APPENDIX

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APPENDIX A

United States Court of Appeals
For the Seventh Circuit

No. 20-1814

(Filed April 9, 2021)

JOHN K. MACIVER INSTITUTE FOR PUBLIC POLICY, INC., *et al*
Plaintiff-Appellant,

v.

TONY EVERS, in his official capacity as Governor of the State of Wisconsin,
Defendant-Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Hon. James D. Peterson, Chief Judge]

Before

Manion, Rovner, and Scudder, *Circuit Judges*

Counsel: For JOHN K. MACIVER INSTITUTE FOR PUBLIC POLICY, INC., WILLIAM OSMULSKI, Plaintiffs-Appellants: Daniel R. Suhr, Attorney, Jeffrey M. Schwab, Attorney, LIBERTY JUSTICE CENTER, Chicago, IL.

For TONY EVERS, in his official capacity as Governor of the State of Wisconsin, Defendant-Appellee: Gabe Johnson-Karp, Attorney, Karla Z. Keckhaver, Attorney, OFFICE OF THE ATTORNEY GENERAL, Madison, WI.

ROVNER, Circuit Judge. Two reporters from the John K. MacIver Institute for Public Policy, Inc., alleged that they were denied access to a press event held by Wisconsin Governor Tony Evers' office based on the viewpoint espoused by the organization. Because we have found no evidence of viewpoint discrimination under any First Amendment test with which we might view the claim, we affirm the district court's grant of summary judgment for Governor Evers.

I.

The importance of a free press to our founders was memorialized in the First Amendment which prohibits the government from abridging the freedom of press, which now, of course, encompasses all forms of media. See U.S. Const. amend. I. Thomas Jefferson stated, "Were it left to me to decide whether we should have a government without newspapers, or newspapers without government, I should not hesitate a moment to prefer the latter." We therefore delve into any case alleging suppression of that core right with seriousness and care. Like all rights enumerated in the Bill of Rights, however, it is not absolute. And allegations of

suppression of the media must be sufficiently alleged to withstand a ruling on summary judgment.

MacIver describes itself as "a Wisconsin think tank that promotes free markets, individual freedom, personal responsibility and limited government." R. 9 at 1. MacIver Institute sponsors what the plaintiffs call a "separately branded" MacIver News Service with its own Twitter account, its own logo, and its own tab on the MacIver Institute's website. At the time of the facts of this case, William Osmulski was a reporter and a news director for MacIver News Service. Matt Kittle was also a reporter for MacIver News Service. We refer to the plaintiffs collectively as MacIver.

Governor Evers, from time to time, holds events during which he answers questions from members of the press. Some of these events are open to any member of the public, and others are limited to subsets of the media of varying size. The Governor's communications department maintains a media advisory list that it uses to notify members of the media of various events. The original version of the media list was based on a version used during Governor Evers' campaign and used neutral selection criteria such as newspaper circulation, radio listenership, and TV viewership. In June 2019, after MacIver's counsel sent a letter to the Governor demanding fair and equal treatment, the Governor's Office of Legal Counsel distributed a memorandum providing more substantial guidance for determining how, going forward, media would be granted access to the Governor's exclusive or limited-access events. The memorandum points out that the

Governor's office faces logistical and security concerns that prevent unlimited access to press events. R. 15-1. After that it enumerates a non-exhaustive list of factors for the communications department to consider when deciding whether to include any given media outfit on the list, noting that the "most important consideration is that access is based on neutral criteria." Id. Those factors are as follows:

> 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?

Id. These factors were adapted from established standards used by the Wisconsin Capital Correspondents Board and the United States Congress, and allow for the inclusion of over 780 e-mail contacts. *Id.* at n.1 & R. 15-2. The MacIver News Service does not meet these criteria although it is currently credentialed by the Wisconsin State Legislature. According to the Governor, MacIver is not included on the Governor's media advisory list because the communications department determined that the MacIver Institute "is not principally a news organization" and "their practices run afoul of the neutral factors" set forth in the memorandum. R. 15 at 6.

The Governor's office describes its press events as falling into one of four categories: public events, press-exclusive events, press briefings, and one-on-one interviews. Public events are, as the name suggests, open to the entire public. For example, Governor Evers appeared at the opening of the Wisconsin State Fair in 2019, and hosted multiple budget listening sessions

across the state in spring 2019. These events were open to any member of the public or press who wished to attend. Sometimes these events include a period of time during which the press may ask questions (what the Governor's office calls "press avail"), but there is no limitation on who may attend. In addition to these public events, there are other ways in which the general public, including MacIver, may access news and information from the Governor's office. MacIver, or any member of the public, may follow the Governor's feed on social media and sign up for press releases. MacIver does not allege that it has been denied entry or access to any public events, or public media sources.

The second category of press events consists of limited access press conferences and other press-exclusive events to which only some members of the press are invited. These events are not open to the general public and press attendance is limited by time, space, and security concerns, as well as other venue-specific factors. For example, when the Governor toured the University of Wisconsin – Milwaukee School of Freshwater Sciences, only a limited number of journalists were invited on the tour which was followed by a press avail time. The Governor's communications department uses the media advisory list to notify members of the media of these limited-access events, and invitees who wish to attend must RSVP so that the Governor's office and security personnel can prepare accordingly. Depending on the type of event, the Governor's office may also reach out to members of the press with specific interests, such as inviting a

science-focused journal to join the tour of the School of Freshwater Sciences.

The third category includes press briefings, which are limited to an even smaller group of invited members of the press. Historically, these have been held as a courtesy to members of the press to provide additional background before the release of large-scale initiatives. These events are off the record – meaning that the information is not intended for public release or as an official representation or statement. Some of the materials provided at a press briefing might be subject to embargoes. Finally, in a fourth category, the Governor may at times grant a one-on-one interview. These are not at issue in this case.

On February 28, 2019, MacIver News Service reporters Osmulski and Kittle got wind of an invitation-only press briefing to be held later that afternoon during which the Governor's office would preview the major initiatives in his budget address scheduled for that same evening. The pair, seeming to understand that this was a "by invitation" event, sent an RSVP to the Governor's staff the day of the event, but did not receive a response before the briefing began. As they attempted to enter the conference room, they were informed that they were not on the RSVP list and thus could not be admitted. They were told they could talk to the Governor's Deputy Chief of Staff, Melissa Baldauff, but she was not available at that moment to hear their appeal. Because this was a small-scale event, hundreds of other journalists and media personnel were also not invited to attend. For example,

Jason Stein, a journalist formerly with the Milwaukee Journal Sentinel and Wisconsin State Journal sent an email to the Deputy Chief of Staff asking to attend, but she denied him admission as he was no longer affiliated with a news organization and instead worked for the Wisconsin Policy Forum, an organization that describes itself as a nonpartisan, independent research organization. In fact, for small-scale events such as the press briefing on February 28, 2019, the communications department layers onto the usual media advisory list the additional requirement that the organization have a readership or viewership justifying inclusion for the particular event.

The MacIver reporters eventually learned that their exclusion from the February 28 event was not an anomaly. The communications department's media advisory list did not include them and thus they would not receive invitations to non-public press events. In response to their initial letter demanding to be included on the list, the Governor's legal counsel responded that the Governor's communications department permits "some journalists to limited-access events, such as exclusive interviews, on a case-by-case basis using neutral criteria, namely newspaper circulation, radio listenership, and TV viewership." R. 7-5. Shortly after that, MacIver sent a public records request asking for, among other things, the criteria used to determine which journalists would be allowed to access briefings. On the heels of fulfilling MacIver's records request for the media advisory list, on June 26,

2019, the Governor's office issued its neutral criteria memorandum described above.

MacIver sued the Governor claiming that (1) it had been denied equal access to certain events and press emails in violation of the First Amendment; (2) the Governor discriminated against MacIver based on its viewpoint in violation of the First Amendment; and (3) the Governor denied MacIver equal protection of the laws under the Fourteenth Amendment by denying equal access to those events and e-mails. MacIver sought an order declaring its exclusion unconstitutional and ordering the Governor to include MacIver in the future. MacIver moved for a preliminary injunction on August 20, 2019, seeking an order requiring Governor Evers to invite MacIver journalists to "generally available press briefings and events and lists announcing such events." R. 6 at 1. MacIver did not define what it meant by "generally available press briefings." After the decision had been pending for six months, MacIver moved, pursuant to Federal Rule of Civil Procedure 65(a)(2), to consolidate the decision on the preliminary injunction with a decision on the merits, affirming that all necessary evidence had already been filed with the court. The district court denied MacIver's motion for a preliminary injunction, but permitted the plaintiffs ten days to demonstrate why the court should not grant summary judgment in favor of the defendants. On April 14, 2020, after rejecting MacIver's request to file a renewed motion for summary judgment, the court granted summary judgment in favor of Governor Evers. The district court

concluded that the press conferences were non-public fora and that the criteria that the Governor had used to accept or exclude media were both reasonable and viewpoint neutral. We review the district court's grant of summary judgment *de novo*, construing all reasonable inferences in the light most favorable to MacIver. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

II.

The amount of access to which the government must give the public for First Amendment activities, and the standards by which a court will evaluate limitations on those rights, depends on the nature of the forum at issue. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). Streets, sidewalks and parks, and the quintessential soap box in the public square fall on one end of the spectrum. We call these traditional public fora. We have the least tolerance for restrictions on First Amendment freedoms in those settings, and the state may only regulate content if it can show that the regulation is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end. *Id.* at 45. The government may regulate the time, place, and manner of the expression where those regulations are narrowly tailored to serve a significant governmental interest and where ample alternative channels of communication remain open. *Id.* There is no question that a traditional public forum is not at issue in this case, but

it serves as an important marker of one end zone of First Amendment forum analysis.

The same prohibitions and tests apply to designated public fora – public property that the state has opened for members of the public to use as a place for expressive activity. *Id.* at 45-46. A designated public forum occurs only where the government intends to make the property available to the general public and not simply when it grants access to one individual or even several individuals or groups. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). The government does not create a designated public forum where it does no more than reserve access to the forum to a particular group of speakers. *Id.* at 679. Requiring permission, limiting access, and having "extensive admission criteria" as the state does here through the advisory list and invitation and RSVP process, are signs that the government has not created a designated public forum. *Arkansas*, 523 U.S. at 679-80; *Cornelius v. NAACP*, 473 U.S. 788, 804-06 (1985). In short, by inviting a limited number of journalists to its press conferences, the Governor's office has not created a designated public forum.

Finally, the third category describes non-public fora, where the government controls public property which is not, by tradition or designation, a forum for public communication, and is open only for selective access. *Perry*, 460 U.S. at 48. "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453

U.S. 114, 129 (1981). The government, like other private property holders, can reserve property for the use for which it was intended, "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46. When the government limits participation only to "appropriate" participants or has extensive admission criteria, it has not created a public forum. *Cornelius*, 473 U.S. at 804-05. And so for example, if a school opens its mailboxes to a union based on its status as the exclusive bargaining unit of the teachers, and not based on its viewpoint, it has not created a public forum and is not constitutionally obliged to allow access to any organization which wishes to have it. *Perry*, 460 U.S. at 48-51. And when the federal government opened its Combined Federal Campaign to allow non-profits to receive charitable donations from federal employees it did not create a public forum merely by allowing approximately 237 organizations (out of approximately 850,000 tax-exempt charities) to participate in the program. *Cornelius*, 473 U.S. at 804-05. "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.* at 806.

The plaintiffs in this case want to attend a limited-access press conference – an event that is not open to the public and not held on government property dedicated to open communication. See *Perry*, 460 U.S.

at 45-46. These limited-access press conferences are open only to journalists who meet the content-neutral criteria, and then, only the limited number of reporters who can be accommodated after taking into account space constraints and security concerns. MacIver wants access to a non-public forum – one to which the government may regulate access provided the regulations are reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 46. The Governor's "decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808.[1]

We find that the Governor's media-access criteria are indeed reasonable and not an effort to suppress MacIver's expression because of its viewpoint. The Governor contends that its criteria are intended to consider limited space constraints, address security concerns, and ensure that those in attendance will maximize the public's access to newsworthy information, and be more likely to abide by professional journalistic standards such as honoring embargoes and off-the-record communications. The resulting list

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[1] The Governor asserts that the standard applicable to non-public fora is the most demanding one that might apply and suggests that, in fact, the Governor's press events could be classified as either a proprietary function or government speech to which only rational basis review applies. We think the non-public forum analysis is the appropriate one as applied to the facts of this case involving an invitation-only, limited-access press event.

of qualified media personnel includes a wide variety of news organizations and journalists from across the state and nation. The first three of the criteria listed in the memorandum are reasonably related to the viewpoint-neutral goal of increasing the journalistic impact of the Governor's messages by including media that focus primarily on news dissemination, have some longevity in the business, and possess the ability to craft newsworthy stories. The list prioritizes access by journalists whose reporting will reach wider audiences, while also allowing room for smaller media outlets (such as tribal publications). The criteria listed in numbers four and five of the memorandum are reasonably related to the viewpoint-neutral goal of increasing journalistic integrity by favoring media that avoid real or perceived conflicts of interest or entanglement with special interest groups, or those that engage in advocacy or lobbying. Similar standards are also used by other governmental bodies such as the United States Congress. There is nothing inherently viewpoint-based about these criteria, and MacIver has not provided any evidence that the Governor's office manipulates these neutral criteria in a manner that discriminates against conservative media.

In its fact section, MacIver asserts that it viewed the media advisory list as confirmation that its exclusion was ideologically motivated, but it offers no support or explanation for that factual assertion. In fact, the list includes media outlets traditionally viewed as conservative leaning such as the Washington Times, Wall Street Journal, Fox News, and

Washington Examiner, as well as those viewed as liberal leaning such as the Capitol Times, New York Times, and Huffington Post. MacIver argues that the list of included conservative media outlets is not relevant as they are national outfits with limited local presence and unlikely to cover the Governor's events, but the inclusion of a broad range of media outlets on both sides of the political spectrum certainly diminishes any claim that the list is based on political ideology. Moreover, Wisconsin politics and policy are frequently the subject of national news media, as we saw during the 2020 elections.

MacIver has not provided sufficient factual support in the record demonstrating that the Governor discriminated against MacIver on the basis of its viewpoint, rather than for the stated reason that "their practices ran afoul of the neutral factors." R. 15 at 6. MacIver does not point to any other local conservative media that meet the access criteria but were excluded. In fact, the Governor's office also excluded the Wisconsin Policy Forum, a liberal think tank, from the media list. MacIver attempts to distinguish itself from the Wisconsin Policy Forum, but fails to offer any record evidence. The Governor's office determined that the MacIver News Service made "no effort to distinguish itself from the overall organization mission" of the MacIver think tank which promotes free markets, individual freedom, personal liberty, and limited government. R. 15 at 6. There is no evidence in the record, for example, to support the claim that MacIver's News Service is actually, rather than merely

nominally, separate from the MacIver Institute. Pointing the court to structural differences on its web-site along with other non-record evidence and evidence gleaned from the internet does not suffice. MacIver's other naked assertions of bias are also unsupported by references to the record. District courts cannot make rulings on summary judgment based on evidence not in the record. *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 648 (7th Cir. 2011). Moreover, the district court found that none of MacIver's comparisons were apt, and we find no reason to disturb the district court's more specific fact findings about these comparisons. D. Ct. Op. at 15-18, R. 30 at 15-18.

MacIver disagrees not just with this outcome, but with the use of forum analysis at all. Forum analysis, it argues, is a "freedom of speech doctrine, governing when a private speaker has a right to speak on government property." MacIver Brief at 9. Instead, it proposes that the court apply the highest level of scrutiny to MacIver's exclusion because the MacIver reporters are protected under the freedom of press clause of the First Amendment. But forum analysis is not merely about who has the right to speak on government property. It also addresses who has the right of access to government property to engage in various expressive pursuits – whether that expressive pursuit is leaf-letting teachers, soliciting charitable donations, wearing political buttons at a polling place, or gathering information for news dissemination. See, e.g., *Perry*, 460 U.S. at 40-41; *Cornelius*, 473 U.S. at 797; *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885

(2018). After all, all of these are forms of expressive activity. And the amount of access and freedom that the government must give to someone in pursuit of an expressive activity depends on the forum (and also the time and manner).

MacIver's proposed "equal access" framework is really an argument that any restriction on someone acting as a member of the press must be subject to strict scrutiny. And this argument fails for several reasons, but the first is that reporters are not cloaked with automatic "strict scrutiny protection" merely because they are members of the press. "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); see also *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 946 (7th Cir. 2015) ("the First Amendment provides no special solicitude for members of the press."). "The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). Neither the First Amendment nor the Fourteenth Amendment grants the media a "special right of access to [governmental buildings or information] different from or greater than that accorded the public generally." *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978). Members of the press are routinely excluded from places that other members of the public may not access such as grand jury proceedings, Supreme Court and appellate court conferences, the meetings of other official bodies gathered in executive session, the

meetings of private organizations, and non-public crime scenes, among others. See *Branzburg*, 408 U.S. at 684-85. We can imagine the havoc that might ensue if government entities could not exclude members of the press from any non-public part of a government building – private offices, meeting rooms, government laboratories – without demonstrating that the restriction is necessary to serve a compelling interest and narrowly drawn to meet that interest.

MacIver's argument that the First Amendment provides a guarantee of "equal access" among members of the media rests on cases that pre-date modern forum analysis or cases with such unique facts as to have no relevance here. It is true that the Second Circuit in 1977 stated 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). But in that case a mayoral campaign blocked access to one of three major networks that existed at the time, ABC, while allowing the other two, NBC and CBS. (The lack of access resulted from a labor dispute). It was the resulting inequity between the three equal networks that the court sought to remedy, and thus it explained, "[i]n the event that CBS and NBC refuse to either cross the picket line or have their managerial crew operate, then the injunction will not be operative because that would result only in ABC getting what we might call in the vernacular a 'scoop' which is not our intention.

In other words, we want the networks to be on a par. . . ." *Id.* at 1084. In addition to pre-dating *Perry* and *Cornelius*, the facts of the ABC case are too far afield. In the ABC case, one of three undisputedly equivalent broadcasting companies was excluded from coverage without any neutral criteria guiding the decision to exclude it. *Id.* at 1083-84. Likewise, *Sherrill v. Knight*, also predates modern forum analysis, but in any event articulates what we already know: a government cannot deny a press pass to an individual reporter based on an alleged but unarticulated vague security concern where there are no established neutral criteria for granting security access. *Sherill v. Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977). The *post-Perry* cases MacIver cites are just too far off the mark factually to be of any help to MacIver. In *Anderson*, a court issued a protective order that prohibited the dissemination of all information in a pending case to all media outlets save for one given exclusive access. *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986). And in the *Huminski* case, the court faced the difficult challenge of balancing First Amendment access to the courtroom by a self-titled "citizen reporter" who sparked security concerns by parking a van in the courthouse parking lot with posters containing veiled threats to a judge. *Huminski v. Corsones*, 386 F.3d 116, 122-28 (2d Cir. 2004), *as amended on reh'g*, 396 F.3d 53 (2d Cir. 2005). We could continue distinguishing these cases, but none of these out-dated, or out-of-context (or out-of-circuit) cases provide any help.

MacIver implores us to look to *Minneapolis Star Tribune* and *Arkansas Writer's Project* as two cases that it argues forbid the state from distinguishing between members of the press. *Minn. Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). But these cases reinforce the Governor's argument by concluding that states can subject the press to generally applicable regulations without offending the First Amendment. *Minn. Star & Trib.*, 460 U.S. at 581 ("It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems."); *Ark. Writers' Project*, 481 U.S. at 228 (same). The burden imposed on the press in *Minneapolis Star Tribune*, was not a generally applicable regulation, but rather a tax which singled out the press over other industrial producers by taxing ink and paper but not other industrial component products. *Id.* at 584, 591. In *Arkansas Writer's Project*, it was a tax exemption based on the content of the written media. *Ark. Writers' Project, Inc.*, 481 U.S. at 229. In short, the court applied strict scrutiny, not simply because the plaintiffs were members of a free press, but because the press in those cases were being subject to differential treatment, and in the case of the *Arkansas Writers' Project*, differential treatment based on content. Here, a rule of general application applies to MacIver: in situations where the state does not open its governmental property to the general public, those who wish to attend functions in state facilities must be invited based on reasonable and content-neutral

criteria. Because the state has not imposed a content-based approach to the burden, or singled out the press over other industries for differential treatment, strict scrutiny is not the appropriate filter with which to evaluate these regulations.

At the end of the day, we can conclude that, when we look at expressive activities – whether pure speech, press, or assembly – location matters. In scrutinizing restrictions to the other enumerated expressive right, the right to assembly, the Supreme Court has explained that "to ascertain what limits, if any, may be placed on protected speech, we have often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (upholding local ordinance prohibiting protesting in front of an individual's residence). This is why protests – one of the most protected forms of First Amendment rights – can be barred from the floor of the United States Capitol chambers but yet protected on the lawn outside. In short, even for the most protected of First Amendment activities, forum matters.

Because of MacIver's theory that all press deserve "equal access to events and information made generally available to the press corps," (MacIver Brief at 11), MacIver expends many words extolling the credentials, professionalism, and skills of its two "award-winning" reporters, Osmulski and Kittle. This is not an argument that MacIver raised below, and therefore we need not consider it. It is worth emphasizing, however, that First Amendment rights do not

turn on, nor are they calibrated to, the quality of the reporting. Imagine a system where the government doled out the freedom of press based on a government official's assessment of the quality of the reporting or the credentials of the reporters. *See Lund v. City of Rockford, Illinois*, 956 F.3d 938, 941 n.1 (7th Cir. 2020) ("We note that First Amendment protection does not depend on the quality of the news source or the wages of the reporter."). The protections of the First Amendment extend not just to the traditional press embodied by newspapers, television, books, and magazines, "but also humble leaflets and circulars," which were meant to play an important role in the discussion of public affairs. *Mills v. State of Ala.*, 384 U.S. 214, 219 (1966). Protecting the right of small, upstart, and non-objective media producers, however, does not mean that the Governor of Wisconsin must grant every media outlet access to every press conference. We cannot 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. And no one's needs would be served if the government were required to allow access to everyone or no one at all.

MacIver appears to have abandoned its equal-protection claim. Although MacIver's Statement of the Issues asserts that its "equal access" among members of press argument is rooted in both the First Amendment and the Fourteenth Amendment's equal-protection clause, MacIver does not develop this argument other than listing a string cite of cases of

out-of-circuit, 35-to-70-year-old cases in which the court placed the right to access by press in the equal-protection clause. We find that MacIver has waived its equal-protection argument, which, in any event, it describes as "coterminous" with its First Amendment claim. MacIver Reply Brief at 3, n.1. A party who does not sufficiently develop an issue or argument forfeits it. *Scheidler v. Indiana*, 914 F.3d 535, 540 (7th Cir. 2019).

In closing, it is worth reiterating the importance that this court and the Supreme Court have placed on newsgathering and its fundamental role in allowing citizens "to see, examine, and be informed of their government," not just for its own sake but so as to enable citizens to form their own judgments on matters of public concern and choose qualified representatives. *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 599-600 (7th Cir. 2012). "The 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*, 384 U.S. at 219. We therefore look carefully at any claim that a government entity is disallowing access to the media or a particular subset thereof. This does not mean, however, that members of the press have special access to newsgathering and must be exempt from laws and rules of general application. *ACLU*, 679 F.3d at 598. Nor does it mean that we must disallow a government's set of viewpoint-neutral criteria simply

because we can imagine a superior system of allocation. The Governor's office has created neutral laws of general application and MacIver has not shown any evidence that it was excluded based on its viewpoint. As a result, the district court's grant of summary judgment for the Governor must be AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 19-cv-649-jdp

(Filed April 14, 2020)

JOHN K. MACIVER INSTITUTE FOR PUBLIC POLICY and WILLIAM OSMULSKI,

Plaintiffs,

v.

TONY EVERS, in his official capacity as Governor of the State of Wisconsin,

Defendant.

ORDER

At plaintiffs' request, Dkt. 28, the court consolidated plaintiffs' motion for preliminary injunction with a decision on the merits as provided by Federal Rule of Civil Procedure 65(a)(2), effectively converting plaintiffs' motion into one for summary judgment. The court denied the consolidated motion, concluding that plaintiffs had adduced no evidence that defendant Tony Evers violated their First or Fourteenth Amendment rights in denying them access to his limited-access press events. Dkt. 30. The court asked plaintiffs

to show cause why it shouldn't grant summary judgment to Evers under Rule 56(f).

In response, plaintiffs now ask the court to permit them to file a motion for summary judgment that (1) develops legal arguments about who counts as "the press" (on the theory that the question should hinge on the individual journalist rather than the entity that employs him); and (2) develops the factual record about the extent of the MacIver News Service's news-gathering activities and its role within its parent organization, the MacIver Institute. Dkt. 31.

The court will deny plaintiffs' request. When plaintiffs asked to consolidate the decision on the preliminary injunction with a decision on the merits, they signaled that they had gathered and presented all the evidence that they deemed pertinent to the merits of their claims. See *Proimos v. Fair Auto. Repair, Inc.*, 808 F.2d 1273, 1277-78 (7th Cir. 1987) ("Rule 65(a)(2) allows a judge to consolidate the hearing of a motion for preliminary injunction with the trial on the merits, but he may do this only if the parties consent or if they receive timely notice allowing them to gather and present all the evidence that would be pertinent at a trial on the merits."). It would be unfair to give the plaintiffs a do-over because they don't like the court's decision on the merits.

The decisive issue in this case is whether Evers has, and uses, reasonable, viewpoint-neutral criteria for granting press credentials. The undisputed facts show that he does. The application of the credentialing criteria will sometimes involve the exercise of

judgment. Plaintiffs have adduced no evidence that Evers has exercised that judgment unreasonably or to disadvantage their viewpoint, so plaintiffs have no constitutional grievance.

The court will grant summary judgment to Evers under Rule 56(f) for the reasons explained in its March 31, 2020 opinion. The court will direct the clerk of court to enter judgment in Evers's favor and close the case.

ORDER

IT IS ORDERED that:

1. Summary judgment is GRANTED in favor of defendant Tony Evers under Federal Rule of Civil Procedure 56(f).
2. Plaintiffs' request for leave to file a supplemental summary judgment motion, Dkt. 31, is DENIED.
3. Plaintiffs' claims are DISMISSED with prejudice.
4. The clerk of the court is directed to enter judgment in favor of defendant and close the case.

Entered April 14, 2020

BY THE COURT

/s/
JAMES D. PETERSON
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 19-cv-649-jdp

(Filed March 31, 2020)

JOHN K. MACIVER INSTITUTE FOR PUBLIC POLICY and WILLIAM OSMULSKI,

Plaintiffs,

v.

TONY EVERS, in his official capacity as Governor of the State of Wisconsin,

Defendant.

OPINION and ORDER

This case involves a dispute over credentials for press conferences held by Governor Tony Evers. Plaintiffs contend that they have a First Amendment right to press credentials, but that Evers withholds credentials because of plaintiffs' conservative viewpoint. Plaintiffs seek no damages; they ask only that the court order Evers to grant them access to his press conferences.

Plaintiffs moved for a preliminary injunction. Dkt. 6. The case calls for a straightforward application

of public forum doctrine, as articulated in *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983) and cases following it. An Evers press conference is a non-public forum, to which Evers may restrict access using reasonable, viewpoint-neutral criteria.

After this suit was filed, Evers adopted press credentialing criteria based on those used by Congress and the Wisconsin Legislature. The court is not persuaded by plaintiff's argument that these criteria, or Evers's expressed interest in "fair and unbiased reporting," embody any viewpoint discrimination. Nor is the court persuaded that Evers has applied these criteria in a discriminatory way.

While the motion for preliminary injunction was under advisement, plaintiffs moved under Rule 65(a)(2) to consolidate the decision on the injunction with a decision on the merits, effectively converting the motion to one for summary judgment. Dkt. 28. Plaintiffs state that the material facts are undisputed; the court will grant the motion to consolidate. (Because the court is denying plaintiffs' request for an injunction, there is no prejudice to Evers, so there is no need to wait for a response from Evers on the motion to consolidate.) For reasons explained more fully below, plaintiffs' consolidated motion for preliminary injunction and for summary judgment is denied.

BACKGROUND

The following facts are drawn from plaintiffs' proposed findings of fact and Evers's responses to them,

Dkt. 16, as well as from the parties' declarations and exhibits. Neither side has requested a hearing, and the material facts are not disputed.

The first plaintiff, the MacIver Institute, describes itself as "a Wisconsin-based think tank that promotes free markets, individual freedom, personal responsibility and limited government." Dkt. 9, ¶ 3. Plaintiffs provide little information about the activities of the MacIver Institute other than the MacIver News Service, which "investigates and reports on what is happening in state and local institutions of government across Wisconsin." Id. ¶ 4. The second plaintiff is William Osmulski, the news director for the MacIver Institute. Dkt. 8, ¶ 1. The president of the MacIver Institute, Brett Healy, describes it as "nonpartisan," but that is true only in the sense that it cannot lobby or expressly endorse political candidates without jeopardizing its non-profit status. Its website (at www.maciverinstitute.com), where its news reporting can be found, conveys consistently conservative political news and opinion supportive of Republican politicians. The court will refer to the plaintiffs together as "MacIver," unless its necessary to identify them separately.

Tony Evers is the governor of Wisconsin, a Democrat elected in November 2018. Evers regularly participates in events where he answers questions from journalists. These events fall into four categories, described below in order of increasing exclusivity. See also Dkt. 15 (declaration from Evers's deputy chief of staff).

The first category consists of "public events." Public events are open to all members of the public, including journalists. Sometimes public events include a "press avail" component where Evers will answer questions from journalists. Evers does not restrict who attends public events, and MacIver does not object to Evers's handling of public events.

The second category consists of traditional "press conferences." Attendance at press conferences is necessarily limited for capacity and security. Journalists are typically informed of press conferences through the "media advisory email list" maintained by Evers's communication department. To attend a press conference, journalists on the media advisory email list must submit an RSVP to the communication department. MacIver's main objection in this case is that it is not included on the media advisory email list, and thus its journalists are not invited to press conferences.

The third category consists of "press briefings," which are off-the-record events to provide background on significant initiatives before they are announced to the public. Attendance at press briefings is by specific invitation only. Invitations go to a selected sub-set of the media advisory list—typically journalists who have a particularly substantial readership or viewership or a relevant subject matter specialty. (MacIver does not separately discuss press briefings in its motion for preliminary injunction, but the court assumes that MacIver believes it is entitled to be on the media advisory list, and that as a result it would get some invitations to press briefings as well.)

The fourth category includes "one-on-one meetings" with journalists. MacIver acknowledges that Evers can grant exclusive interviews to specific journalists without violating the rights of other journalists. MacIver does not object to Evers's handling of one-on-one meetings with the press.

The dispute that led to this lawsuit arose shortly after Evers took office in January 2019. Osmulski requested that MacIver journalists be added to the media email advisory list, but Evers's staff didn't respond to the request. On February 28, the governor's office hosted an invitation-only press briefing to preview the 2019-2020 executive budget before its public release. Osmulski heard about the press briefing second-hand, and he emailed Evers's press staff to RSVP for himself and another MacIver journalist. But when Osmulski and his colleague arrived at the briefing, they were told that they weren't on the RSVP list and were turned away. Other journalists were also turned away that day.

Over the next few weeks, Osmulski complained, without success, to Evers's staff about being excluded from press conferences and press briefings. In May, counsel for MacIver made a public-records request for documents or communications related to any "neutral criteria the Communications Department of the Governor's Office uses to determine which journalists are allowed access to briefings or other events." Dkt. 7-6, at 2. The governor's office produced some responsive documents on June 20, but it withheld records that it considered privileged attorney-client communications,

including records about its press-access criteria. Dkt. 17-1.

Six days later, on June 26, the governor's office of legal counsel circulated an internal memorandum to the communications department, providing "guidance for determining how and when media is granted access to the Governor for exclusive/limited-access events." Dkt. 15-1, at 1. The media memorandum stated that the "most important consideration is that access is based on neutral criteria." It advised the communications staff that in response to requests for access, communication staff should consider the following non-exhaustive factors:

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?

Id. A footnote explained that the factors were drawn from the press-access standards used by the Wisconsin Capitol Correspondents Board and the United States Congress. See id. at 1, n.1.

Evers's original media advisory list was apparently based on the one used during his campaign for the governorship. In the months following the circulation of the media memorandum, the communications department made substantial changes to the media advisory email list to reflect the criteria. Compare Dkt.

7-1 (original list), with Dkt. 15-2 (current list). Recipients affiliated with the Democratic Party of Wisconsin and other political organizations were removed from the list.

The media memorandum was not made available to MacIver, so MacIver didn't know the basis for the administration's refusal to include its journalists on the list. In August, MacIver and Osmulski filed this suit, asserting claims under the First and Fourteenth Amendments and moving for a preliminary injunction. MacIver learned about the administration's media criteria and the updated media advisory email list for the first time when Evers included them with his brief in opposition to the motion for preliminary injunction. Evers says that MacIver journalists are excluded from the media advisory email list under its press-access criteria because MacIver is not principally a news organization. According to Evers, the MacIver Institute is a think tank with an affiliated news service that makes no effort to distinguish the work of the news service from the overall advocacy-focused mission of the think tank.

ANALYSIS

MacIver asserts three claims in its complaint: (1) a First Amendment equal-access claim premised on the theory that any denial of press access is subject to strict scrutiny; (2) a First Amendment viewpoint discrimination claim; and (3) a Fourteenth Amendment equal protection claim. MacIver does not ask for

damages; it seeks only declaratory and injunctive relief, including an injunction enjoining Evers from excluding MacIver journalists from press conferences and press briefings.

A. Preliminary injunction and summary judgment standards

The court evaluates MacIver's motion for preliminary injunction under the familiar two-part framework. First, the plaintiff must make three threshold showings: (1) it will suffer irreparable harm before a final resolution of the merits; (2) traditional legal remedies are inadequate; and (3) there is some likelihood of success on the merits of the claim. *HH-Indianapolis, LLC v. Consol. City of Indianapolis and Cty. of Marion*, 889 F.3d 432, 437 (7th Cir. 2018). Second, if the plaintiff makes the threshold showings, the court assesses the competing harms and the interests of the public in light of the plaintiff's chances of success. *Id.* Preliminary injunctions that require an affirmative act by the defendant, instead of merely restraining action, are "ordinarily cautiously viewed and sparingly issued." *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 295 (7th Cir. 1997) (citation omitted).

Summary judgment is appropriate only if there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a). In ruling on a motion for summary judgment, the court views all facts and draws all inferences in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Summary judgment will not be granted unless "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Sarver v. Experian Info. Sols.*, 390 F.3d 969, 970 (7th Cir. 2004) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). The court agrees with MacIver that the material facts are undisputed, so it's efficient to consider the motion as one for summary judgment. But, for the reasons that follow, the court concludes that MacIver is not entitled to judgment as a matter of law.

B. Irreparable harm and adequacy of legal remedies

MacIver contends that its journalists suffer irreparable harm every day that they are excluded from Evers's limited-access press events. 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 at press conferences or briefings. These are types of First Amendment harms that have been deemed to be irreparable. *See Karem v. Trump*, No. CV 19-2514, 2019 WL 4169824, at *10 (D.D.C. Sept. 3, 2019) (temporary suspension of journalist's White House press pass "undoubtedly constitutes a concrete, unrecoverable harm sufficient to warrant preliminary relief"); see also *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal

periods of time, unquestionably constitutes irreparable injury.").

Traditional legal remedies would be inadequate. As in many cases involving restrictions on First Amendment rights, "the quantification of injury is difficult and damages are therefore not an adequate remedy." *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (citations and internal quotation marks omitted); see also *Karem*, 2019 WL 4169824, at *10 ("[T]he only way to remedy the injury is to return the [press] pass and the access that comes with it").

In cases implicating the First Amendment, the plaintiffs "likelihood of success on the merits will often be the determinative factor." *Higher Soc'y of Indiana v. Tippecanoe Cty., Ind.*, 858 F.3d 1113, 1116 (7th Cir. 2017) (citation omitted). That's the case here. MacIver has made the requisite showings of irreparable harm and inadequacy of traditional legal remedies; the court turns to the merits. The material facts are undisputed, so from this point on, the analysis of the motion for preliminary injunction coincides with the evaluation of the motion for summary judgment.

C. Evaluation on the merits

1. Legal framework for press-access claims

Claims challenging government-imposed restrictions on access to government property or events have been generally governed by public forum doctrine,

which establishes a framework for analyzing such restrictions based on the type of government property or event at issue. *See Perry Educ. Ass'n*, 460 U.S. at 44. "Traditional public forums," such as public streets or parks, are places open to anyone where citizens are traditionally free to speak without governmental approval or interference. Speakers cannot be excluded from a traditional public forum without a compelling government interest. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S 788, 800 (1985). A compelling government interest is also required to justify exclusions from "designated public forums," such as public theaters or other venues that the government has designated as a place for or a means of communication. *Id.* But in "nonpublic forums," access may be restricted "as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* (citations, quotation marks, and alterations omitted).

Public forum analysis has three steps. First, the court must decide whether the activity in which MacIver seeks to engage is protected by the First Amendment. *Cornelius*, 473 U.S. at 797. Here, there is no dispute that it is. See *Alvarez*, 679 F.3d at 597-600 ("[T]he First Amendment provides at least some degree of protection for gathering news and information, particularly news and information about the affairs of the government").

Second, the court must assess whether the forum at issue is public or nonpublic, to determine the appropriate level of constitutional scrutiny. *Cornelius*, 473

U.S. at 800. Evers contends that his press conferences and press briefings are nonpublic forums because he makes them available only to the select journalists who meet his access criteria. MacIver doesn't address this question. MacIver does not argue that the court should consider Evers's press events to be "designated public forums" that Evers has "opened up for expressive activity by part or all of the public." *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Evers's limited-access press events do not qualify as designated public forums under the Supreme Court's definition. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) ("A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers."). So the court concludes that Evers's limited-access press conferences and press briefings are nonpublic forums.

At the third step of the public forum analysis, the court must assess the access restrictions under the appropriate level of scrutiny, in this case the standard applicable to nonpublic forums. For a nonpublic forum, the question is whether the restrictions are (1) reasonable and (2) not an effort to suppress an opposing viewpoint. *Cornelius*, 473 U.S. at 800.

With that general framework in mind, the court turns to MacIver's three constitutional claims.

2. MacIver's First Amendment equal-access claim

MacIver says that the First Amendment's free press clause "includes a right of equal access for all journalists to information or events made generally available to the press corps." Dkt. 7, at 9.

MacIver contends that public forum analysis is relevant only for determining when a "speaker may speak" on government property, not for questions about press access, which MacIver says are always subject to strict scrutiny. Dkt. 19, at 2. For this proposition MacIver relies principally on *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977). *Sherrill* involved a correspondent for The Nation magazine who was denied a White House press pass for unspecified reasons, which were later identified as related to security. The court concluded that the denial of a press pass to a bona fide Washington correspondent must be based on a compelling government interest, and that it would require notice, an opportunity to rebut, and a written decision. *Id.* at 130. The analysis in *Sherrill* did not invoke public forum doctrine, but that isn't surprising because *Sherrill* predates *Cornelius* and *Perry*, the cases that established modern forum doctrine. In any case, the *Sherrill* court did not hold that governmental press-credentialing is subject to strict scrutiny. To the contrary, the court concluded that the Constitution did not require "the articulation of detailed criteria upon which the granting or denial of White House press passes is to be based." *Id.* at 128. MacIver doesn't cite

any more recent authority for its contention that press-credentialing is subject to strict scrutiny.

Contrary to MacIver's central argument, courts now routinely analyze press-access issues under public forum doctrine following *Cornelius* and *Perry*. See, e.g., *Youngstown Pub. Co. v. McKelvey*, No. 4:05 CV 00625, 2005 WL 1153996, at *6 (N.D. Ohio May 16, 2005) (applying public forum doctrine in newspaper's challenge to mayor's policy forbidding city employees from speaking with newspaper's reporters), *opinion vacated on other grounds, appeal dismissed sub nom. Youngstown Publ'g Co. v. McKelvey*, 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) (applying public forum doctrine in analyzing denial of equal access to a television broadcast corporation seeking to broadcast a public ceremony); *Getty Images New Servs. Corp. v. Dep't of Def.*, 193 F. Supp. 2d 112, 119 (D.D.C. 2002) (applying public forum doctrine in analyzing photojournalism company's claim that the government had denied it equal access to the detention facilities at Guantanamo Bay).

The court concludes that MacIver is not likely to prevail on its First Amendment equal access claim and is not entitled to summary judgment on that claim.

3. First Amendment viewpoint discrimination claim

Properly framed, MacIver's First Amendment claim is that it is a victim of viewpoint discrimination.

This calls for an evaluation of restrictions placed on a non-public forum, so the question is whether Evers's press-credentialing process is (1) reasonable and (2) viewpoint neutral.

a. Reasonableness of press credential criteria

The government may restrict access to a non-public forum on the basis of "subject matter and speaker identity" so long as the restrictions are consistent with the purpose of the forum and do not discriminate on the basis of viewpoint. *Cornelius*, 473 U.S. at 806. The government interests need not be compelling ones. *Id.* at 809.

The court begins with Evers's proffered interests, which implicitly articulate the purpose of the forum at issue. Evers says that its press-access criteria are intended to serve two interests: (1) limiting attendance for space constraints; and (2) ensuring that those in attendance are established, bona fide journalists who will (a) maximize the public's access to newsworthy information and (b) be more likely to abide by professional journalistic standards, such as honoring embargoes and respecting the distinction between on-and off-the-record communications. These interests apply to both press conferences and press briefings. Because MacIver does not separately address them, the court will consider them together.

Evers's interest in addressing space constraints is manifestly reasonable, even though Evers does not say

specifically how many journalists can be accommodated at the capitol. And even if the space used for press conferences and briefings were not filled to capacity, it would be reasonable to limit attendance to some number that would afford those in attendance a reasonable opportunity to ask questions. MacIver doesn't dispute that Evers has a legitimate interest in controlling press access for space or security concerns, and MacIver does not challenge Evers's credentialing process on this ground.

Evers's interest in audience impact and journalistic ethics are also legitimate concerns. To facilitate greater public access to newsworthy information, Evers includes criteria nos. 1, 2, and 3, designed to gauge journalistic impact, favoring journalists from organizations that (1) focus principally on news dissemination, (2) have published news continuously for at least 18 months and maintain periodical or established television or radio components, and (3) employ professional journalists (or student journalists working for student-run publications). These criteria are reasonably related to the goal of making sure that the journalists who attend press conferences and briefings will reach larger audiences. MacIver does not dispute the legitimacy of Evers's interest in journalistic impact or dispute that these criteria are reasonably related to that interest.

Evers also includes criteria nos. 4 and 5, which concern journalistic integrity. Criterion no. 4 favors journalists and organizations who avoid real or perceived conflicts of interests, entanglement with special

interest groups, and other associations that might compromise journalistic integrity. Criterion no. 5 addresses the independence of the journalist from groups that engage in lobbying or advocacy. These criteria are based on standards used by other governmental bodies—Congress and the Wisconsin legislature—and they reflect longstanding, well-established norms. The court concludes that these criteria reflect reasonable efforts to advance a legitimate government objective.

b. Viewpoint neutrality of press credential criteria

Evers's press-credentialing criteria are, at least as stated, viewpoint neutral. There is nothing about these traditional indicia of journalistic impact and integrity that favors one part of the political spectrum over another. MacIver does not contend otherwise.

MacIver's main argument is that the criteria are subjective, which vests broad discretion in Evers's staff, who apply the credentialing criteria unfairly, to the detriment of journalists with conservative viewpoints. MacIver relies primarily on three sets of comparators to demonstrate viewpoint discrimination.

First, MacIver contends that viewpoint discrimination may be inferred from the presence of three left-leaning outlets on the media advisory email list: *The Progressive*; *The Capital Times*; and *The Devil's Advocates Radio*, a liberal talk-radio show. But MacIver does not dispute that these three outlets are principally in the business of disseminating news and thus

meet a threshold criterion that MacIver doesn't. As Evers points out, the media advisory email list includes several outlets that are widely viewed as conservative, including *The Washington Times, Fox News*, and *The Wall Street Journal*. MacIver argues that these are national outlets that are unlikely to send journalists to cover Evers's press conferences. But that's not Evers's choice, and MacIver hasn't identified any local conservative media outlets that meet the credentialing criteria whose journalists have been excluded from the media advisory email list.

Second, MacIver contends that viewpoint discrimination can be inferred from the inclusion of comparators that are affiliated with organizations that engage in lobbying and advocacy activity. For instance, MacIver notes that the editors of two tribal newspapers—*Menominee Nation News* and *Kalihwisaks* (sponsored by the Oneida Nation)—are included on the list, even though both tribes are registered to lobby in Wisconsin. MacIver also cites WUWM (a public radio station operated by the University of Wisconsin-Milwaukee) and Wisconsin Public Television, both of which are on the list, even though both are affiliated with the University of Wisconsin Board of Regents, which retains legislative liaisons who engage in paid advocacy on behalf of the university system. MacIver says that many other entities on the list regularly engage in "lobbying" or "political advocacy" if those terms are defined as broadly as they have been applied to MacIver.

These are not helpful comparators because the media outlets are substantively independent from

their parent organizations. Wisconsin Public Television, for example, operates as part of the University of Wisconsin and is thus under the auspices of the Board of Regents. But Wisconsin Public Television is not directly controlled by or funded exclusively by the Board of Regents. The *Menominee Nation News* may be affiliated with the tribe, and the tribe itself may engage in policy advocacy, but the Menominee Nation News functions as a stand-alone news organization. The relationship between these media outlets and their affiliated entities is nothing like the close connection between the MacIver Institute and the journalists who create content for its website.

Third, MacIver points out that some credentialled publications, such as the Milwaukee Journal Sentinel and the Wisconsin State Journal run editorials endorsing candidates in political races. And the media advisory email list includes many opinion journalists, columnists, and radio show hosts who regularly endorse causes, candidates, and legislation. Publishing editorials and endorsements does not disqualify an outlet under traditional standards of journalistic integrity, so long as the opinion staff and the news staff are separated. Again, MacIver has not demonstrated any separation between the ideological mission of the think tank and its news organization.

Fourth, MacIver contends that if Evers is serious about including only organizations whose "principal business" is "news dissemination," he should exclude journalists affiliated with most broadcast television networks and radio stations. After all, NBC, ABC, and

CBS spend more time broadcasting sports and entertainment than news shows, and some of the radio stations on the media advisory email list dedicate more airtime to music than to news coverage. This is a variation on the argument made against Wisconsin Public Television, and it is based again on an overly expansive notion of "organization." The media advisory email list includes television and radio reporters who work for established news organizations, which in some cases are part of a larger media enterprise. Nothing in this supports the argument that Evers's press-credentialing process demonstrates viewpoint discrimination.

A truly relevant comparator would be a journalist from another think tank or advocacy group who is nevertheless included on the media advisory email list. For example, it would be probative of viewpoint discrimination if Jason Stein of the Wisconsin Policy Forum were on the list, because it would demonstrate that Evers includes journalists from some think tanks but not others. But Stein, a highly experienced journalist, isn't on the list and he was excluded from Evers's press briefing on February 28, 2019, despite his express request to be included. See Dkt. 15-4. Stein's affiliation with a think tank rather than a journalistic enterprise resulted in his being treated just as Osmulki was treated.

None of the comparators that MacIver has identified raise an inference that Evers's press-access criteria have any viewpoint discriminatory effect. And without evidence of discriminatory effect, MacIver cannot prevail on its First Amendment claims. See

Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth., 100 F.3d 1287, 1299 (7th Cir. 1996) ("[I]t is th[e] unconstitutional effect that ultimately matters.").

MacIver contends that it employs experienced journalists, and it is nonpartisan, not registered to lobby, and does not (and cannot) endorse political candidates. The court agrees that its journalists, including plaintiff Osmulski, have sufficient professional experience to make them credible state capitol correspondents. But their personal credentials have never been the problem. Evers has reasonably concluded that MacIver is not a bona fide news organization. MacIver publicly brands itself as a think tank committed to ideological principles. It engages in policy-driven political advocacy, including advocating for specific initiatives and policy approaches. It has a "news" tab on its website, but it does not maintain a news-gathering organization separate from its overall ideological mission. It stands on the same footing as the Wisconsin Policy Forum.

Much of MacIver's opening brief, Dkt. 7, is devoted to showing that Evers is motivated to discriminate against MacIver's conservative viewpoint. And in its reply brief, Dkt. 19, at 3-4, MacIver contends that Evers's expressed interest in a "fair and unbiased press corps," Dkt. 7, at 12, demonstrates his intent to censor journalists that he thinks are unfair and biased. The court assumes that Evers would prefer favorable press coverage, and that as a Democrat, he would be less inclined to appreciate the work of the MacIver Institute than his Republican predecessor. But Evers's

personal or political motives are simply not material: it only matters that he has reasonable, viewpoint neutral criteria for granting access to his press conferences and press briefings. See *Grossbaum*, 100 F.3d at 1293 ("We are governed by laws, not by the intentions of legislators. Just as we would never uphold a law with unconstitutional effect because its enactors were benignly motivated, an illicit intent behind an otherwise valid government action indicates nothing more than a failed attempt to violate the Constitution." (citation and internal quotation marks omitted)).

MacIver has adduced no evidence that Evers grants or denies press access unreasonably or on the basis of the journalist's viewpoint. The court concludes that MacIver will not succeed on its First Amendment viewpoint discrimination claim and is not entitled to summary judgment on that claim.

4. Equal protection claim

MacIver's Fourteenth Amendment equal protection claim repackages its First Amendment claims. The court has already concluded that MacIver will not succeed under the First Amendment. Because MacIver hasn't shown that Evers's criteria infringes on a fundamental right, MacIver is not entitled to heightened review under the Equal Protection Clause. See *Perry Educ. Ass'n*, 460 U.S. at 54 (concluding that the entitlement-to-access argument that the Supreme Court rejected under the First Amendment "fares no better in equal protection garb"); *Lyng v. Int'l Union, United*

Auto., Aerospace & Agr. Implement Workers of Am., UAW, 485 U.S. 360, 370 (1988) (where a statute has no substantial impact on a fundamental interest, the classification does not garner heightened scrutiny under the Equal Protection Clause).

Accordingly, in deciding MacIver's equal protection claim, the court evaluates Evers's press-access criteria under the deferential rational basis standard. *See Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1071 (7th Cir. 2013). The press-access criteria easily survive rational-basis review, for the reasons explained above. The press-access criteria are reasonably related to Evers's asserted interests in accounting for space constraints, maximizing public access to information, and upholding journalistic standards. So the court concludes that MacIver will not succeed on its equal protection claim either.

D. Balance of hardship

Given the court's decision on the merits, the court will not consider the balance of harms at great length. MacIver says that the harms associated with its continued exclusion from the media advisory list are substantial, both to MacIver and its journalists and to the public at large, and that any hardship on Evers would be negligible because complying with an injunction would require nothing more than adding a few names to a listsery or setting out a few extra chairs at a press conference. Evers takes a broader view of the implications of an injunction. He contends that if he is ordered

to grant access to MacIver, there will be no limiting principle by which he could restrict media access at all.

The court is persuaded that on balance, the harms of granting an injunction would outweigh the harms of maintaining the status quo. MacIver journalists won't have access to press conferences and briefings, but there is nothing to stop them from continuing to publish stories about Evers and his administration. But ordering Evers to grant access to MacIver journalists would establish an untenable precedent. Any citizen journalist could make the same case MacIver has made, forcing Evers to either permit unrestricted access at every event or forego press events altogether. Under these circumstances, the balance of harms tips against an injunction.

E. Conclusion

The court concludes that the material facts are undisputed, but that the law supports Evers, not MacIver. Accordingly, the court will give MacIver ten days to show cause why summary judgment should not be granted to Evers.

ORDER

IT IS ORDERED that:

1. Plaintiffs' motion to consolidate the decision on the preliminary injunction with a decision on the merits under Federal Rule of Civil Procedure 65(a)(2), Dkt. 28, is GRANTED.

2. Plaintiffs' motion for preliminary injunction, Dkt. 6, is DENIED.

3. Plaintiffs must respond to the court's Rule 56(f) notice by April 10, 2020, showing why the court should not grant summary judgment against them on all claims.

Entered March 31, 2020.

BY THE COURT

/s/
JAMES D. PETERSON
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

No. 19-cv-649-jdp

(Filed August 20, 2019)

JOHN K. MACIVER INSTITUTE FOR PUBLIC POLICY and WILLIAM OSMULSKI,

Plaintiffs,

v.

TONY EVERS, in his official capacity as Governor of the State of Wisconsin,

Defendant.

AFFIDAVIT OF WILLIAM (BILL) OSMULSKI

1. I am the news director for the MacIver Institute. I am a member of the Society of Professional Journalists, Madison Chapter.

2. I previously worked in television news in Milwaukee (2002-2005, CBS-58, sports editor), Eau Claire (2005-2008, ABC-18, general assignment reporter), and Madison (2008-2009, ABC-27, Rock County bureau chief).

3. While a television news reporter, I won Wisconsin Broadcasters Association awards in 2004 (first

place for sports reporting, major market television) and in 2008 (second place for hard news/ investigative reporting, small market television). While at the MacIver Institute, I was part of the team that won Bronze in the Milwaukee Press Club's excellence in journalism awards for "Best Long Hard Feature Story" (2018).

4. I currently produce a weekly public-affairs program for WVCY-TV 30 in Milwaukee.

5. When Governor Evers took office, I asked the Governor's press staff to include myself and my MacIver News Service colleagues on any distributions lists they maintained for the news media. I never received any media advisories in response to this request.

6. When the Governor's Office held a press briefing on February 28, 2019, in advance of the Governor's budget announcement, I did not receive prior notification of the briefing from the Governor's press staff.

7. MacIver did hear about it from other members of the press corps, and pursuant to our colleagues' suggestion, myself and Matt Kittle, then our investigative reporter, emailed the Governor's press office to RSVP for the briefing. We received no response to our RSVP.

8. When we went to the Governor's Office suite where the briefing was to be held, we were stopped by staff and told we were not on the RSVP list.

9. When we asked whom we could speak to in order to be included, we were told that Melissa Baldauff, the Governor's communications director, was the

responsible staff person but that she was not available at that time, and that we should follow up with her directly for access to future briefings

10. We were not permitted into the February 28, 2019, budget briefing.

11. We subsequently contacted Baldauff but never got a response.

12. We have never been ejected from a press conference with Governor Evers or any other public official, and I am not aware of any of my MacIver colleagues who have ever been ejected from a press conference for being rude or disrespectful.

Pursuant to 28 U.S. Code § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on August ___, 2019

William (Bill) Osmulski, Affiant

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 19-cv-649-jdp

(Filed August 20, 2019)

JOHN K. MACIVER INSTITUTE FOR PUBLIC POLICY and WILLIAM OSMULSKI,

Plaintiffs,

v.

TONY EVERS, in his official capacity as Governor of the State of Wisconsin,

Defendant.

AFFIDAVIT OF BRETT HEALY

1. I am president of the John K. MacIver Institute for Public Policy, and have been since April 2009.

2. The MacIver Institute is a 501(c)(3) nonpartisan, nonprofit organization based in Madison, Wisconsin.

3. The Institute distills its mission into the phrase: "the Free Market Voice for Wisconsin. More formally, the John K. MacIver Institute for Public Policy is a Wisconsin-based think tank that promotes free markets, individual freedom, personal responsibility and limited government.

4. In order to achieve our mission, the Institute undertakes several lines of work. Its MacIver News Service investigates and reports on what is happening in state and local institutions of government across Wisconsin. The Institute also produces real-time research and analysis on the pressing issues of the day. Both the Institute overall and the News Service specifically work to make government more transparent for the taxpayers.

5. None of MacIver's employees are registered to lobby on any pending rules or legislation.

6. In 2018, the MacIver Institute won a bronze award in the "Excellence in Journalism" competition from the Milwaukee Press Club for their long-form, hard-news reporting.

7. MacIver is credentialed by the Wisconsin State Legislature to cover its activities.

8. Neither our news director, William Osmulski, nor any other past or current MacIver journalist has ever been ejected from a press conference for being disruptive or disrespectful.

Pursuant to 28 U.S. Code § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on August ___, 2019.

_____

Brett Healy, Affiant

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

No. 19-cv-649-jdp

(Filed September 17, 2019)

JOHN K. MACIVER INSTITUTE FOR PUBLIC POLICY and WILLIAM OSMULSKI,

Plaintiffs,

v.

TONY EVERS, in his official capacity as Governor of the State of Wisconsin,

Defendant.

AFFIDAVIT OF MELISSA BALDAUFF

1. I am a Deputy Chief of Staff in the Office of Governor Tony Evers (the "Office"). I lead the Office's communications department. I have held this position since January 7, 2019.

2. In that capacity, I regularly coordinate communications between the Office and members of the press.

3. The press generally has access to the Office in four ways: (a) public events, (b) press conferences and

other press-specific events, (c) press briefings, and (d) one-on-one meetings with the Governor or staff.

Public Events

4. Some Office events are entirely open to the public. These public events also can include press availability, also known as a "press avail," which is an additional opportunity for press to ask questions directly of the Governor or other Office staff, usually after the publicly attended event.

5. One example of this is the Governor's appearance at the opening ceremonies of the 2019 Wisconsin State Fair, which included a press avail. Another example is the budget listening sessions held across the state, which included press avails.

6. Public events are announced in several different ways. One way of providing information to the public is through social media channels. The Office uses Facebook, YouTube, and Twitter to announce public events. Anyone can follow the Governor on these social media platforms. I am not aware of the Governor's Office ever blocking any user or censoring public comment on any of these platforms.

7. Press releases are another way the Office alerts the public about upcoming public events. Anyone can sign up on the Office's website (evers.wi.gov) to receive press releases via email. Press releases are delivered directly to requesters' email accounts as soon as the press release is issued.

8. Additionally, if another agency, official, or organization is the host of an event, they would primarily handle the invitations or public notification.

Press Conferences and Other Press-Specific Events

9. Press conferences and other press-exclusive events serve to highlight different Governor initiatives and to allow media to learn more about the Governor's plans or priorities so they can report back to the public. These events also can include press avails.

10. An example of this type of event is the Governor's tour of the University of Wisconsin Milwaukee School of Freshwater Sciences, where the Governor was invited to tour that facility, journalists were present, and a press avail was held.

11. For these events, an open invitation to the public is not practical. There are multiple reasons for this: (a) space or capacity at the venue may be limited; (b) security concerns for the Governor or other dignitaries in attendance; or (c) the venue may be private property, with its own facility rules.

12. Also, some events implicate unique considerations, such as privacy concerns. For example, if an appearance is at a healthcare facility, there are likely additional privacy considerations that would make unmanaged public invitation impossible.

13. One way that members of the media are alerted to these types of events is via notification from

our communications department, which maintains a media advisory email list.

14. The media advisory email list is used to alert a wide array of media representatives to different events throughout the state, including press conferences, so that regardless of the location, there are local media representatives notified of the opportunity for press coverage. Attendees are asked to RSVP to the Office's communications department, which allows the Office and security personnel to effectively plan and prepare for the event.

15. The media advisory list is not the only way in which the press may be alerted to media events involving the Office. Depending on the type of event, our office may directly reach out to members of the press from a specific area of the state or those who tend to cover a particular subject matter related to the event.

16. Additionally, if another agency, elected official, or organization is the host of the event, they would primarily handle invitations and monitor attendance. For example, when legislative Democrats hosted a press conference about Medicaid expansion, they handled the invitations and media advisories.

17. Immediately after Governor Evers's inauguration, our communications department compiled a list of email recipients to serve as the Office's media advisory list. This list was built on a list of email recipients put together during the campaign, which is why some non-media individuals or groups were

included on the list. This version of the media advisory list – which is the version Plaintiffs attached to their complaint – is no longer used.

18. In June 2019, the Governor's Office of Legal Counsel provided a memorandum outlining a set of neutral factors for the communications department to apply when determining whether a requester should be added to the media advisory list or considered "media" for purposes of access to any press-specific events. The standards in the memorandum are based on standards provided by the Wisconsin Capitol Correspondents Board, as adopted by the Wisconsin Legislature, as well as standards set by the United States Congress. A true and correct copy of this memorandum is attached as Exhibit 1.

19. As a result of the guidance from the Office of Legal Counsel, the list has substantially changed. A true and correct copy of the media advisory list as of September 17, 2019, is attached as Exhibit 2.

20. The current list includes numerous bona fide journalists and news organizations, including outlets usually perceived as "conservative leaning," such as the Washington Times, Wall Street Journal, and Fox News, as well as others usually perceived as "liberal leaning," such as the Capitol Times, the New York Times, and the Huffington Post.

21. The MacIver Institute, including its employees, do not qualify as bona fide press under our adopted standards for press-specific events.

22. The MacIver News Service and William Osmulski are not included on the medial advisory list and are not invited to press-specific events because their practices run afoul of the neutral factors adopted by our communications department.

23. The MacIver Institute is not principally a news organization. On its website, the organization characterizes itself as "a Wisconsin-based think tank that promotes free markets, individual freedom, personal responsibility and limited government." The organization's "news" branch makes no effort to distinguish itself from the overall organization mission. See http://www.maciverinstitute.com/about-us/, last accessed on September 17, 2019.

24. In addition, based on my experience with media and politics, it is my understanding that MacIver Institute engages in policy advocacy and lobbying. For example, in June 2017, MacIver Institute joined "44 other free market groups and individuals" in urging the United States Senate to repeal all Obamacare taxes. See http://www.maciverinstitute.com/2017/06/maciver-joins-45-conservative-groups-and-activists-urging-senate-to-repeal-all-obamacare-taxes/, last accessed on September 17, 2019; see also https://www.wisgop.org/2019-state-convention/ (Wisconsin GOP annual convention; media panel with MacIver journalist Matt Kittle discussing the "effective messaging techniques, and the issues that will motivate voters in 2020").

25. MacIver Institute's political advocacy, lobbying activity, and status as a think tank demonstrate that MacIver Institute is not a bona fide press organization under the standards adopted by the Office.

26. Even before the issuance of guidance from the Office of Legal Counsel, I did not grant MacIver Institute's request to be added to our media advisory list because even before formal guidance, the communication department's intent was to have a list designed to include bona fide journalists.

27. Without some distinction between media and non-media, the media advisory list would be virtually indistinguishable from any public mailing list. The distinction matters because bona fide journalists can be expected to adhere to widely recognized professional standards, such as honoring embargoes (which are requests that provided information will not be made public until a designated time) and respecting the distinction between off-the-record and on-the-record communications.

28. MacIver Institute is not the only organization that has not been added to the Office's media advisory list despite requests to be included. For example, the Wisconsin Examiner was denied inclusion because the organization has not been established long enough to meet the criteria.

29. The MacIver Institute's self-described viewpoint is not the basis for its exclusion from the media advisory list. Rather, the issue is that they do not

meet the established standards designed to determine whether a requester is a qualifying (i.e., bona fide) media organization.

Press Briefings

30. The Office has also provided the opportunity for smaller groups of media representatives to interact with the Governor or staff in the form of a "briefing." These events are typically offered as a courtesy to members of the press so that they might have additional background before the release of large-scale initiatives. These are off-the-record events, which means that the information provided is not intended for public release or as an official representation or statement.

31. An example of this type of small-scale event is the 2019 budget briefing that occurred on February 28, 2019. That was an invitation-only event for a small group of journalists. It was an opportunity to introduce the Governor's 2019-2020 Executive Budget in advance of public release so that invited journalists could provide comprehensive press coverage contemporaneously with the budget's public release. The Governor was not present for that event. Rather, state employees from the State Budget Office previewed the items.

32. Invitations for press briefings like this would not go out via the media advisory list.

33. I am not aware of any similar briefing events since the February 28, 2019, briefing.

34. If the Office were to host future briefings, invitees would not only have to meet the guidelines underlying the media advisory list; they would also have to have a readership or viewership that justifies inclusion. While this is partially a matter of the size of readership or viewership, we might also consider additional factors, such as subject-matter specialty. For example, a briefing on education issues might include journalists from a university publication.

35. Additionally, outlets that routinely cover capitol maters, including outlets that are on the Capitol Correspondents list, may be included. A true and correct copy of the Capitol Correspondents list is attached as Exhibit 3.

36. The Office does not determine who is included on the Capitol Correspondents list. It is my understanding that the Capitol Correspondents list is not necessarily the same as the larger listing of individuals who have received press credentials from the Legislature. The Office does not determine who is given credentials to cover the Legislature.

37. The communications department did not invite MacIver Institute to the February 28, 2019, event. As such, they were not admitted, despite having apparently learned about the event from invited journalists.

38. Jason Stein, current Research Director of the Wisconsin Policy Forum and former reporter for the Milwaukee Journal Sentinel and Wisconsin State Journal, similarly asked to attend that event and was

denied admission because he is not a member of one of the invited press organizations and is no longer employed as a journalist. A true and correct copy of my texts to and from Mr. Stein are attached as Exhibit 4.

One-on-one meetings

39. Finally, the Governor or his staff sometimes grants a face-to-face interview with a reporter, just as they may have meetings with members of the public, advocacy organizations, and even registered lobbyists. The difference with the former, as opposed to the latter, is the shared understanding of the terms of the meeting regarding journalist practices, such as embargos and the on-the-record/off-the-record distinction.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct to the best of my knowledge.

Dated this 17th day of September, 2019.

s/ Melissa Baldauff
MELISSA BALDAUFF