

No. 21-388

In The
Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

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

**BRIEF OF GOLDWATER INSTITUTE, REASON
FOUNDATION, AND MAINE POLICY INSTITUTE AS
AMICI CURIAE SUPPORTING PETITIONERS**

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**IDENTITY AND INTEREST
OF *AMICI CURIAE*¹**

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases, and it files *amicus* briefs when its or its clients' objectives are directly implicated. Goldwater is especially interested in this case because, like Petitioner John K. MacIver Institute for Public Policy, Inc., it is a public-policy think tank that has employed a full-time journalist.

Reason Foundation (“Reason”) is a national, nonpartisan, and nonprofit public policy think tank, founded in 1968. Reason’s mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish, and it advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further its

¹ Rule 37 Statement: The parties have consented to the filing of this brief. *Amici* gave counsel of record for all parties timely notice of their intention to file this brief. Counsel for *amici* affirms that no counsel for any party authored any of this brief and that no person or entity, other than *amici*, their members, or counsel funded its preparation or submission.

commitment to “Free Minds and Free Markets,” Reason participates as *amicus curiae* in cases raising significant constitutional, legal, or public policy issues.

The Maine Policy Institute is a nonprofit, nonpartisan organization that conducts detailed and timely research to educate the public, the media, and lawmakers about public-policy solutions that advance individual liberty and economic freedom in Maine. Among other activities, the Institute publishes the *Maine Wire*, a news and opinion service dedicated to providing information and perspective on issues important to the people of Maine. In particular, the *Maine Wire* seeks to report on stories that would otherwise be ignored by the media, keeping a critical eye on the actions of Maine’s state government and members of Congress.

◆

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent, Wisconsin Governor Tony Evers, excluded journalists employed by Petitioner John K. MacIver Institute for Public Policy, Inc. (“MacIver”) from his press briefings, specifically because they were affiliated with MacIver, a Wisconsin think tank that engages in public-policy advocacy.

That is content- and identity-based censorship. *Cf. Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (speech burdens “based on the content of speech [or] the identity of the speaker” are subject to strict

scrutiny). It is also unjustifiable as a matter of free speech doctrine. Journalists employed by think tanks and other nonprofit organizations play an important role in the evolving news marketplace. As the legacy media's coverage of state government has declined, nonprofit groups have stepped in to fill the void. At the national level, journalism projects sponsored by think tanks cover stories that the traditional media might not. And for a long time, magazines published by nonprofit organizations have engaged in reputable journalism—even if their sponsoring organizations have distinctive, deliberate points of view.

To defend his exclusion of MacIver's journalists from his press conferences, Governor Evers has cited supposedly neutral criteria that might appear designed to ensure that journalists who are admitted are objective and credible. But that, too, is antithetical to the First Amendment, under which the people, not the government, have the right to decide who to deem objective, credible, and worth listening to. The Constitution's guarantee of freedom of the press does *not* assume that the press will be "objective," and to allow the government power to draw legal lines around the press based on the government's determination of "objectivity" is unworkable in principle. Besides, many Americans question the objectivity and credibility of today's corporate media, and a *majority* find it not credible. So there is little basis to deem journalists employed by organizations like MacIver to be uniquely non-objective and not credible—and, in any event,

there can be no justification for giving them less First Amendment protection.

◆

ARGUMENT

I. Journalists employed by think tanks and other nonprofit organizations play an important role in the evolving news marketplace.

Journalists employed by “think tanks” or other nonprofit organizations with an ideological or otherwise distinct and deliberate perspective play an important role in the news marketplace. Among other things, they provide coverage of state government that traditional media outlets can no longer afford; they cover national stories that other media outlets do not; and they otherwise engage in authentic journalism, even if the stories they choose and the points they emphasize are influenced by an editorial point of view.

A. As traditional media’s coverage of state government has drastically declined, journalists employed by think tanks and nonprofits have helped fill the void.

As traditional newspapers have closed or drastically cut staff during this century, the number of reporters covering state government has declined sharply—and journalists employed by think tanks and

other nonprofit or advocacy groups have helped to fill the void.

Illinois provides one example. In the late 1980s, the state had 44 full-time Statehouse reporters—but by 2018, it had only 20. Lindsey Salvatelli, *Journalism Tries to Adapt*, Ill. Times, Apr. 4, 2019.² The Illinois News Network (“INN”), initially a project of the nonprofit think tank Illinois Policy Institute, stepped in to make up for that loss by hiring veteran journalists to cover state government, making stories available to local newspapers for free. *See id.* But, just as MacIver’s journalists have been excluded from Wisconsin’s Governor’s press conferences, INN was barred from the Illinois legislature’s press conferences because of its association with its parent organization. *See id.*; *Reeder v. Madigan*, 780 F.3d 799 (7th Cir. 2015) (affirming dismissal of First Amendment challenge to this exclusion based on legislative immunity).

INN nonetheless continued to cover state government, and it eventually evolved into The Center Square, which is now a project of the nonprofit Franklin News Foundation and operates a wire service covering state government in 13 states. Lindsey Estes, *How The Center Square Has Created a Successful Statewide Wire Service and Ways to Use Their Content*, Local Media Association, June 16, 2019.³ Unlike INN’s

² <https://www.illinoistimes.com/springfield/journalism-tries-to-adapt/Content?oid=11482190>.

³ <https://localmedia.org/2019/06/how-the-center-square-has-created-a-successful-state-wire-service-and-how-you-can-use-their-content-for-free/>.

former parent, the Franklin News Foundation is not a policy think tank; its stated mission is “to hold government accountable through objective, balanced, citizen-focused public journalism with a taxpayer sensibility.” Mission, Vision & Values, Franklin News Foundation.⁴

The Center Square’s stories appear both on its own website and in hundreds of newspapers that choose to use them. *Id.* And it has broken stories of statewide interest. In August, for example, it broke the news that Illinois regulators were threatening the medical license of a doctor and local school board member, based on his criticism of Governor J.B. Pritzker’s school mask mandate,⁵ and then followed the story as a state senator filed an ethics complaint against the Pritzker administration,⁶ the regulatory agency

⁴ <https://www.franklinnews.org/mission-vision-values/>.

⁵ Greg Bishop, *Doctor: Illinois Threatening Medical License Over Mandatory Mask Opposition*, The Center Square, Aug. 18, 2021, https://www.thecentersquare.com/illinois/doctor-illinois-threatening-medical-license-over-mandatory-mask-opposition/article_4a4f40f6-006e-11ec-a070-a78e30de9e54.html.

⁶ Greg Bishop, *Senator Files Ethics Complaint Over Pritzker Agency Investigating School Board Member*, The Center Square, Aug. 19, 2021, https://www.thecentersquare.com/illinois/senator-files-ethics-complaint-over-pritzker-agency-investigating-school-board-member/article_017fea80-0125-11ec-91e9-af48474332ba.html.

dropped its investigation against the doctor,⁷ and legislators called for hearings on the incident.⁸

Providing another example, *amicus* Maine Policy Institute has published news and commentary on state government through its *Maine Wire* project. For example, *Maine Wire* has published articles uncovering fraud within the Maine Housing Authority,⁹ calling attention to a newspaper's questionable reporting on a relationship between a Maine Congresswoman and a billionaire whose company owns major Maine newspapers,¹⁰ and breaking the story that Maine's state auditor lacked the legal qualifications to hold that position and would therefore vacate the office.¹¹

⁷ Greg Bishop, *Regulatory Agency Drops Investigation Into School Board Member's Position on Masks in Schools*, The Center Square, Aug. 20, 2021, https://www.thecentersquare.com/illinois/regulatory-agency-drops-investigation-into-school-board-members-position-on-masks-in-schools/article_6036d7b0-01f1-11ec-85cd-93a14767f48c.html.

⁸ Greg Bishop, *Lawmakers Call for Hearings After Investigation of Doctor's Stance on Mask Mandate*, The Center Square, Aug. 23, 2021, https://www.thecentersquare.com/illinois/lawmakers-call-for-hearings-after-investigation-of-doctor-s-stance-on-mask-mandate/article_f041a6d6-0440-11ec-b8b7-53de0c9921cc.html.

⁹ Steve Robinson, *Luxury Hotels, Magicians, and Massage: Maine Housing Vendor List Reveals Questionable Expenditures*, *Maine Wire*, Jan. 17, 2012, <https://www.themainewire.com/2012/01/luxury-hotels-magicians-massage-maine-housing-vendor-list-reveals-questionable-expenditures/>.

¹⁰ Steve Robinson, *Pingree and the Press Herald—Together at Last*, *Maine Wire*, Feb. 13, 2012, <https://www.themainewire.com/2012/02/editorial-pingree-press-herald/>.

¹¹ Katherine Revello, *Dunlap Vacates State Auditor Position After Narrowly Missing Exams to Obtain Auditor Credentials*,

Despite its ten years of publishing such work, *Maine Wire* was recently told that it would be excluded from the Maine Center for Disease Control’s COVID-19 press briefings, as would a news organization operated by the progressive Maine People’s Alliance, because the agency deemed them “advocacy journalists.” After the groups objected, along with the president of the Maine Press Association,¹² the Maine CDC reversed its decision—at least for its next press conference. Caitlin Andrews, *In Reversal, Maine CDC Will Allow ‘Advocacy Journalists’ Into Next COVID-19 Briefing*, Bangor Daily News, Oct. 6, 2021.¹³

Amicus Goldwater Institute, another policy think tank, long employed a veteran investigative reporter, Mark Flatten, whose journalistic work complemented the Institute’s policy work. See Jim Barnett, *Nonprofits With a Perspective Hiring Journalists: A Sign of Things to Come?*, NiemanLab, Sept. 10, 2009.¹⁴ For example, the Institute used Flatten’s reporting on the failings of the FDA’s “compassionate use” program to advocate for

Maine Wire, Oct. 1, 2021, <https://www.themainewire.com/2021/10/dunlap-vacating-state-auditor-position-after-narrowly-missing-exam-to-obtain-auditor-credentials/>.

¹² Members of the legacy media are not always so supportive when their colleagues from non-traditional outlets are excluded like this. See Jacob Huebert, *Journalists Demand Access, But Sometimes They’re Selective*, Wall St. J., Mar. 2, 2017, <https://www.wsj.com/articles/journalists-demand-access-but-sometimes-theyre-selective-1488498959>.

¹³ <https://bangordailynews.com/2021/10/06/politics/maine-cdc-bars-advocacy-journalists-from-briefings-kicking-off-debate/>.

¹⁴ <https://www.niemanlab.org/2009/09/nonprofits-with-a-perspective-hiring-journalists-a-sign-of-things-to-come/>.

“Right to Try” laws that states and ultimately Congress passed to give terminally ill patients access to treatments the FDA has not yet approved. See Mark Flatten, *Dead on Arrival*, Goldwater Institute, Feb. 24, 2016¹⁵; *President Trump Signs Right to Try Act into Law*, Goldwater Institute, May 30, 2018.¹⁶ Flatten also reported on the burden state occupational licensing laws imposed on military spouses, which gave the Institute evidence it could use to advocate for reform. See Mark Flatten, *Derelection of Duty: Military Spouses Struggle to Earn a Living Despite ‘Feel-Good’ Licensing Laws*, Goldwater Institute, Dec. 12, 2019.¹⁷ Once Arizona enacted the reform the Institute advocated, Flatten reported on the new law’s consequences—providing facts the Institute could, in turn, use to inform legislators in other states. See Mark Flatten, *1,200+ Arizonans Get Freedom to Work Under State’s New Universal Recognition Law*, Goldwater Institute, June 15, 2020.¹⁸

Apart from policy-oriented think tanks, many other nonprofit organizations have lately produced state and local news coverage that traditional news outlets cannot or will not provide. For example, ProPublica—a nonprofit news organization that began in 2007 and has won six Pulitzer Prizes, among many

¹⁵ <https://goldwaterinstitute.org/article/dead-on-arrival/>.

¹⁶ <https://goldwaterinstitute.org/article/president-trump-signs-right-to-try-act-into-law/>.

¹⁷ <https://goldwaterinstitute.org/derelection-of-duty/>.

¹⁸ <https://goldwaterinstitute.org/freetoworksuccess/>.

other awards¹⁹—has recently established regional units to engage in “local accountability journalism.” *ProPublica to Launch New Regional Units in the South and Southwest; ProPublica Illinois to Expand to Midwest Regional Newsroom*, ProPublica, Oct. 8, 2020.²⁰ And, to give just one more of many available examples, the nonprofit *Texas Tribune* has been a prominent purveyor of news on Texas government and politics since 2009. See Freia Nahser, *The Texas Tribune: Audience Strategy and Business Model*, Medium, Sept. 27, 2018.²¹

B. Journalists employed by think tanks and advocacy organizations cover national stories the traditional media overlook.

In addition, journalism projects sponsored by think tanks and advocacy groups cover national stories they believe traditional outlets will not cover sufficiently, if at all.

The progressive Center for American Progress entered that field when it expanded its *ThinkProgress* blog into a full-fledged news organization in 2011, to publish news stories of interest to progressive

¹⁹ See *Awards*, ProPublica, <https://www.propublica.org/awards>.

²⁰ <https://www.propublica.org/atpropublica/propublica-to-launch-new-regional-units-in-the-south-and-southwest-propublica-illinois-to-expand-to-midwest-regional-newsroom>.

²¹ <https://medium.com/global-editors-network/the-texas-tribune-audience-strategy-and-business-model-376c0a980194>.

reporters and readers. See Ben Smith & Kenneth P. Vogel, *CAP News Team Takes Aim at GOP*, Politico, Apr. 12, 2011.²² Though acknowledging that there could be “bias . . . in the selection of the stories that [it] chose to report,” it pledged to present those stories “honestly.” *Id.* And, regardless of whatever “bias” it might have had, *ThinkProgress* broke numerous stories that were picked up by national media outlets before its demise in 2019. See *ThinkProgress*, Wikipedia (collecting examples).²³

Elsewhere on the ideological spectrum, the Heritage Foundation founded its *Daily Signal* news website in 2014, telling the *Washington Post* that it did so based on its “sense [that] there are a lot of really good stories that go unreported or under-reported.” Paul Farhi, *Heritage Foundation Starts Online Site to Cover News It Says Is Unreported or Under-reported*, Wash. Post, June 2, 2014.²⁴ Its publisher further said that he wanted existing outlets such as “Fox, MSNBC, CNN, The Washington Post and the New York Times” to be “reporting on things that were first reported on the Daily Signal.” *Id.* And, indeed, not long after the *Daily Signal*’s launch, its interview with former Deputy Assistant Secretary of State Raymond Maxwell was

²² <https://www.politico.com/story/2011/04/cap-news-team-takes-aim-at-gop-053053>.

²³ <https://en.wikipedia.org/wiki/ThinkProgress>.

²⁴ https://www.washingtonpost.com/lifestyle/style/heritage-foundation-starts-online-site-to-cover-news-it-says-is-unreported-or-under-reported/2014/06/02/2a7631ce-ea76-11e3-b98c-72cef4a00499_story.html.

picked up by various traditional national media outlets. See, e.g., Stephanie Condon, *Will Politics Doom the Benghazi Investigation?*, CBS, Sept. 17, 2014.²⁵ By 2015, it had hired a foreign correspondent in Ukraine, whose *Daily Signal* articles were republished by *Newsweek*. Laura Hazard Owen, “*This Is My Dream Job*”: *How One Journalist Became The Daily Signal’s First Foreign Correspondent*, NiemanLab, June 17, 2015.²⁶

Although these news projects’ parent entities have an ideological perspective and take positions on issues of public policy, academics have noted that they could nonetheless engage in valuable journalism. Kelly McBride, a media ethicist at the Poynter Institute for Media Studies, noted that, although the *Daily Signal* would “never be a credible source for liberals,” it could nonetheless “become part of the fifth estate that is creating information that plays big in the marketplace of ideas,” as long as it has “good journalists [who] are trained to do this work” and “stay[s] focused on facts.” Kristen Hare, *Heritage Foundation’s News Site Doesn’t Have Ad or Traffic Constraints*, Poynter, May 8, 2014²⁷; see also, e.g., Dan Gillmor, *In Praise of the Almost-Journalists*, Slate, Mar. 28, 2014 (article by journalism

²⁵ <https://www.cbsnews.com/news/will-politics-doom-the-benghazi-committees-investigation/>.

²⁶ <https://www.niemanlab.org/2015/06/this-is-my-dream-job-how-one-journalist-became-the-daily-signals-first-foreign-correspondent/>.

²⁷ <https://www.poynter.org/reporting-editing/2014/heritage-foundations-news-site-doesnt-have-ad-or-traffic-constraints/>.

professor arguing in favor of “journalism with a worldview,” praising journalistic work by organizations such as Human Rights Watch, the ACLU, and the Cato Institute).²⁸ And having an organizational sponsor with no concern for advertising revenue or traffic targets can give journalists at such organizations greater freedom to report in the manner they think best. *See* Hare, *supra*. And, of course, honest reporting is essential for such organizations to build trust with the audience they seek to reach. *See* Hare, *supra*; Barnett, *supra*.

C. Magazines published by think tanks and similar nonprofits have long engaged in quality journalism.

Although journalism sponsored by think tanks and similar nonprofits and advocacy groups has lately increased and taken new forms, journalism sponsored by non-profits with an ideological perspective is not new. Some well-regarded publications have long operated under the auspices of a nonprofit parent.

Indeed, before the advent of the modern think tank, newspapers or magazines often effectively *were* think tanks. They brought writers together to offer the type of intellectual content in ways that think tanks later imitated. For example, in the 1930s-40s, the *New York Herald-Tribune* offered the perspectives of writers such as Dorothy Thompson, Walter Lippmann, and

²⁸ <https://slate.com/technology/2014/03/human-rights-watch-and-other-advocacy-groups-doing-great-journalism.html>.

Isabel Paterson, who combined advocacy and journalism. Richard Kluger, *The Paper: The Life and Death of the New York Herald-Tribune* 256–61 (1986). Journals often served as de facto think tanks before think tanks themselves existed. *The Freeman* was founded in 1950, and only absorbed by the Foundation for Economic Education in 1954. *National Review* was a magazine almost 40 years before its think tank arm, National Review Institute, was founded.

Reason magazine began publication in 1968—a decade before *amicus* Reason Foundation was organized. While the Foundation engages in public policy research, the magazine is and always has been, editorially independent of the Foundation’s “think tank” functions, though they share a commitment to “free minds and free markets.” The magazine has a monthly print and digital edition circulation of 50,000, and its website receives five million visits monthly. *About Reason*, Reason.²⁹

Outside of ideological and policy circles, the magazine has received numerous awards for the quality of its journalism. For example, in 2019, *Reason* received four first-places at the Southern California Journalism Awards, including best investigative article in a print magazine for Jacob Sullum’s “America’s War on Pain Pills is Killing Addicts and Leaving Patients in Agony,” which judges deemed “[a] well-researched and poignant story on the impact on the war on pain pills that unwittingly affects patients who really need them.”

²⁹ <https://reason.com/about/>.

Mike Riggs, *Reason Brings Home 4 First-Place Wins at the Southern California Journalism Awards*, Reason, July 1, 2019.³⁰

In 2011, *Reason*'s Radley Balko won the Southern California Journalism Award for Journalist of the Year, with judges calling him “one of those throw-back journalists that understands the power of groundbreaking reporting,” and noting that “his stories cause readers to stop, think, and most significantly, take action.” Matt Welch, *Radley Balko Named “Journalist of the Year,”* Reason, June 28, 2011.³¹ *Reason* is also notable for publishing the *Volokh Conspiracy* blog, whose reporting and commentary by legal scholars from a generally conservative or libertarian perspective are widely read and respected—and have even been cited by justices of this Court. See *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 n.5 (2021) (Thomas, J., concurring) (citing Eugene Volokh, *Might Federal Preemption of Speech-Protective State Laws Violate the First Amendment?*, *Volokh Conspiracy*, Reason, Jan. 23, 2021).

National Review is now a wholly owned subsidiary of the National Review Institute, which proclaims its “conservative convictions” and desire “to better influence our culture while opposing its determined foes.” About NRI, National Review Institute.³² Nonetheless,

³⁰ <https://reason.com/2019/07/01/reason-brings-home-4-first-place-wins-at-the-southern-california-journalism-awards/>.

³¹ <https://reason.com/2011/06/28/radley-balko-named-journalist/>.

³² <https://nrinstitute.org/about-nri/>.

although it might not pass Respondent's criteria for admission to his press conferences, *National Review* is accredited by the Periodical Press Gallery of Congress. See Credentialed Correspondents—117th Congress, First Session.³³

On the left, *Mother Jones* is published by the non-profit Foundation for National Progress (which, in contrast with the Reason Foundation and National Review Institute, exists solely to publish a magazine) and acknowledges that its stories come from a distinct “point of view.” Frequently Asked Questions, *Mother Jones*.³⁴ And *Consumer Reports*, winner of many journalism awards, is owned by Consumers Union, a non-profit advocacy organization. Charles Lewis, *The Nonprofit Road*, Colum. Journalism Rev., Sept./Oct. 2007.³⁵ Other magazines owned by nonprofits that report on matters related to government and public policy include *Foreign Affairs*, *Harper's*, and *AARP The Magazine*. *Id.*

Whatever one might think of any of those magazines' editorial perspectives, few would deny that they are engaged in journalism as legitimate as any—at least as far as the First Amendment's guarantee of freedom of the press is concerned. Their journalists should enjoy the same First Amendment protections as any others.

³³ <https://periodical.house.gov/membership/credentialed-correspondents-117th>.

³⁴ <https://www.motherjones.com/about/faq/>.

³⁵ https://archives.cjr.org/feature/the_nonprofit_road.php.

II. A supposed lack of objectivity is not a legitimate basis for denying journalists employed by think tanks or nonprofits equal access to government press conferences.

Governor Evers excluded MacIver’s journalists from his press briefings because MacIver “is not principally a news organization” and because its “practices” supposedly “run afoul of the neutral factors” the Governor’s office established (after the fact) to determine which journalists would be admitted. Petition at 6–7; App.5. Those “neutral factors” include, among other things, whether a given journalist is “free of associations that would compromise journalistic integrity or damage credibility” and “avoid[s] real *or perceived* conflicts of interest.” App. 4–5, 33–34 (emphasis added). Those criteria, among others, suggest that the Governor is (ostensibly) concerned that reporters admitted to his press conferences be objective and credible.

But First Amendment rights in no way depend on an individual’s objectivity or credibility. Under the First Amendment, judgments about who is an objective or credible news source are for the people, not government, to make. And, besides, the objectivity and credibility of journalists employed by the traditional corporate media are just as debatable as those of journalists employed by think tanks or other nonprofits, which makes the latter’s exclusion arbitrary and unjustifiable.

A. The First Amendment right to freedom of the press in no way depends on a speaker’s objectivity.

Nothing in the Constitution or its history suggests that the freedom of the press may be curtailed based on the “objectivity” or “credibility” of the person involved. On the contrary, such a notion would have struck the authors of the Constitution as absurd, and in principle such a rule is incoherent. The entire premise of the First Amendment’s protections is that it is up to the reader or the listener to judge the objectivity of the writing or the speech at issue, and to make up his or her own mind accordingly. That, at least, was what Justice Brandeis thought when he wrote that “[t]hose who won our independence by revolution” believed that “falsehood and fallacies” are best dealt with by “more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

When the First Amendment was written, the theory of media “objectivity” was not a cultural commonplace. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring) (“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.”). Indeed, “before the 1830s, objectivity was not an issue,” because “American newspapers were expected to present a partisan viewpoint, not a neutral one.” Michael Schudson,

Discovering the News: A Social History of American Newspapers 4 (1978).

Historians debate precisely when the concept of objectivity came to be valued as a journalistic ideal—whether it was in the middle of the nineteenth century, Dan Schiller, *Objectivity and the News: The Public and the Rise of Commercial Journalism* 7 (1981), or after World War I, Schudson, *supra*, at 7—but in any event, it was well after the First Amendment preserved in the Constitution “the freedom of the press.” At that time, “the press” consisted largely of competing party organs. Indeed, “almost all of the nation’s newspapers were aggressively partisan.” Susan Dunn, *Jefferson’s Second Revolution: The Election Crisis of 1800 and the Triumph of Republicanism* 139 (2004).

Thomas Jefferson, who complained frequently and loudly about what he called the abuses of the partisan press in his day—saying that “our newspapers for the most part, present only the caricatures of disaffected minds”—nonetheless believed that it was “better to trust the public judgment, rather than the magistrate, with the discrimination between truth and falsehood.” Letter to M. Pictet, Feb. 4, 1803, in *10 Writings of Thomas Jefferson* 357 (A.E. Bergh ed., 1905). The idea that the constitutional protections for freedom of the press could turn on the question of the publication’s “objectivity” would have struck him as bizarre.

Even those who took a narrower view of the freedom of the press than he did, such as the authors of the Sedition Act, never sought to distinguish between

“objective” publications and those that were partisan. They sought to punish “libelous” publications critical of government officials, see Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 Ohio St. L.J. 435, 448 (2007), but never purported to treat “objective” publications differently from others.³⁶ In *A Dissertation Upon the Constitutional Freedom of the Press in the United States* 10 (1801)—a book John Adams said contained so many “good things” that it seemed to be “written with sun beams,” Letter to William Cunningham, Mar. 15, 1804, in *John Adams: Writings from the New Nation 1784-1826* at 415 (Gordon Wood ed., 2016)—the Federalist James Sullivan explained that the freedom of the press referred to “an unrestrained use, and free improvement of the privilege of writing, and printing, in the communication of sentiments and opinions, on matters of public concernment, governmental measures, and political procedures.” Sullivan never distinguished between objective or non-objective; on the contrary, he noted that while some might argue that “if it could be rendered certain that nothing but the truth would, under [a government] license, be published,” such a restriction might be desirable, “[b]ut this idea is against the tenor of all our constitutions.” Sullivan, *supra*, at 22.

The reason no such distinction was recognized at the time was that the very purpose of the First

³⁶ Indeed, non-objective publications *in praise* of the Adams administration would not have been punished under the Sedition Act.

Amendment was to forbid the government from deciding in advance who does and does not qualify as worthy of the freedoms of press or speech—whether the criterion be “objectivity” or any other. It was not that there is no such thing as objectivity—on the contrary, the founding generation believed there was. Rather, it was that no authority could be trusted with the power to deem what did or did not qualify as objective—or whatever the standard might be. James Madison used the metaphor of a tree: there could be no denying that the press often published abusive and libelous material, he wrote, but “it is better to leave a few of the noxious branches, to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits.” *Report on the Alien and Sedition Acts*, in *James Madison: Writings* 647 (Jack Rakove ed., 1999).

The great danger in distinguishing between purportedly objective media and non-objective or biased media is that questions of objectivity are so complex and subtle that they cannot be safely entrusted to government officials. As John Milton remarked in *Areopagitica*, bureaucrats purporting to decide what writings are or are not sufficiently objective or true to be worthy of publication would have to be people “above the common measure, both studious, learned, and judicious”—but such people would find the task of reviewing proposed publications for objectivity would find such work so “tedious and unpleasing” that they would soon quit, and be replaced by “ignorant, imperious, and remiss, or basely pecuniary” officeholders. John Milton, *Areopagitica* 33 (Cambridge University Press, 1918) (1644).

And these officials, Milton warned, would likely censor great and true books. Thus the wiser course was to leave questions of truth or objectivity “wholly to the demeanor of every grown man.” *Id.* at 19.

More than a century and a half later, Jefferson echoed this point when he dismissed arguments for government restrictions on publications by asking “shall a layman, simple as ourselves, set up his reason as the rule for what we are to read, and what we must believe?” Letter to N.G. Dufief, Apr. 19, 1814, in *Jefferson: Writings* 1334 (Merrill Peterson ed., 1984).

For just that reason, the Constitution leaves judgments as to whose reporting is objective, credible, and worthy of consideration to individual citizens themselves. For government officials to make that judgment in advance—to influence which voices people hear and do not hear—is untenable, dangerous, and unconstitutional.

In the simplest case, it will be virtually impossible for political leaders or their deputies to set aside their own biases to determine what reporters or publications are or are not “objective.” They will inevitably exercise that authority in a manner that serves their own political principles or goals: Republicans will deem CNN non-objective because it does not report on the malfeasance of Democratic politicians; Democrats will call Fox non-objective because it exaggerates minor peccadilloes by politicians of their own party.

But more common will be situations that are subtler—and consequently more dangerous for free

speech. These will involve, for example, whether subsidizing a new sports stadium downtown will actually benefit the local economy, or whether constructing a new light rail system will improve public transportation in the city, or whether a school district's curriculum sufficiently accounts for concerns about racism in American history. When debates over such matters erupt, mayors and city council members will purport to exclude reporters from briefings if they are deemed insufficiently "objective" about whether or not the stadium will create jobs, or whether the curriculum inadequately emphasizes the contributions of Asians or Hispanics. Determining what qualifies as "objective" in such circumstances is simply too fine a task for the instruments of the law. The *only* solution is to allow the flow of ideas to be "uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), with individuals free to decide for themselves whether a reporter is being objective or not.

This very question was addressed in several cases involving laws prohibiting "false" political speech. See *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016); *281 Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014); *Commonwealth v. Lucas*, 34 N.E.3d 1242 (Mass. 2015); *Rickert v. State Pub. Disclosure Comm'n*, 168 P.3d 826 (Wash. 2007). The *Arneson* court got to the point quite effectively: laws against false statements, it said, failed the narrow-tailoring requirement of strict scrutiny because there is no practical means whereby government can distinguish "actual" falsehoods from mere "exaggeration, rhetoric,

figurative language, and unfavorable, misleading or illogical statements or opinions.” 766 F.3d at 794. More importantly, “the most immediate remedy to an allegation of falsity” by one speaker is to allow others to point out the lie and tell the truth. *Id.* at 793. “Such ‘back and forth,’” the court added, “is the way of the world in election discourse.” *Id.* at 795.

That “back and forth” has value beyond the resolution of any particular dispute, as well. Journalists who are not “objective” provide a valuable—even crucial—voice in political debate. Few would call Mark Twain, H.L. Mencken, Zora Neale Hurston, Dorothy Thompson, Hannah Arendt, Alan Drury, or William F. Buckley politically neutral. But their journalism from legislatures and courtrooms has provided lasting sources of philosophical and cultural reflection, even decades after their deaths. Arendt was not an objective journalist, but *Eichmann in Jerusalem* remains an enlightening, hotly debated classic. Such journalism has even given rise to works of art: Twain’s work as a reporter covering Congress gave him material for *The Gilded Age* and Drury’s work covering Congress led to novels such as *Advise and Consent*.

In short, the First Amendment assumes that having competing perspectives—with advocates on both sides—is a social *benefit* in several dimensions. It not only allows for the public to learn from all sides of a political dispute, but also provides material for teaching future generations. For the government to draw a distinction between journalists who are and are not

sufficiently “objective” to satisfy government officials is contrary to that principle.

**B. The “objectivity” sword cuts both ways—
or would, if consistently applied.**

As noted above, nonprofit organizations such as MacIver and the *Amici* perform important journalistic work. Further, whatever reason there might be to characterize them as not “objective” applies at least as much to traditional corporate media.

Many Americans view the traditional corporate media as insufficiently objective because they believe media outlets are influenced by the interests of their investors or other corporate entities operated under the same umbrella. In their book *The New Media Monopoly* (2004), Ben Bagdikian and Dan Emeritus argue that American media are too concentrated in the hands of few owners: “[f]ive global-dimension firms,” they write, “own most of the newspapers, magazines, book publishers, motion picture studios, and radio and television stations in the United States.” *Id.* at 3. They believe that “[t]his gives each of the five corporations and their leaders more communications power than was exercised by any despot or dictatorship in history.” *Id.* Others share this concern. Professor Mehnaaz Momen writes that the “increasingly consolidated media-information complex” has made news reporting “corporate-controlled, homogenized, and mainstream,” so that “[n]ews media networks” are best described, not as liberal or conservative, but as “corporate.” Mehnaaz

Momen, *Political Satire, Postmodern Reality, and the Trump Presidency: Who Are We Laughing At?* 10 (2019).

Whether these views are accurate or not, they indicate that there is genuine concern among the public that traditional, corporate media outlets—whom politicians might easily deem “objective”—are in fact not objective, but are unduly influenced by their corporate parents’ interests. And it is true that virtually all corporate parents of major media outlets engage in lobbying and political contributions; for example, CNN’s corporate parent, Time Warner, spends around \$3 million on lobbying annually—not counting the lobbying done by trade organizations to which it and other similar companies belong, such as the Motion Picture Association of America. Scott Fitzgerald, *Time Warner*, in *Global Media Giants* 51, 64 (Benjamin J. Brinkbine, et al. eds., 2014). And since 2010, Time Warner has given nearly \$200,000 to the Democratic Governors Association, to name just one beneficiary of its political donations. Democratic Governors Assn: Donor Search, Open Secrets.³⁷ In that same time period, NBC’s corporate parent, Comcast, has given that same political organization more than \$1,000,000. Democratic Governors Assn: Donor Search, Open Secrets.³⁸ It is no surprise, therefore, that many Americans believe major media outlets’ news reporting is influenced by their owners’ political interests.

³⁷ <https://bit.ly/3uU3loy>.

³⁸ <https://bit.ly/3Am4dDx>.

Some believe media conglomeration and their efforts to profit from government largesse give their news outlets a conservative bias. See, e.g., Robert W. McChesney, *Corporate Media and the Threat to Democracy* 63–64 (1997). Others, by contrast, believe traditional corporate media have a liberal bias, because of the journalists’ personal views, because the media are a kind of echo-chamber, Tim Groseclose, *Left Turn: How Liberal Media Bias Distorts the American Mind* 23–24 (2011), because the media are biased toward simplistic conflict stories, Stephen E. Stewart, *Abortion*, in *Media Bias: Finding It, Fixing It* 65, 75 (William David Sloan & Jenn Burleson Mackay eds., 2007), and because of the establishment of a kind of media cartel. Daniel Sutter, *Can the Media Be So Liberal? The Economics of Media Bias*, 20 *Cato J.* 431 (2001). These beliefs are not without support: the overwhelming majority of professional journalists align themselves with the political left. Bernard Goldberg, *Bias: A CBS Insider Exposes How the Media Distort the News* 123–24 (2001).

In any event, *most* Americans do not find the traditional corporate media credible at all. Fifty-six percent believe that journalists “are purposely trying to mislead people by saying things they know are false or gross exaggerations.” Andy Meek, *Fewer Americans Than Ever Before Trust the Mainstream Media*, *Forbes*, Feb. 20, 2021.³⁹ And approximately 60 percent think most news organizations are more concerned with

³⁹ <https://www.forbes.com/sites/andymeek/2021/02/20/fewer-americans-than-ever-before-trust-the-mainstream-media/>.

supporting an ideology than with providing information and are “not doing well at being objective.” *Id.*

In light of these facts, the idea that nonprofit organizations are systematically *less* reliable or objective than traditional corporate media is itself not credible. And it certainly cannot provide a basis—much less a constitutional one—for distinguishing between reporters aligned with nonprofits and those aligned with legacy institutions. The point here does not depend on whether any of the common criticisms of corporate media are accurate; the point is that their objectivity and credibility are widely disputed. And, under the First Amendment, that dispute is one for the public, not the government, to address.

◆

CONCLUSION

The petition for certiorari should be *granted*.

Respectfully submitted,

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