No. 21-388

In The
Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

The question presented by this appeal—the proper First Amendment test for scrutinizing government officials' selective exclusion of journalists from press conferences and briefings—goes to the heart of the Constitution's guarantee that government will not abridge freedom of the press. This is not, and should

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[1] Petitioners' and Respondent's counsel of record were provided timely notice in accordance with Supreme Court Rule 37.2(a), and have consented to the filing of this brief. In accordance with Supreme Court Rule 37.6, *amicus curiae* Atlantic Legal Foundation certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

not be, a partisan issue. It does not, and should not, favor liberals over conservatives, Republicans over Democrats, or traditional press over "new media." It is a concern that is as compelling today as it was 230 years ago when the First Amendment was added to the Constitution, in part to prevent a tyrannical government from suppressing a free and open press.

As a nonprofit, nonpartisan, public interest law firm that champions individual liberty, free enterprise, and limited government, the Atlantic Legal Foundation believes that affording members of the press equal access to federal, state, and local government officials is one of the pillars of our democracy. The Foundation is filing this brief to urge the Court to grant certiorari and hold that journalists should not be excluded from press events based on a publication's political or ideological viewpoint, or its affiliation with a "think tank" or other organization that engages in public policy analysis or advocacy.

SUMMARY OF ARGUMENT

Freedom of the press is not synonymous with freedom of speech. Although freedom of the press and freedom of speech often intertwine, "[t]he press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978); *see* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age*, 65 Ohio St. L.J. 249, 353 (2004) ("The basic idea underlying the 'press' and the main reason it is distinguished from 'speech'

in the First Amendment, is that 'freedom of press' implies a vehicle for the wide dissemination or publication of information.").

Yet, in its decision here, the Seventh Circuit erroneously viewed freedom of the press and freedom of speech as one and the same. Instead of analyzing selective exclusion of journalists through a freedom-of-the-press lens, the court of appeals mistakenly relied upon a freedom-of-speech doctrine, "forum analysis," which is designed to test the reasonableness of government regulation of speech. This Court has summarized forum analysis as follows:

> Generally speaking, [the Court's] cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. The same standards apply in designated public forums—spaces that have not traditionally been regarded as a public forum but which the government has intentionally opened up for that purpose. In a nonpublic forum, on the other hand—a space that is not by tradition or designation a forum for public communication—the government has

> much more flexibility to craft rules limiting speech. The government may reserve such a forum for its intended purposes, communicative or otherwise, 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.

Minnesota Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018) (internal citations and quotation marks omitted).

Relying on forum analysis to determine whether governmental exclusion of particular journalists from official press events unconstitutionally suppresses freedom of the press is both doctrinally inapposite and unworkable. *See* Pet. at 10-19, 19-32. It also is extraordinarily dangerous to American democracy. The Seventh Circuit's doctrinal mismatch enables, if not invites or even encourages, governmental discrimination based on the political or ideological views of individual journalists or their employers. And it unjustifiably favors traditional "mainstream" media over the advent of "new" media.

The Court should grant certiorari both to restore uniformity of decision regarding the proper First Amendment test for cases involving governmental exclusion of members of the press, and to ensure that the First Amendment's guarantee of freedom of the press continues to be respected by federal, state, and local officials throughout the nation.

ARGUMENT

The Need To Determine the Appropriate First Amendment Test For Selectively Excluding Members of the Press Is Compelling

A. "Forum analysis" is an inappropriate test for determining whether a selective exclusion is constitutional

This case is about freedom of the press. More specifically, the question here is whether the governor of a State can devise and use so-called "media-access criteria" in a transparent attempt to exclude from official press conferences, journalists who are employed by a state-credentialed, award-winning, "new media" news outlet (MacIver News Service), merely because it is affiliated with a "think tank that promotes free markets, individual freedom, personal responsibility and limited government." App. 3.

Because this case does not concern freedom of speech or assembly, such as the right to gather and protest in a public park, the Seventh Circuit erred by using "forum analysis" to determine whether the Respondent Governor of Wisconsin's selective exclusion of MacIver News Service journalists violates the First Amendment guarantee of freedom of the press. As this Court has explained, forum analysis is an appropriate tool for assessing cases about the right to *free speech* in particular places. *See*, *e.g.*, *Mansky*, 138 S. Ct. at 1885 ("This Court employs a distinct standard of review to assess *speech restrictions* in nonpublic forums . . . .") (emphasis added); *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) (applying forum analysis to "places . . . devoted

to assembly and debate"). Forum analysis—the Court's "distinct standard" for reviewing free-speech restrictions in particular fora—is inapplicable to cases involving freedom of the press.

Instead, the Court has applied strict scrutiny to cases concerning discrimination against the *press*—such as where it is "singled out" for "special treatment." *See, e.g.*, *Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983) ("differential taxation of the press" subject to strict scrutiny). The Court also has applied strict scrutiny to laws that differentiate *among* members of the press. *See, e.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987) (tax scheme that targeted some members of the press but not others subject to strict scrutiny). This is because "targeting individual members of the press . . . poses a particular danger of abuse by the State." *Id*. at 228. And while strict scrutiny is intentionally difficult to satisfy—requiring the government to demonstrate that the "regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end," *id*. at 231—it is flexible enough to allow for necessary restrictions, such as space limitations imposed by the size of a briefing room. *See, e.g.*, *Getty Images News Servs. Corp. v. Dep't of Def.*, 193 F. Supp. 2d 112, 120 (D.D.C. 2002) (applying heightened scrutiny but observing that "access is necessarily limited by . . . logistical support and resources").

The Seventh Circuit's decision makes hash of these significant doctrinal distinctions. By misapplying forum analysis to the Governor's "media-access criteria," the court of appeals unjustifiably conflated

excluding members of the press from statehouse news briefings with restrictions on the location (i.e., forum) for speech and assembly. According to the court of appeals, however, forum analysis applies to "gathering information for news dissemination" because it is "an expressive pursuit" such as "leaf-letting teachers, soliciting charitable donations, [and] wearing political buttons at polling places." App. 16. In the court's opinion, "when we look at expressive activities — whether pure speech, press, or assembly — location matters." *Id.* 16.

To the contrary, "gathering information for news dissemination" does not involve expression of speakers' views, but instead, conduct protected under the First Amendment's freedom-of-the-press clause. *See* McDonald, *supra* at 268, 352 ("Information gathering frequently consists of predominantly *non-expressive* conduct . . . there is *nothing inherently expressive* about the act of being in or traveling to one place versus another, or in the act of obtaining documents or other materials. . . . [It is] more reasonable to imply a right to gather information from the concept of 'freedom of the press' than 'freedom of speech.'") (emphasis added). This is why application of forum analysis to press-exclusion cases does not fit. It rips forum analysis from its doctrinal roots—speech and assembly—and engrafts it onto a legally and factually distinct, albeit First Amendment-protected, activity—exercise of a free press.

B. Applying forum analysis to selective exclusion invites viewpoint discrimination

Treating attendance at a press conference as a speech-like expressive activity—and enabling

selective exclusion of journalists from that activity merely if it complies with the loose criteria governing location-based restrictions on free speech—encourages government officials to engage in the type of viewpoint discrimination that the First Amendment abhors. *See generally Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) ("Our cases use the term 'viewpoint' discrimination in a broad sense . . . . We have said time and again that the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of the hearers.") (internal citations and quotation marks omitted).

As a matter of first principles, viewpoint discrimination is prohibited under the First Amendment: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Indeed, "[w]hen the government targets . . . particular views" the violation of the First Amendment "is all the more blatant." *Rosenberger v. Rector*, 515 U.S. 819 (1995); *see Matal*, 137 S. Ct. at 1763 (collecting cases). Viewpoint discrimination is prohibited in both speech and press cases alike. *See Arkansas Writers' Project*, 481 U.S. at 229, 230 (in assessing whether a state law violates the "guarantee of freedom of the press," treatment based on "content" or "particular views" was "particularly repugnant to First Amendment principles").

Concerns with viewpoint discrimination explain why this Court applies strict scrutiny to discrimination against the press. As the Court explained in *Minneapolis Star*, "differential

treatment" among the press "suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." 460 U.S. at 585. In other words, restrictions that favor one press outlet over another are presumed unconstitutional because they long have been understood to be intimately connected with viewpoint discrimination—a proposition dating to the Founding. As James Madison wrote to the Virginia House of Delegates when advocating against the Alien and Sedition Act, the ability of "the press [to] exert[] a freedom in canvassing the merits and measures of public men" is the "footing" on which "the freedom of the press has stood," and therefore, the Sedition Act's bar on expression of certain views transgressed the Constitution. James Madison, *Report to the Virginia House of Delegates* (1800); *see also* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455, 466 (1983) (during founding era, "when printers were attacked for publishing unpopular viewpoints, they often defended by appealing to the public's appreciation of the value of free and open discussion").

Viewpoint discrimination, however, does not receive the same level of prophylactic protection when situated within the broad confines of forum analysis. Although even restrictions in nonpublic fora must be purportedly "viewpoint neutral," *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009), forum analysis provides a markedly weaker framework for revealing viewpoint discrimination than strict scrutiny.

1. Although the Seventh Circuit stated that the access criteria had to be viewpoint neutral, it put the

burden on the *Petitioners* to show that the restrictions were not neutral. *See* App. 14 ("MacIver has not provided any evidence that the Governor's office manipulates these neutral criteria in a manner that discriminates against conservative media.").

This burden shifting directly conflicts with application of strict scrutiny in the freedom-of-press context, where it is the *government's* "heavy burden" to justify its actions, including the viewpoint-neutrality of any regulations. *Arkansas Writers' Project*, 481 U.S. at 234 (applying "heavy burden" to government). Shifting the burden to media that claim unconstitutional exclusion threatens to be outcome-dispositive in cases such as this one—shielding potential viewpoint-discrimination—where it is the government, not the press, that presumably possesses information that might shed light on purpose and motive—and ultimately, whether "neutral" criteria are pretextual. *See* Developments in the Law, The Law of Media, *Viewpoint Discrimination and Media Access to Government Officials*, 120 Harv. L. Rev. 1019, 1030 (2007) (inquiring into "motive" would "likely eliminate the most obvious and egregious forms of viewpoint discrimination," whereas "current forum-based doctrine" "creates a safe zone for government officials").

2. Forum analysis also requires a materially different—and weaker—substantive showing of no viewpoint discrimination than the corresponding showing required under strict scrutiny.

As is standard under strict scrutiny, regulations that discriminate among members of the press must be justified by a "compelling state interest" that is

"narrowly drawn to achieve that end." *Arkansas Writers' Project*, 481 U.S. at 234. This exacting test is motivated by the concern that when the state distinguishes among members of the press, viewpoint discrimination is often lurking close by.

The test applied by the Seventh Circuit, under the banner of forum analysis, comes nowhere close to the exacting scrutiny required by *Arkansas Writers' Project* and related cases, and thus risks permitting the type of viewpoint discrimination that strict scrutiny is designed to smoke out. Instead, the Seventh Circuit applied what essentially amounted to rational-basis review of the media-access criteria offered by the Governor:

> 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 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 . . . . 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[.]

App. 13-14. This analysis—and in particular, its invocation of the "reasonably related" standard—is merely a rendition of the rational basis test, the lowest form of protection that can be offered to constitutional

rights. *See generally Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 557 (2012) (rational-basis review satisfied where law was "reasonably related" to governmental interest); *Turner v. Safley*, 482 U.S. 78, 87 (1987) ("reasonably related to legitimate" state interests is not "heightened scrutiny").

3. The decision below exemplifies the dangers that courts countenance when they substitute forum analysis for strict scrutiny. The Governor justified his exclusion of MacIver's award-winning journalists because "MacIver News Service made no effort to distinguish itself from the overall organizational mission of the MacIver think tank" with which the news organization was affiliated. App. 15. In other words, according to the Governor, MacIver News Service was too closely affiliated with a think tank to be allowed to participate in gubernatorial press briefings.

This contrived rationale for MacIver's exclusion is troubling and should have been subjected to strict scrutiny. Traditional newspapers and broadcast companies employ opinion editorialists whose columns or media spots are provided right alongside news coverage, so it is not clear why, according to the court of appeals, MacIver News Service would have needed to "distinguish" itself from the think tank with which it is affiliated. Further, the context of MacIver's exclusion is crucial: The Governor listed purportedly "neutral" criteria governing media access only *after* MacIver wrote a letter demanding an explanation for its exclusion. App. 8–9.

Proper application of strict scrutiny would have placed the burden on the government to explain its

decisions and reveal whether the Governor's post-hoc media-access criteria were motivated in part by viewpoint discrimination. The Seventh Circuit's application of rational-basis forum analysis did not meaningfully test the Governor's arguments, breathing potential life into viewpoint discrimination here and in other cases involving selective exclusion of the press. *See* Luke M. Milligan, *Rethinking Press Rights of Equal Access*, 65 Wash. & Lee L. Rev. 1103, 1117 n.9 (2008) (a court holding that there is "never a right of equal access" allows for "unmitigated viewpoint discrimination").

C. Applying forum analysis to selective exclusion invites discrimination against new types of media

"Since 1964 . . . our Nation's media landscape has shifted in ways few could have foreseen." *Berisha v. Lawson*, 141 S. Ct. 2424, 2427 (2021) (Gorsuch, J., dissenting from the denial of certiorari). Today, we inhabit a "new media world" of "social media" and other "online media platforms," such as blogs and websites, that have significantly displaced traditional media, such as print newspapers and major television networks. *Id*. at 2428–29. These "new media" include outlets like MacIver News Service. It reports on state and local government in Wisconsin and publishes its stories online. Importantly, it is credentialed by the Wisconsin Legislature, and in 2018 won an award for Excellence in Journalism from the Milwaukee Press Club. App. 58.

"[T]he First Amendment does not 'belong' to any definable category of persons or entities." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 802

(1978) (Burger, C.J., concurring). Application of forum analysis instead of strict scrutiny to press-discrimination cases threatens to do precisely the opposite by fixing into place an improper preference for mainstream media, in derogation of the First Amendment. *See* David B. Sentelle, *Freedom of the Press: A Liberty for All or a Privilege for a Few?*, 2013 Cato S. Ct. Rev. 15, 34 (2013) ("[P]rotecting online posts . . . and other new forms of publishing technology is consistent with an originalist interpretation of the First Amendment.").

To be sure, not every citizen is entitled to a press pass. But this case doesn't involve that question. Instead, it concerns whether a state government can exclude a news organization because it is not part of the established, traditional media. And the "media-access criteria" offered here by the Governor, combined with the lax forum analysis employed by the Seventh Circuit, reflect exactly how this favoritism works.

1. "The liberty of the press is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 452 (1938). Yet, the Governor's media-access criteria quite explicitly and unjustifiably favor legacy, mainstream media, and exclude newer, less-established media counterparts, such as MacIver News Service.

For example, under the Governor's criteria, a media outlet seeking to cover the Governor's press conferences must "ha[ve] published news continuously

for at least 18 months," and also must have either a "periodical publication component" or "an established television or radio presence." App. 4. These media preferences risk limiting access to the Governor's press conferences to newspapers, television, and radio, even though "basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011). And it is no answer to say that media conglomerates distribute their news across a variety of media (such as on television, online, and in print); the key point is that "if forum-based distinctions drive the outcomes in media access cases," "little [is done] to protect the underlying values of the First Amendment" because "*who* delivers it can be as important as the fact of its delivery." *Viewpoint Discrimination and Media Access to Government Officials*, *supra* at 1027 (emphasis added).

2. Perhaps more problematic still is the Governor's requirement that the representative of a media outlet be a "bona fide correspondent of repute" in the industry. App. 4. The Governor and the Seventh Circuit attempted to justify this restriction by suggesting it would "ensure that those in attendance will maximize the public's access to newsworthy information." App. 13. This, of course, begs several questions—such as how the Governor or staff decides who is "reputable," or what constitutes "bona fide"—and advantages mainstream media outlets with name recognition, over smaller, newer organizations that are not as well known. *See Bellotti*, 435 U.S. at 777 ("The inherent worth of the speech in terms of its

capacity for informing the public does not depend upon the identity of its source."). Other aspects of the media-access criteria also harden this preference for mainstream media. The Governor's rules require that media be "employed by or affiliated with an organization whose principal business is news dissemination." App. 4. Moreover, a media organization cannot engage in "policy advocacy" (whatever that means), even though almost every mainstream media outlet, national or otherwise, hires opinion columnists and editorialists whose job it is to advocate for certain views.

This is all highly troubling. It conflicts with core First Amendment principles. "When the Framers thought of the press, they did not envision the large, corporate newspaper and television establishments of our modern world. Instead, they employed the term 'the press' to refer to the many independent printers who circulated small newspapers or published writers' pamphlets for a fee." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring). Indeed, "the purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it." *Pennekamp v. Florida,* 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring). The Governor's patently discriminatory media-access criteria defy this clear admonition.

Further, advantaging mainstream media—those who supposedly have "repute" in the industry—fosters the very viewpoint discrimination that the First Amendment forbids. "[L]arge media outlets, which depend on preferential access . . . are the entities least

likely to object to a development that tends to further legitimate discriminatory treatment." *Viewpoint Discrimination and Media Access to Government Officials*, *supra* at 1027. Thus, "if access law indeed favors media outlets that have entrenched relationships with government officials," then "[n]onmainstream presentations of the news could become harder to find," which should "give pause to those who believe that the First Amendment should protect nonmainstream . . . speech." *Id.*

3. Forum analysis provides little or no protection for exclusion of, or other discrimination against, nontraditional media. Because forum analysis turns on the physical location of speech, it can be used to exclude disfavored press from nonpublic fora, which is what happened here. Without application of strict scrutiny, journalists employed by nontraditional media will be at the mercy of government officials who want to exclude them for virtually any reason, including because they disagree with their viewpoints or ideologies. This case presents an ideal vehicle to resolve these important questions.

CONCLUSION

The Court should grant the Petition For a Writ of Certiorari.

Respectfully submitted,

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