

On the other side of the split, the Fourth Circuit has rejected an equal access principle. Respondent calls that court's decision in *Baltimore Sun* "materially distinguishable" because it involved "retaliation precedent." BIO 23. But according to the Fourth Circuit, the retaliation claim "requir[ed]" the court "to determine" whether there was "a substantial adverse impact or chill on The Sun's exercise of its First Amendment rights." 437 F.3d at 417. The court concluded that "giving one reporter or a small group of reporters information or access" did not involve a violation of First Amendment rights. *Id.* at 418. The court thus affirmed the district court, which said that the Fourth Circuit has "declined to recognize a journalist's right to have equal access to public

information sources." *Baltimore Sun Co. v. Ehrlich*, 356 F. Supp. 2d 577, 581 (D. Md. 2005).

In sum, this petition squarely presents a 2-3 conflict among the Courts of Appeals. This Court's review is necessary.

II. The decision below is wrong and unworkable.

Review is also needed because the Seventh Circuit's approach is wrong. At the outset, respondent makes the remarkable claim that "[t]his case is not about impingements on the right to publish or the right to speak." BIO 17; *see id.* at 28 (claiming that the government policy is not even an "arguabl[e] impinge[ment]" of petitioners' "writing, publishing, and dissemination"). Of course it is. As the courts below explained, "Because they are excluded, MacIver journalists must rely on the reporting of others and on after-the-fact press releases to cover the Evers administration," and "[t]hey have no opportunity to ask questions." App. 37; *id.* at 16 (prevented from "gathering information for news dissemination"). The MacIver journalists could not meaningfully "publish" or "speak" about a meeting from which they were excluded.

So this case involves no dispute that the MacIver journalists were denied relevant access to publish and disseminate news; the only question is how to analyze that denial. The Seventh Circuit used forum analysis to "address[] who has the right of access to government property" to "gather[] information for news dissemination." App. 16. Beyond conflicting with the approach of other circuits, that approach contradicts this Court's precedents. Those precedents

have "consistently applied strict scrutiny to such regulations that target a specific news outlet for differential treatment." Pet. 23; *id.* at 20–23. That is precisely the type of regulation here.

Respondent's only answer to cases like *Minneapolis Star* and *Arkansas Writers' Project* is that "[t]hose cases involved tax laws that directly and discriminatorily burdened newspapers." BIO 27 n.11. Yes, and this case involves a government policy that directly and discriminatorily burdens particular media outlets. As explained, "Just as the State of Minnesota [in *Minneapolis Star*] differentiated between publications based on their size, the Governor's rule discriminates against media based on" various characteristics. Pet. 23. Respondent never explains why *this* discriminatory treatment of the press would be subject to an entirely different rule.

Instead, Respondent repeats that the Constitution does not "guarantee[] special protections for 'the press.'" BIO 27. No one disputes that. Pet. 27, 30–31. The problem is that—under this Court's precedents—once the "government has opened its doors," the press must have "equal access." *Gannett Co. v. DePasquale,* 443 U.S. 368, 405 (1979)) (Rehnquist, J., concurring) (cleaned up).

Next, respondent's claim that the Seventh Circuit's approach "comports with the original public meaning of the First Amendment's protection of a free press" (BIO 28) is unserious. Putting aside that respondent discusses no historical evidence, the Seventh Circuit applied a free speech doctrine invented in the 1970s instead of the Press Clause. Pet. 15. And while "the Governor's criteria privilege modern" large media outlets, "the Press Clause was

written to protect new voices like MacIver." *Id.* at 24–25; *see* Center for Constitutional Jurisprudence Br. 2–6.

Finally, respondent mostly ignores the negative consequences of the Seventh Circuit's approach. He does not contest that "[f]orum analysis would allow government officials to engage in pernicious discrimination." Pet. 19, 29. He has no answer to the criteria's acceptance of newspaper editorial advocacy and rejection of think-tank advocacy. *Id.* at 27; *see* Goldwater Institute Br. 17–28. Nor does he contest that the forum approach turns "on a seemingly irrelevant fact": the location of the press event. Pet. 19; *cf.* The Honorable Scott Walker Br. 8–9.

Instead, respondent parrots the Seventh Circuit's concern about "practical difficulties." BIO 29. But as already explained—and ignored by respondent—the First Amendment does not protect "the convenience of the politicians," and the circuits recognizing the equal access rule have not seen chaos. Pet. 30–31. And nothing about the equal access rule prevents "narrowly tailored limits on press access when a compelling need justifies it." *Id.* at 31.

Respondent suggests that this case would require the Court to "constitutionalize the task of defining who is and who is not 'press.'" BIO 29. First, as discussed next, the MacIver journalists are members of the "press" for First Amendment purposes. This Court can decide the case on that assumption.

Second, this Court already decides who is "press" when it holds, for instance, that States may not impose differential taxes on newspapers. If the "press" could simply be "defined by the political branches" as

respondent suggests (BIO 30 n.12), the Press Clause would mean little indeed. Small media outlets, nonprofits, and many others that would be excluded by respondent play a crucial role in informing the public about their government. *See* Goldwater Institute Br. 4–16. Thus, a rule of absolute deference to the "decree[s]" of "the political branches" (BIO 30) does not workably account for the vital interests that the First Amendment's Press Clause protects: a free press that will "serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible." *Mills v. State of Ala.*, 384 U.S. 214, 219 (1966).

III. This case is an ideal vehicle.

Respondent argues that the question presented "rests on two premises that are squarely refuted by the record": first, that MacIver is a "member of the press," and second, that there was "some ideologically motivated 'selective exclusion' at play." BIO 31.

Starting with the latter, the question presented does not reference or depend on ideological exclusion. All it raises is the proper framework to analyze "selective exclusion" of the press. Such "selective exclusion" occurred here: some journalists were admitted, and MacIver journalists were excluded. Selective treatment of the press is constitutionally problematic no matter if there is any "evidence of an improper censorial motive." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987).

This Court certainly need not "venture beyond the record" (BIO 29), and the petition does not do so. Instead, MacIver has pointed out the indisputable

facts that the Governor's criteria expressly discriminate against organizations that engage in advocacy (among other things), and that the ultimate decision is purely discretionary. Pet. 25–27; *accord* App. 4. Such unfettered government discretion to exclude certain members of the press heightens the First Amendment concerns. *See* Pet. 26 (collecting cases); Atlantic Legal Foundation Br. 7–13.

Respondent's primary complaint—that MacIver journalists are not "members of the press"—is both meritless and inconsistent with findings of the courts below and respondent's own arguments. Below, respondent repeatedly "accept[ed] that MacIver and its staff are 'press.'" Brief of Defendant-Appellee, *supra*, at 15; *id.* at 35. Respondent repeatedly described the MacIver journalists as "reporters." *E.g.*, *id.* at 10; D. Ct. Dkt. 14, at 1, 4. And respondent agreed that they "cover important stories related to state and local government." D. Ct. Dkt. 16, at 2.

The courts below also agreed that the MacIver journalists are members of the press. The district court said that the "MacIver journalists" faced irreparable harm because they "must rely on the reporting of others." App. 37. The court agreed that they had "sufficient professional experience to make them credible state capitol correspondents." App. 49. Indeed, they are credentialed as press members by the legislature, *id.* at 5; BIO 5 n.2; D. Ct. Dkt. 16, at 3 (respondent conceding this fact), and have won journalism awards, *id.*; App. 58. The Seventh Circuit repeatedly referred to the MacIver journalists as "reporters," App. 2, 3, 7, 8, 16, 21, and found any arguments about the "quality of the reporting" beside the point, App. 22.

Fundamentally, under respondent's theory, all a government has to do is issue a new definition of the press—gerrymandered to whichever outlets will give that government the best coverage—and the Press Clause no longer applies. The legislature in *Arkansas Writers' Project* needed only to have defined general interest magazines not to be "bona fide" press, and it could have selectively taxed away.

That is not how the Constitution's protections work. And respondent may not run from its own statements of the issue here—adopted by all the courts below—to avoid this Court's resolution of a square conflict of law among the courts of appeals.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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