No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner William Osmulski is an award-winning reporter for the MacIver News Service, a project of Petitioner John K. MacIver Institute for Public Policy. Osmulski and another MacIver reporter had long been credentialed journalists covering the Wisconsin governor, among other things, but when a new administration took office, the incoming governor removed the MacIver reporters from his press list without notice. This action prohibited the journalists from being invited to and participating in official press conferences and briefings.

The First, Second, and D.C. Circuits have consistently recognized a principle of equal access for journalists, and subjected any individual exclusions to strict scrutiny. The Seventh Circuit in this case, however, chose to join the Fourth Circuit in applying forum analysis from Speech Clause cases and held that because this selective exclusion took place in a nonpublic forum, the removal of Petitioners from the press list did not violate the First Amendment because it was viewpoint neutral and reasonable.

The question presented is:

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.

CORPORATE DISCLOSURE STATEMENT

The John K. MacIver Institute for Public Policy, Inc. is a nonprofit, nonstock charitable corporation registered in the State of Wisconsin. It has no parent or publicly held company owning stock.

LIST OF ALL PROCEEDINGS

United States Court of Appeals for the Seventh Circuit, No. 20-1814, *John K. MacIver Institute for Public Policy, Inc. v. Evers*, judgment entered April 9, 2021.

United States District Court for the Western District of Wisconsin, No. 19-cv-649-jdp, *John K. MacIver Institute for Public Policy, Inc. v. Evers*, judgment entered April 14, 2020.

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DECISIONS BELOW

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The Seventh Circuit's opinion affirming is reported at 994 F.3d 602 (7th Cir. 2021), and reprinted at App. 1-24.

STATEMENT OF JURISDICTION

Petitioners timely file this petition from the Seventh Circuit's April 9, 2021, decision. This Court has jurisdiction under 28 U.S.C. 1254(a).

PERTINENT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The newly designed list of non-exhaustive factors considered by the Governor's press office appears at App. 4-5.

INTRODUCTION

If the Constitution's guarantee of the "freedom of the press" means anything, it must mean this: a government official's decision to selectively exclude certain news outlets from press briefings must be narrowly tailored to a compelling interest. That is how the First, Second, and D.C. Circuits have interpreted the First Amendment. And application of strict scrutiny to unequal press access necessarily follows from this Court's precedents, which have consistently applied such scrutiny to government regulations that discriminate against the press either as a whole or in part. Once the "government has opened its doors," members of the press must have "equal access." *Gannett Co. v. DePasquale*, 443 U.S. 368, 405 (1979) (Rehnquist, J., concurring) (cleaned up). This rule should readily govern here.

The MacIver News Service is a project of the free-market John K. MacIver Institute for Public Policy, and its professional journalists have long been credentialed to cover Wisconsin government, including the legislature and governor. But when a new Democratic governor took office, his communications director determined that the MacIver journalists were not "bona fide" and so banned them from the Governor's press corps and excluded them from press events. When pressed and later sued, the Governor's office came up with rotating sets of supposedly neutral criteria for its decision, each of which conveniently justified its original, standards-free decision. The criteria themselves noted they were really just non-exhaustive factors that would be applied in the office's sole discretion by political appointees of the Governor.

The Seventh Circuit in the decision below broke from the majority of circuit courts and this Court's precedents, joining the Fourth Circuit in rejecting an equal access principle. Rather than apply what would seem to be the obvious part of the First Amendment—the freedom of the press—the Seventh Circuit applied the speech doctrine of public forum analysis. Because it found that the press conferences here were nonpublic fora and the exclusion was reasonable, it upheld the Governor's action.

This Court's review is urgently needed. Not only does the decision below squarely present a 3-2 split on an important question of federal constitutional law—and thereby make the test for equal treatment of the press differ depending on location—it breaks from the First Amendment principles consistently articulated by this Court in its cases involving the press. Under those cases, government regulations that discriminate against the press or against certain components of the press must satisfy strict scrutiny. The Governor's criteria, which exclude certain journalists while permitting those from more traditional media, is such a regulation.

Moreover, the decision below is unworkable and will have negative consequences. Fitting the round peg of unequal press access into the square hole of forum analysis makes little sense. Forum analysis would let government officials routinely exclude nontraditional and new media sources. Forum analysis also suggests that different rules would apply to a press briefing in a public park from one held in a government conference room. And journalists are not primarily at press briefings to *speak*; at a given press conference, many journalists do not ask any

questions. They are there to perform the crucial function of the press in our republic: holding the government accountable to the People. In Thomas Jefferson's words, "Our liberty depends on the freedom of the press, and that cannot be limited without being lost." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 548 (1976) (quoting 9 Papers of Thomas Jefferson 239 (J. Boyd ed. 1954)). Forum analysis undersells the value of a free press.

Finally, this case is an ideal vehicle to resolve the pure legal question presented. The district court consolidated the preliminary injunction record to issue a final ruling on the merits, so the factual universe is limited. And there is no dispute as to the relevant facts: the MacIver journalists are qualified and credentialed by the state legislature, but have been excluded by the Governor's office. The Governor's office has never tried to satisfy strict scrutiny, but if it decided to try, this Court could remand after setting the correct framework.

It is essential for this Court to resolve whether unequal press access is subject to strict scrutiny under the Press Clause—as three Courts of Appeals have held—or forum analysis under the Speech Clause—as the decision below and the Fourth Circuit hold. The former preserves the important role of the press as a check on the government. The latter leaves the government flexibility to exclude disfavored press at its discretion. The Court should grant this petition.

STATEMENT OF THE CASE

A. Facts.

Petitioner William Osmulski and Matt Kittle were both award-winning reporters for the MacIver News Service credentialed by the Wisconsin State Legislature. App. 3, 55. They delivered their reporting on television (the weekly MacIver News Bulletin on Milwaukee's WVCY-30), online (www.MacIverInstitute.com/News), and on social media (Twitter: @NewsMacIver). MacIver's reporting has been recognized by the Milwaukee Press Club and the Atlas Economic Research Foundation for ground-breaking stories on the impact of Wisconsin's Act 10 reforms to public-sector unions. Osmulski still works for MacIver.

On February 28, 2019, the pair received a tip from a press colleague that the Governor's office would be providing a background briefing that afternoon on the major initiatives in the Governor's budget address, scheduled for delivery that evening. App. 7. They emailed their RSVP to the Governor's staff and assembled with other journalists outside the entrance to the conference room. *Id.* But while the other reporters filed past, they were stopped by the Governor's staff. They were informed that they were not on the RSVP list, and so could not be admitted. *Id.* They were told that they could talk to the Governor's communications director, but she was not currently available to hear any appeal. *Id*. They returned to their desks and emailed her, but never received a response. *Id.* at 56. Upon further investigation, they learned that they were in fact being blocked from all media access by the Governor's team, including press conferences, gaggles, and media advisories. *Id.* at 8.

The journalists' counsel sent a letter to the Governor demanding fair and equal treatment in the press corps as guaranteed by the First Amendment. App. 8. The Governor's chief legal counsel responded, stating that the Governor's communications office chose journalists for press events based on purportedly "neutral selection criteria such as newspaper circulation, radio listenership, and TV viewership." *Id.* MacIver sent a reply seeking clarification and filing an open records request. App. 32-33. The Governor's office fulfilled the request, providing a media advisory list of over 1,000 news organizations, lobbyists, and political operatives. *Id.* But the Governor's office did not explain how it compiled the list, so MacIver did not "know the basis for the administration's refusal to include its journalists on the list." App. 35.

B. Proceedings below and policy changes

MacIver filed suit and sought a preliminary injunction. App. 35. In his response, the Governor made two substantial revelations. First, the Governor's office admitted that when the initial decision to exclude MacIver was made as the new administration took office in January 2019, no neutral criteria were used. App. 65. Rather, the Governor's communications director concluded "based on my experience with media and politics" that the MacIver News Service staff were not "bona fide journalists." App. 64-65.

Second, the Governor's office revealed that six days after fulfilling the records request, it adopted a new set of "neutral criteria," which—surprise, surprise—conveniently validated its previous decisions. App. 33. Those criteria are:

1. Is the petitioner employed by or affiliated with an organization whose principal business is news dissemination?

2. Does the parent news organization meet the following criteria?

a. It has published news continuously for at least 18 months, and;

b. It has a periodical publication component or an established television or radio presence.

3. Is the petitioner a paid or full-time correspondent, or if not, is acting on behalf of a student-run news organization affiliated with a Wisconsin high school, university, or college?

4. Is the petitioner a bona fide correspondent of repute in their profession, and do they and their employing organization exhibit the following characteristics?

a. Both avoid real or perceived conflicts of interest;

b. Both are free of associations that would compromise journalistic integrity or damage credibility;

c. Both decline compensation, favors, special treatment, secondary employment, or political involvement where doing so would compromise journalistic integrity; and

d. Both resist pressures from advertisers, donors, or any other special interests to influence coverage.

> 5. Is the petitioner or its employing organization engaged in any lobbying, paid advocacy, advertising, publicity or promotion work for any individual, political party, corporation or organization?

App. 4-5, 33-34. The memorandum describes these as a "non-exhaustive" list of "factors" intended as "guidance." App. 3-4, 33. And the Governor's communications director admitted that these were not necessarily hard-and-fast rules, but non-exhaustive "factors" that the office would consider when deciding who to admit. App. 4, 33, 63. The Governor's office has said that it may also consider an outlet's "readership or viewership" and "additional factors." Brief of Defendant-Appellee 10 n.1, *John K. MacIver Institute for Public Policy v. Evers*, No. 20-1814 (7th Cir. July 23, 2020).

According to the Governor's office, these factors are based on a blend of the criteria set by the U.S. Congress and the Wisconsin State Legislature. App. 5, 34. If the office had simply adopted the criteria set by the Wisconsin State Legislature, then the MacIver journalists would have been admitted, as they were already credentialed by the Legislature. App. 5. The Governor knew this fact when he made the new criteria. *See* Dkt. 7-4, Suhr Demand Letter at 2, *John K. MacIver Institute for Public Policy v. Evers,* 2020 WL 7043561 (WD Wis. Apr. 14, 2020) (No. 3:19-cv00649-jdp). The new press list based on the blended criteria, however, includes 780 email addresses for various reporters—but not MacIver's. App. 5.

The District Court denied a preliminary injunction, holding that MacIver was not likely to succeed on the merits. App. 28-53. The court agreed

that "the activity in which MacIver seeks to engage is protected by the First Amendment." App. 39. But the court held that "[c]laims challenging government-imposed restrictions on access to government property or events" should be adjudicated under the "public forum doctrine." App. 38.

The court identified four categories of events where the Governor answers questions from journalists, in order of increasing exclusivity:

1. "Public events" open to all;
2. "Press conferences" limited by capacity and security;
3. "Press briefings" by specific invitation and off-the-record; and,
4. "One-on-one meetings."

App. 31-32. The court determined that "limited-access press conferences and press briefings are nonpublic forums." App. 40. And because the press conferences were nonpublic fora, the court held that the criteria would be upheld if "(1) reasonable and (2) not an effort to suppress an opposing viewpoint." *Id*. The court held that both factors were satisfied here. App. 50.

The court rejected the argument that the appropriate First Amendment test centered on the free press right of equal access. App. 41-42. The court acknowledged that the seminal case in this area, *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977), "did not invoke public forum doctrine," but dismissed it because it preceded "the cases that established modern forum doctrine." App. 41. Thus, the court granted summary judgment for the Governor.

The Seventh Circuit affirmed. It rejected the argument that the inquiry should focus on the Free Press Clause and the guarantee of equal access recognized by other courts. App. 16-19. The court acknowledged that the Second Circuit has held 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." App. 18 (quoting *Am. Broad. Companies, Inc. v. Cuomo*, 570 F.2d 1080, 1083 (2nd Cir. 1977)). But the Seventh Circuit dismissed that and similar decisions as "pre-dat[ing] modern forum analysis" or involving "unique facts." App. 19. Thus, it applied public forum analysis, the same that applies to "expressive activity" under the Free Speech Clause. App. 11, 17. And it agreed with the district court that the Governor's press conferences are nonpublic fora and that the exclusion here was reasonable and viewpoint neutral. App. 12-13.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with decisions from the First, Second, and D.C. Circuits.

The decision below conflicts with decisions from three other circuits, which hold that unequal press access should be subject to strict scrutiny. In the Seventh Circuit, by contrast, unequal press access (at least in nonpublic fora) need only be reasonable and viewpoint neutral. The Fourth Circuit has similarly rejected an equal access principle. Only this Court can resolve this conflict on an important constitutional question.

The Second Circuit has squarely held 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 (2nd Cir. 1977). In *Cuomo*, mayoral candidates Mario Cuomo and Edward Koch, along with the New York City Police Department, barred ABC reporters from campaign press events while allowing CBS and NBC reporters. *Id.* at 1082. At the time, ABC was involved with a union labor dispute, and the candidates argued that ABC's participation could lead the other networks' crews to leave. *See id.*

The candidates argued that excluding ABC did not violate the First Amendment because their campaign activities were "private premises" where generally an "invitation is required" to attend. *Id.* at 1083. They compared the press conferences to "post-election festivities or obsequies," which would necessarily be "by invitation only." *Id.*

But the Second Circuit rejected this type of forum-based analysis, explaining that "we do not think that the particular place involved is necessarily the outer limit of the constitutional protection of the First Amendment." *Id.* In the Second Circuit's view, "The issue is not whether the public is or is not generally excluded, but whether the members of the broadcast media are generally excluded." *Id.* And "once the press is invited," "there is a dedication of those premises to public communications use," which precludes "discrimination" against other members of the press. *Id.* In other words, once a press event is held for "some

of the media," "the First Amendment requires equal access to all of the media." *Id.*

The court therefore required the defendants to allow ABC to participate in any events involving CBS and NBC. *See id.* at 1084. As the court emphasized, "we want the networks to be on a par." *Id.*

The Second Circuit identified the danger with any other rule: "that those of the media who are in opposition or who the [politician] thinks are not treating him fairly would be excluded." *Id.* If such media members were excluded, "it is the public which would lose." *Id.* "[T]he First Amendment rights of ABC and of its viewing public would be impaired by their exclusion from the campaign activities." *Id.*

The Second Circuit applied its rule more recently in *Huminski v. Corsones*, where Vermont state officials prohibited Scott Huminski, a long-time critic of the state courts, from some courthouses. 396 F.3d 53, 58 (2nd Cir. 2005). The court separately considered Huminski's free expression and courthouse access claims. It examined the free expression claim using a forum analysis. *Id.* at 89. But it examined the courthouse access claim under the joint "First Amendment rights of freedom of speech and of the press." *Id.* at 80.

The governing rule for that claim was *Cuomo*'s equal access rule. The court emphasized that "the exclusion of any person undermines right-of-access principles." *Id.* at 83. Quoting *Cuomo*'s language requiring "equal access to all of the media," the Second Circuit said that "[a] person singled out for exclusion . . . is placed at an extraordinary disadvantage in his or her attempt to compete in the

'marketplace of ideas.'" *Id.* at 84. "Exclusion of an individual reporter also carries with it the danger that granting favorable treatment to certain members of the media allows the government to influence the type of substantive media coverage that public events will receive, which effectively harms the public." *Id.* (cleaned up). The court found that the exclusion was not narrowly tailored to a compelling government interest and so concluded that it was "unconstitutional." *Id.* at 85–88.

Had 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, and the officials' position was "reasonable." *Id.* at 88. And under Wisconsin's purported "neutral," non-exhaustive criteria, a citizen journalist like Huminski would never qualify. But in the Second Circuit's view, "[n]either the courts nor any other branch of the government can be allowed to affect the content or tenor of the news by choreographing which news organizations have access to relevant information." *Id.* at 84 (cleaned up).

The D.C. Circuit's approach is much the same as the Second Circuit's—and much different from the Seventh Circuit's. In *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977), the court considered a claim by a journalist who claimed that the Secret Service unconstitutionally deprived him of a White House press pass. The government argued that "because the public has no right of access to the White House, and because the right of access due the press generally is no greater than that due the general public, denial of a White House press pass is violative of the first

amendment only if it is based upon the content of the journalist's speech or otherwise discriminates against a class of protected speech." *Id.* at 129 (cleaned up). But the court disagreed, saying that the government "ignored" "additional first amendment considerations." *Id.*

In the D.C. Circuit's view, "White House press facilities having been made publicly available as a source of information for newsmen, the protection afforded newsgathering under the first amendment guarantee of freedom of the press requires that this access not be denied arbitrarily or for less than compelling reasons." *Id.* (cleaned up). "[N]ewsmen," "the publications for which they write," and "the public at large have an interest protected by the first amendment in assuring . . . individual newsmen not be arbitrarily excluded from sources of information." *Id.* at 129–30 Thus, "[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.

The D.C. Circuit reiterated and readopted these principles just last year in *Karem v. Trump*, 960 F.3d 656, 660 (D.C. Cir. 2020) ("[T]he protection afforded newsgathering under the first amendment requires that this access not be denied arbitrarily or for less than compelling reasons." (cleaned up)).

The First Circuit has also held that "[a] court may not selectively exclude news media from access to information otherwise made available for public dissemination." *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986) (citing *Cuomo*, 570 F.2d at 1083). In *Anderson*, the First Circuit considered a district

court's order protecting discovery materials from public disclosure with a limited exception for the producers of a particular television program. *Id.* at 3. The court held that this violated other press outlets' First Amendment rights. The court emphasized that "[t]he danger in granting favorable treatment to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive." *Id.* at 9. "Such a practice is unquestionably at odds with the first amendment," for "[n]either the courts nor any other branch of the government can be allowed to affect the content or tenor of the news by choreographing which news organizations have access to relevant information." *Id.* An earlier First Circuit decision reached the same conclusion by way of the Fourteenth Amendment's equal protection clause. *McCoy v. Providence Journal Co.*, 190 F.2d 760, 766 (1st Cir. 1951).

The Seventh Circuit dismissed these cases as "outdated" because they preceded "modern forum analysis." App. 19. As an initial matter, courts should hesitate to reduce the First Amendment's original meaning to a doctrine invented in the 1970s. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1714 (1987).

More to the point, the equal access rule remains good law in those three circuits and is regularly applied by courts around the country. Though this Court "has not ruled on . . . a reporter's claim of access to places or information that are closed to the public but opened to at least some members of the media," most lower courts "have tended to coalesce their

holdings around the following rule: The press enjoys First Amendment rights of access to all places or information that, notwithstanding their being closed to the general public, have been made generally available to the press." Luke M. Milligan, *Rethinking Press Rights of Equal Access*, 65 Wash. & Lee L. Rev. 1103, 1106 (2008).

Indeed, courts continue to recognize and follow the analysis used by the First, Second, and D.C. Circuits. *See, e.g., Nicholas v. Bratton*, 376 F. Supp. 3d 232, 259–60 (S.D. N. Y. 2019); *Baldeo v. City of Paterson*, No. 18-5359, 2019 WL 277600, at *13 (D. N.J. Jan. 18, 2019); *Danielson v. Huether*, 355 F. Supp. 3d 849, 868 (D. S.D. 2018) ("[S]ome courts have held that when the government gives the media general access to press conferences, press facilities, or official meetings, the First Amendment prohibits the government from excluding particular reporters or media entities from these forums."); *United Teachers of Dade v. Stierheim*, 213 F. Supp. 2d 1368, 1373, n.2 (S.D. Fla. 2002) (citing *Cuomo* and stating that "all news reporters" must "be given equal access to places reserved for the media"); *Nicholas v. City of New York*, No. 15-9592, 2017 WL 766905, at *5 (S.D. N.Y. Feb. 27, 2017) ("Equal press access is critical"); *United States v. Connolly*, 204 F. Supp. 2d 138, 139 (D. Mass. 2002) ("[O]nly in the most extraordinary circumstances is the government permitted, consistent with the First Amendment, to discriminate between members of the press in granting access to . . . governmental proceedings."); *accord Courthouse News Serv. v. Planet*, 947 F.3d 581, 596 n.8 (9th Cir. 2020) ("Favoring one media organization over another would 'present serious First Amendment concerns.'" (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659 (1994))). *See also*

Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1176 (3d Cir. 1986) (en banc) (on a motion to dismiss).

Other courts, however, agree with the Seventh Circuit's approach, in favor of a forum analysis. *See, e.g., Youngstown Publ'g Co. v. McKelvey*, No. 4:05 CV 00625, 2005 U.S. Dist. LEXIS 9476, at *6 (N.D. Ohio May 16, 2005), *opinion vacated, appeal dismissed as moot*, 189 F. App'x 402 (6th Cir. 2006); *Telemundo of Los Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095, 1101–02 (C.D. Cal. 2003). That is why scholars continue to recognize this area as "fragmented and inconsistent." Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age*, 65 Ohio St. L.J. 249, 254 (2004); *see also Viewpoint Discrimination and Media Access to Government Officials*, 120 Harv. L. Rev. 1019, 1021 (2007) (noting that this Court has not resolved "the access question").

Most notably, the Fourth Circuit has rejected an equal access principle. In *The Baltimore Sun Co. v. Ehrlich*, the Fourth Circuit considered an executive order prohibiting any Maryland agency employee from speaking to two *Baltimore Sun* journalists who had supposedly "fail[ed] to objectively report on" the Governor. 437 F.3d 410, 413 (4th Cir. 2006). The newspaper argued "that the Governor's directive unconstitutionally retaliated against it for exercising its First Amendment speech and press rights." *Id.* The district court dismissed, stating that the Fourth Circuit has "declined to recognize a journalist's right to have equal access to public information sources and to be treated the same as other journalists." *Baltimore*

Sun Co. v. Ehrlich, 356 F. Supp. 2d 577, 581 (D. Md. 2005).

The Fourth Circuit affirmed. According to that court, "giving preferential access to some reporters and refusing to give access to" others is generally "not actionable" and has a "*de minimis*" "adverse impact." 437 F.3d at 418–19. The court found no First Amendment problem with situations "in which government officials disadvantage some reporters because of their reporting and simultaneously advantage others by granting them unequal access to nonpublic information." *Id.* at 418.

The Fourth Circuit in *Baltimore Sun* relied on one of its earlier opinions that expressly rejected the analysis of the First, Second, and D.C. Circuits. *See id.* at 418. In that opinion, the court cited *Cuomo*, *Anderson*, and *Sherrill* but rejected their propositions that the First Amendment protects the "right for a journalist to have equal access to public information sources." *Snyder v. Ringgold*, 133 F.3d 917 (4th Cir. 1998) (table opinion). The court rejected any "right of equal access" because, among other reasons, it was concerned about "space constraints" in "White House press conferences" and whether such a right would "confer[] a privileged First Amendment status on the press." *Id.* The court even suggested that government officials could limit access because they "like[] one reporter's stories better than another's." *Id.*

This type of limitation would surely fail under the rule of the circuits that apply the equal access rule. *E.g.*, *Cuomo*, 570 F.2d at 1083 ("[T]he danger would be that those of the media who are in opposition or who the candidate thinks are not treating him fairly

would be excluded. And thus we think it is the public which would lose.").

In sum, the decision below exacerbates a conflict between the Courts of Appeals, thereby leading to inconsistent First Amendment protections that depend on geographic region. This Court has never before had an opportunity to resolve this conflict because no petition for certiorari was ever filed to this Court in *Baltimore Sun*. This Court should resolve this conflict now.

II. The decision below is wrong and unworkable.

Apart from exacerbating a conflict on an important federal constitutional question, the Seventh Circuit's approach is wrong and unworkable. This Court has consistently adjudicated government laws and regulations that subject the press to unequal burdens under strict scrutiny. A holding recognizing a guarantee of equal access would be grounded in this settled rule that government officials may not favor or disfavor one news source among others similarly situated. Given the importance of the press in our system of government, requiring the government to justify unequal access makes good sense.

The forum analysis, by contrast, both undervalues the press's role in our republic and is unworkable. Forum analysis would allow government officials to engage in pernicious discrimination against those press outlets they dislike. Moreover, under the forum analysis, the constitutional test would hinge on a seemingly irrelevant fact: was the press conference in a park or in a conference room? And the forum analysis does not account for the value of a press

event, which is not mainly for a journalist's own speech but for reporting about the event to the public's benefit. Though the Seventh Circuit feared that the equal access rule would lead to chaos, that has not happened in the circuits applying that rule, and there is no question that some interests—like security—are sufficiently compelling that the government could satisfy strict scrutiny in appropriate cases.

A. Applying forum analysis here is inconsistent with the First Amendment.

The Seventh Circuit's approach contradicts foundational First Amendment principles. Forum analysis is a relatively recent free speech doctrine, governing when "speakers can be excluded" from government property. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). But these "public forum principles are out of place in the context of" cases like this one. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 478 (2009) (cleaned up). This case involves a separate First Amendment guarantee—the freedom of the press—that has been long understood to require strict scrutiny whenever the government discriminates against either the press as a whole or similarly situated press members.

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue provides an example of both issues. 460 U.S. 575 (1983). There, the Court considered a use tax on ink and paper for publications, which had been structured so that it only affected large publications. *Id.* at 579. The Court acknowledged that "the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating

constitutional problems." *Id.* at 581. But applying the Press Clause, the Court held that "differential taxation of the press" was inconsistent with the First Amendment and therefore required the State to show a "compelling" interest that cannot be "achieve[d] without differential taxation." *Id.* at 583, 585.

Relying on the Founders' consideration of the First Amendment, the Court explained that differential press treatment "can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." *Id.* at 585. And "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Id.*

The Court also held that Minnesota's law violated the First Amendment "because it targets a small group of newspapers." *Id.* at 591. The Court found this aspect of the law particularly troublesome: "singl[ing] out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." *Id.* at 592; *accord id.* at 593 (White, J., concurring in part and dissenting in part) ("This feature alone is sufficient reason to invalidate the Minnesota tax.").

The Court has often applied this prohibition on targeting of outlets within the news media. For instance, in *Arkansas Writers' Project, Inc. v. Ragland*, the Court held that "a state sales tax scheme that taxes general interest magazines, but exempts newspapers and religious, professional, trade, and sports journals, violates the First Amendment's

guarantee of freedom of the press." 481 U.S. 221, 223 (1987). Noting that the Arkansas "sales tax system directly implicates freedom of the press," the Court applied the rule from *Minneapolis Star* and held that the system impermissibly "treats some magazines less favorably than others." *Id.* at 227 n.3, 229.

The Court reiterated that "targeting individual members of the press[] poses a particular danger of abuse by the State." *Id.* at 228. Indeed, the Court found the Arkansas system "more disturbing" "because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*." *Id.* at 229. "Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press," no matter if any viewpoint discrimination was present. *Id.* at 230.

"[T]o justify such differential taxation," Arkansas had to "show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Id.* at 231. Because the State "failed to meet this heavy burden," the Court declared the tax "invalid under the First Amendment." *Id.* at 234.

Likewise, in *Grosjean v. American Press Co.*, the Court applied the Press Clause and invalidated a tax on written publications with advertisements that depended on the "extent of the circulation of the publication in which the advertisements are carried." 297 U.S. 233, 251 (1936). The Court recognized that the scheme had "the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." *Id.*

As these cases show, "[r]egulations that discriminate among media . . . present serious First Amendment concerns." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659 (1994). That is why this Court has consistently applied strict scrutiny to such regulations that target a specific news outlet for differential treatment. And that is precisely the type of regulation here. Thus, applying strict scrutiny under the Press Clause is the appropriate method of analysis.

There is no dispute that the MacIver journalists "have sufficient professional experience to make them credible state capitol correspondents." App. 49. Indeed, MacIver News Service was credentialed by the Wisconsin State Legislature. App. 5. And there is likewise no dispute that the MacIver journalists are now treated differently from other journalists by the Governor's office.

These facts fit neatly into the prohibition on differential treatment applied in *Minneapolis Star* and *Arkansas Writers' Project*. The Seventh Circuit thought otherwise, finding the MacIver exclusion to stem from a "rule of general application." App. 20. Not so. The MacIver journalists were excluded under a rule that expressly differentiated between members of the press. And aspects of that rule are analogous to the rules in *Minneapolis Star* and *Arkansas Writers' Project*. Just as the State of Minnesota differentiated between publications based on their size, the Governor's rule discriminates against media based on their "principal business," "established" nature, length of operation, employment, and undefined "repute." App. 4-5. The government also suggested that it relies on the size of the press outlet, "namely

newspaper circulation, radio listenership, and TV viewership." App. 8.

The rule here also discriminates against journalists whose employers engage in other activities protected by the First Amendment like "advocacy." App. 14. Yet under the decision below, it is "reasonable" for the government to define away a reporter because he or his employer engages in more First Amendment speech. App. 13. In other words, an organization's press access depends on the content of their other speech. This is yet another reason that forum analysis is the wrong framework. This Court always applies strict-scrutiny to content-based restrictions on speech, regardless of the physical location of the speech. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Restricting access to all journalists employed by think tanks because other employees of the same parent entity engage in "policy advocacy" is to punish them for the content of their speech. If the journalists work for a newspaper with an editorial board that engaged in policy and political advocacy, that is acceptable; but policy advocacy by a think-tank is disqualifying. This also points to strict scrutiny.

Arkansas Writers' Project and many other cases forbid the Seventh Circuit's backwards approach to the First Amendment. If "a profit motive" does not "strip communications of the otherwise available constitutional protection," it is hard to see how separate advocacy could. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989). After all, in 1791, "many of the newspapers were intensely partisan and narrow in their views," but no one could suggest that they were *less* protected by the First

Amendment on that basis. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 248 (1974); *cf. id.* at 259 (White, J., concurring) ("A newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation in matters affecting the exercise of journalistic judgment.").

Moreover, the Governor's criteria operate to privilege existing and traditional news outlets. For-profit newspapers with editorial boards that make candidate endorsements are not "too political," but think tanks engaged in "policy advocacy" apparently are. Equally, new outlets in operation less than 18 months are excluded. And all journalists must be "employed by or affiliated with an organization whose principal business is news dissemination." App. 4-5. This all serves to reinforce existing media monopolies and prevents new and nontraditional voices from covering the governor. But "[w]hen the Framers thought of the press, they did not envision the large, corporate newspaper and television establishments of our modern world. Instead, they employed the term 'the press' to refer to the many independent printers who circulated small newspapers or published writers' pamphlets for a fee." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring). The Governor's criteria privilege modern media, while the Press Clause was written to protect new voices like MacIver.

If that were not enough, the Governor's "rule" is not a rule at all. It is "a non-exhaustive list of factors for the communications department to consider when deciding whether to include any given media outfit." App. 4. And a rule is "not generally applicable 'where the State has in place a system of individual

exemptions.'" *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring) (quoting *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 884 (1990)); *id.* at 1878 (majority opinion) (applying this rule to decisions made "at the 'sole discretion'" of the government).

"[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988). Unfettered government discretion to exclude certain members of the press is especially problematic. "[T]he press serves and was designed to 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 to all the people whom they were selected to serve." *Mills v. State of Ala.*, 384 U.S. 214, 219 (1966). "[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Grosjean*, 297 U.S. at 250.

Allowing government officials to decide which members of the press have access to government events and information would eviscerate these protections for an independent press. Under the First Amendment, the press is "to serve the governed, not the governors." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring); *accord United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D. N.Y. 1943) (Learned Hand, J.) ("[R]ight conclusions are more likely to be gathered out of a

multitude of tongues, than through any kind of authoritative selection.").

Thus, the decision below was wrong to hold that the government may effectively define away individual press rights by imposing purportedly neutral criteria that would violate the First Amendment if imposed directly. Without satisfying strict scrutiny, the government cannot impose taxes based on a media outlet's size, length of operation, or advocacy. Neither can it exclude press members from official events on these bases. The issue is not the forum in which the exclusion occurs, but instead the differential treatment.

To illustrate the unfairness: the Wisconsin rule classifies "think tank advocacy" as incompatible with "bona fide journalism," but has no problem with editorial advocacy from more traditional news outlets. The rule allows the government to discriminate against nontraditional outlets, specifically because of their nontraditional nature, while turning a blind eye to the advocacy of radio and television talk show hosts, opinion columnists, and newspaper editorial boards.

To be sure, "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). But "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. And once the "government has opened its doors," the press must have "equal access." *Gannett*, 443 U.S. at 405 (Rehnquist, J., concurring) (cleaned up). Strict scrutiny applies, and the contrary decision below is wrong.

B. Applying forum analysis is unworkable, whereas the equal-access principle is easy to apply.

For several reasons, the Seventh Circuit's application of forum analysis to exclusion from press events would be unworkable and lead to anomalous consequences. First, forum analysis suggests that different rules would apply depending on the location of the press event. It simply cannot be that a journalist's rights depend on whether the governor holds his press conference on the Capitol lawn (a traditional public forum), in the Capitol rotunda (a limited public forum), or in his Capitol conference room (a nonpublic forum).

While it makes sense that the government would have more power to restrict speech in a limited public forum, it doesn't make any sense why a limited public forum would allow the government more ability to pick and choose the press than a public forum. From the perspective of the First Amendment, the same harm of exclusion occurs from both press conferences equally, regardless of their location. The equal access principle recognizes this harm; forum analysis does not, and makes the constitutional analysis turn on happenstances detached from the nature and benefits of a free press.

Is the Governor really to maintain three different press lists, and ask his lawyers how widely he must circulate his media advisories every time he goes to a different event, relying on them to appropriately classify the nature of the ground on which he speaks?

Second, forum analysis does not provide sufficient protection against government discrimination against

disfavored media outlets. The "use of the public forum doctrine . . . can provide government officials a safe harbor from which they can engage in undisguised viewpoint discrimination in nonforums." *Viewpoint Discrimination and Media Access to Government Officials*, *supra*, at 1020. "Sophisticated officials can deny a reporter a right of access by simply relabeling an 'open' event as" private. Milligan, *supra*, at 1109 (2008). And it would "be difficult to discern precisely when a conference call becomes a press conference-like forum." *Viewpoint Discrimination and Media Access to Government Officials*, *supra*, at 1026–27. The Governor's office here took this exact route, arguing below that no forum analysis should apply at all because the "Governor's press events" are a "proprietary function." App. 13 n.1. Thus, "if forum-based distinctions drive the outcomes in media access cases, there is no line that can be drawn to ensure that the discrimination remains confined to two reporters rather than two million." *Viewpoint Discrimination and Media Access to Government Officials*, *supra*, at 1026. This discrimination would likely benefit "established media outlets." Milligan, *supra*, at 1117 n.35. But as explained above, the value of a free press depends on a loud marketplace of ideas. If government officials could easily limit press voices to those they prefer, the press cannot provide the check on the government envisioned by the First Amendment.

Third, categorizing press conferences as government-created fora in which journalists speak their own views does not accurately or entirely describe the value of access to these conferences. For example, journalists still value access to press conferences even if they do not ask questions or indeed say anything at all. Journalists primarily want to use

the information from inside the press conferences to speak *outside* the "forum." The equal access principle recognizes that the relevant constitutional right derives from freedom of the press, not merely freedom to speak.

While the forum framework raises a host of problems, the Seventh Circuit wrongly posits an equal access rule will lead to "havoc." App. 18. The Seventh Circuit could not "fathom the chaos that might ensue if every gubernatorial press event had to be open to any 'qualified' journalist with only the most narrowly drawn restrictions on who might be excluded." *Id.* at 22. If we have journalists running around exercising constitutional rights, imagine the inconvenience!

First off, the First Amendment exists to protect the rights of the people, not the convenience of the politicians. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021) ("efficiency" and "mere administrative convenience" are not sufficient to justify governmental invasion of associational rights). When in doubt, this Court should prefer the rights of journalists to question elected officials over the supposed concerns of those politicians and their political-appointee communications directors about the journalists' supposed "bona fides."

Second, the Governor has 780 journalists and outlets on his media advisory list. App. 5. It seems hard to credit the idea that adding a 781st will result in "chaos" by overwhelming gubernatorial time and staff.

More practically, the circuits recognizing the equal access rule have not seen chaos, and for good reason. As already discussed, the press collectively has no

right of special access. *Branzburg*, 408 U.S. at 684. Nor does it have an inherent right to command access of governmental information. *E.g.*, *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 40 (1999). Nor does it seek a right to demand "interviews or briefings." *Sherrill*, 569 F.2d at 129.

But MacIver's "claim is not premised upon the assertion that the [Governor's office] must open its doors to the press, conduct press conferences, or operate press facilities." *Id.* Instead, it is premised on the press's right of equal access once the government chooses to do so. All MacIver wants is the same access that all members of the Capitol press corps receive to attend the Governor's press events and briefings.

With this or any right protected by strict scrutiny, the government may still adopt narrowly tailored limits on press access when a compelling need justifies it. For instance, there are only so many seats on Air Force One, and the government may parcel them out based on neutral criteria. *See Frank v. Herter*, 269 F.2d 245, 248 (D.C. Cir. 1959) (Burger, J., concurring). War zones are dangerous places, and the military may allocate embedded slots using neutral criteria. *See Getty Images News Servs. v. Dep't of Defense*, 193 F. Supp. 2d 112, 120 (D. D.C. 2002) ("[A]ccess is necessarily limited by the logistical support and resources that the military can provide."). Press access also puts journalists close to elected officials, so security and background checks are often compelling interests. *See Sherrill*, 569 F.2d at 129.

In short, an equal access rule has not and will not lead to havoc. Instead, it merely requires the government to justify press exclusions. It puts the burden where it belongs under the First Amendment,

which is on the government to justify its exclusion, rather than on the citizen to justify his right to equal treatment. In doing so, it avoids the arbitrariness of applying the forum doctrine here. The decision below threatens a core federal constitutional right that plays an "essential role in our democracy." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 381–82 (1973) (cleaned up). The Court should grant this petition.

III. This case is an ideal vehicle.

Not only does this case involve a stark disagreement on an important issue of federal law, it presents an ideal vehicle to resolve that disagreement. The courts below expressly considered and resolved this pure question of law. App. 9-10, 29. The relevant facts are simple and clear, as the district court consolidated the preliminary injunction with a final decision on the merits. *Id.* at 29.

Nor are the relevant facts in dispute. All agree that the MacIver journalists are indeed journalists, with "sufficient professional experience to make them credible state capitol correspondents." App. 49. All also agree that these journalists were credentialed as press members by the Wisconsin State Legislature. *Id.* at 5. Finally, all agree that the journalists were excluded by the Governor's office following a change in administration and a determination by a political appointee on the Governor's personal staff based on "a non-exhaustive list of factors" that MacIver "is not principally a news organization." *Id.* at 4-5. The only question is whether this unequal press access requires strict scrutiny or application of forum doctrine.

Resolution of this pure legal question will be outcome-determinative. The Governor has never argued that his media access criteria are the least restrictive means of furthering any compelling interest. And given the Governor's non-exhaustive list of arbitrary criteria, he could not satisfy strict scrutiny. But even if the Governor wanted to argue for the first time that his discretionary press picks could pass strict scrutiny, that question could be resolved on remand.

This case is also a good vehicle for the Court to begin addressing the emergence of new media. *See Berisha v. Lawson*, 141 S. Ct. 2424, 2427 (2021) (Gorsuch, J., dissenting from denial of certiorari) ("Since 1964, however, our Nation's media landscape has shifted in ways few could have foreseen. . . . The effect of these technological changes on our Nation's media may be hard to overstate."). Resolving the question presented does not require the Court to determine whether government has a compelling interest in limiting press access to "bona fide journalists" with standard professional credentials. *Sherrill*, 569 F.2d at 129. A right to equal press access, even with the press broadly defined, is not necessarily a warrant for every person with a Twitter handle to demand a seat at every press conference. The Court can resolve this important framework question now and defer to a future day the harder job of applying that standard to citizen journalists.

Finally, the facts of this case are typical of such controversies. The criteria used by the Governor here (to the extent they are followed) are drawn from similar criteria used elsewhere. *See* App. 5. The type of press events at issue are routine for government

officials. *See id.* at 5-6. And the journalists involved have standard press credentials qualifying them as members of the press. *See id.* at 5. This case would resolve the important legal question at issue.

CONCLUSION

"The Bill of Rights protects the freedom of the press not as a favor to a particular industry, but because democracy cannot function without the free exchange of ideas. To govern themselves wisely, the framers knew, people must be able to speak and write, question old assumptions, and offer new insights." *Berisha*, 141 S. Ct. at 2425–26 (Gorsuch, J., dissenting from denial of certiorari). This case calls for this Court to ensure that image-conscious public officials cannot shut down journalists because they ask tough questions, offer new insights, or don't belong to the media industry's cool kids club.

The petition for a writ of certiorari should be granted to resolve this persistent circuit split.

Respectfully submitted,

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SEPTEMBER 7, 2021

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