No. 21-388

In the

Supreme Court of the United States

JOHN K. MACIVER INSTITUTE FOR PUBLIC POLICY, INC., ET AL.,

Petitioners,

v.

TONY EVERS, GOVERNOR OF WISCONSIN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the proposition that the freedom of the press protected in the First Amendment is an individual right to publish or broadcast information and opinion without the requirement of government permission. Dr. John C. Eastman, founder of the Center and its Director, testified to Congress on these matters in 2006

SUMMARY OF ARGUMENT

The First Amendment's protection of freedom of the press is not a special exemption granted to favored guild or institution. As originally understood, this protection grants an individual liberty to all individuals to publish (or broadcast) their sentiments without prior restraint. The Press Clause protects an activity, not an institution. And this protection extends to all individuals who wish to partake of that activity

The protection at the heart of the Press Clause the right to publish without requiring prior approval of the government. While licensing schemes were the prior restraint of choice at the time that the original notions liberty of the press were being debated in England, the modern equivalent of those licensing

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[1] All parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

schemes is the creation of government-imposed criteria for what types of media representatives will be allowed access to press conferences and briefings. By controlling who has access to information, the government controls who may publish.

The Court should grant review in this case to determine whether the First Amendment allows state actors to pick and choose which publications or broadcasters will be permitted access to government press conferences and briefings and which shall be excluded.

REASONS FOR GRANTING THE WRIT

I. The First Amendment Protects an Activity, Not an Institution.

The First Amendment prohibits laws "abridging the freedom of speech, or of the press." U.S. Const. Amend. I. This case raises the question of *who* is protected and *what* is protected. Justice Potter Stewart, in a speech at the Yale Law School, argued that the Press Clause does not protect individuals. Instead, according to Justice Stewart, it protects "an institution." Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 633 (1975). Judge Sentelle, however, suggests that we ought to consider the original understanding of the press clause and ask did "the press" refer "to a method of communication or a privileged class of communicators?" David B. Sentelle, *Freedom of the Press: A Liberty for All or a Privilege for a Few?*, 2013-2014 CATO Supreme Court Review 15, 17. There is no evidence that the Framers envisioned a special constitutional role for the "institutional press" as Justice

Stewart argued. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 799 (1978) (Burger, C.J., concurring).

As outlined below, "the press" referred not to a collection of businesses printing newspapers – but to the activity of printing itself. The special mention it warranted in the First Amendment was based on the history of government attempts to control the printing press and those that sought to broadcast their opinions via prior restraint.

A. Concern for "freedom of the press" grew out of government control of printing presses and requirements for licenses for publication.

Guttenberg's invention of a printing press with movable type was introduced to England in 1476. Almost immediately, the government-imposed restrictions on its use. Vincent Blasi, *A Reader's Guide to John Milton's Areopagitica, the Foundational Essay of the First Amendment Tradition*, 2017 Sup. Ct. Rev. 273, 275 (2017); Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 Ind. L. Rev. 295, 298 (2001).

Initially, the government asserted monopoly control over "the act of printing." Blasi, 2017 Sup. Ct. Rev. at 275. Over time, government chose licensing schemes as the most efficient mode of controlling publishing. Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 Stan. L. Rev. 661, 673 (1985). It was these licensing schemes – determining who would be allowed to pub-

lish their works, that convinced the founding generation of the need for the Press Clause in the First Amendment. *See* Senex, *Virginia Independent Chronicle*, *reprinted in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION at 506; An Old Whig III, *Philadelphia Independent Gazetteer*, *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION at 426-27.

For Blackstone, freedom of the press meant nothing more than the right of "[e]very freeman" to publish his sentiments to the public – "free of the restrictive power of a licenser." William Blackstone, *Commentaries on the Laws of England* (1769) 4:150-53, *reprinted in* 5 THE FOUNDERS' CONSTITUTION at 119. This is the right that is recognized in the First Amendment. It is right available to every citizen to publish without prior restraint. Joseph Story, *Commentaries on the Constitution* 3:§ 1874, *reprinted in* 5 THE FOUNDERS' CONSTITUTION at 182.

The Press Clause of the First Amendment was drafted against this background of government controls over publishing. The early printing presses were owned by the government and citizens needed special permission to have anything printed. Once printing presses came into private ownership, government continued to control publishing through licensing. Again, one could only publish what the government permitted. These were the specific abuses that the Press Clause was meant to protect against.

B. The First Amendment protects an individual right to publish or broadcast with prior restraint or license.

Both Blackstone and Story are clear that the press freedom belongs to everyone – not just those in the business of selling newspapers. Blackstone, *supra* at 4:150-53; Story, *supra* at 3:§ 1874. Dr. Eastman noted that this theme is confirmed in the several proposals for an amendment protecting freedom of the press. Testimony of Dr. John C. Eastman, Hearing Addressing Obligations of the Media with Respect to Publication of Classified Information, U.S. House of Representatives, Permanent Select Committee on Intelligence (May 26, 2006) at 8. Each of the proposals noted that the right belonged to "the people," not a select guild of media companies.

Early state constitutions also recognized that freedom of the press was an individual right. For instance, paragraph XII of the Pennsylvania Declaration of Rights of 1776 noted "[t]hat the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." It was *the peoples'* rights to publish and write that were protected by the freedom of the press.

This Court emphasized that the Press Clause protected a "fundamental personal right." *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972). It is not a right confined to a particular guild or institution. *Id.*; *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) ("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") (Frankfurter, J., concurring).

This case presents the very problem that develops under the theory that the Press Clause protects only an institution. Someone must decide who is in

the club and who is out. That, according to Chief Justice Burger, "is reminiscent of the abhorred licensing system of Tudor and Stuart England – a system the First Amendment was intended to ban from this country." *Bellotti*, 435 U.S. at 801 (Burger, C.J., concurring).

II. The Court Should Grant Review to Determine Whether the Practice of Restricting Access to Government Information to Only Government-Approved Publications and Broadcasters Acts as a License in Violation of the First Amendment

Governor Evers denied MacIver the functional equivalent of a press license by conditioning MacIver's access to press events on state approval of MacIver's past content and message. Because the First Amendment is meant to protect "ready communication of thoughts between subjects," heightened scrutiny is required to evaluate discrimination among press outlets. *See Near v. Minnesota*, 283 U.S. 697, 717 (1931).

A. Conditioning a news outlet's exercise of press rights on the government's approval of the outlet's past content functions as a license and is thus a prior restraint.

In its first case interpreting the Press Clause, this Court found facially unconstitutional a statute which enjoined publications statutorily defined as a "a nuisance" for publishing something "malicious, scandalous and defamatory" in the past from publishing any future work. *Near,* 283 U.S. at 698. Stressing the Framers' abhorrence of the English licensing system,

the majority wrote that *permanently* barring the disfavored press from exercising its press function was an "an effective censorship," a "prior restraint and hence . . . an abridgment of freedom of the press," and one which ran "counter to the conception of liberty deeply embedded in Anglo-American jurisprudence." *Id.*

The prior restraint in *Near* resembled the English licensure system. Under that system, a license to publish was dependent on the state's approval of a newspaper's past content. Disfavored printers were permanently barred from publishing. In July 1590, the judicial branch of the Stationers' Company found Roger Ward guilty of printing an unauthorized book of sermons. The court ordered the "defacing, burning, breaking and destroying" of Ward's presses and type to prevent him from printing or seeking license to print in future. Order of July 4, 1590. W. Gregg, Records of the Court of the Stationers Company 42 (1930).

Evers's denial of access to government press events to the MacIver journalists is similar to the licensing schemes used in England. After failing Evers's "neutral standards" for press access based on the content of their past work, the MacIver journalists were permanently denied license to gather information from their Governor. Only publications on the approved list are permitted to attend the press events. This is the abuse feared by Chief Justice Burger. *Bellotti*, 435 U.S. at 801 (Burger, C.J., concurring).

The danger inherent in picking and choosing which reporters or media outlets are entitled to attend government press briefings has been recognized by the lower federal courts. *Huminski v. Corsones*, 396

F.3d 53, 83 (2d Cir. 2004) (holding that a citizen reporter could not be excluded where other reporters were allowed, absent reasonable basis for believing he posed a security interest); *ABC v. Cuomo*, 570 F.2d.1080, 1083 (2d Cir. 1977) (holding political candidates could not selectively exclude ABC from a "public function" while admitting other members of the media); *Westinghouse Broadcasting Co. v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1976) (holding that a city council could not exclude some press from its meetings and admit others), *Quad-Citv News Service v. Jeben*s, 334 F. Supp. 8, 13 (S.D. Iowa 1971) (holding that a mayor could not deny an underground newspaper access to police department records available to other media); *Kovach v. Maddux*, 238 F. Supp. 835 (M.D. Tenn. 1965) (striking down the exclusion of a reporter from the State Senate).

The District of Columbia Circuit Court of Appeals held invalid three White House press access denials for vocal opponents of the president in *Karem v. Trump*, and *Sherrill v. Knight*, determining that individual members of the press may not be excluded from White House press briefings based on vague, ad hoc criteria like "professionalism" or based on a generic interest in the president's security. *Karem* 960 F.3d 656, 665 (D.C. Cir. 2020)*; Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977). MacIver's exclusion from Evers's press list, justified with similarly vague criteria about the political neutrality and primary purpose of MacIver's work, has the same constitutional infirmity as the exclusions in *Karem,* and *Sherrill.* Indefinitely conditioning a reporter's exercise of press rights on the government's approval of the reporter's

past conduct or past content is a prior restraint system that the Founders intended to foreclose permanently.

B. Heightened scrutiny is required when government selectively excludes members of the press.

When the government discriminates among media outlets based on the content of the organization's past publications, it creates a content-based restriction which requires heightened scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2018). Government regulation is content based if a law applies to speech because of the topic discussed or the idea or message expressed. *Id.* Determining whether a regulation is content based asks a court to consider whether the regulation, on its face, draws distinctions based on the message a speaker conveys.

MacIver was excluded from Governor Evers's media list after Evers assessed MacIver's prior work and concluded MacIver did not pass muster because the content of its message was not "neutral" and because the "primary purpose" of the MacIver Institute is not its function as news outlet. In other words, the content of MacIver's past speech was examined. However, admitted to the media list were many "journalists" from outlets with decidedly non-neutral editorial stances, such as *The Progressive Magazine*, Devil's Advocate Radio, and *The Capital Times*, as well as organizations lacking a "primary purpose" as a news outlet, including the Democratic Party of Wisconsin, Democratic legislative offices, and left-wing advocacy groups like One Wisconsin Now. Because the criteria Evers uses to discriminate among press outlets is entirely based on the content of the press outlet's work—

especially the assessment of the outlet's ideological stance for finding "neutrality"—this regulation is content based.

Courts have found the First Amendment prohibits arbitrary discrimination among media outlets in the White House, in courtrooms, in official press conferences, in political campaign events, in legislative galleries and have consistently applied heightened scrutiny where such discrimination exists. *Karem*, 960 F.3d at 665 (heightened scrutiny for arbitrarily denied White House press pass); *Sherrill*, 569 F.2d at129 (heightened scrutiny for arbitrarily denied press pass); *Huminski*, 396 F.3d at 83 (heightened scrutiny for courtroom access denial). The First Amendment prohibits arbitrary or unexplained exclusions of the press—or inconsistent application of standards for exclusion—and requires a government that wishes to selectively deny press access to establish and publish clear standards for admission, to assure the fair and equitable application of these standards and, notably, to justify these standards as narrowly drawn restrictions based on a compelling state interest. *See*, *Anderson v. Cryovac*, *Inc.*, 805 F.2d 1, 5 (1st Cir. 1986). MacIver journalists suffered the same deprivation of rights acknowledged here by the courts when Evers indefinitely refused them access to his media list. But because the Seventh Circuit departed from precedent to apply a "reasonableness" standard to MacIver's exclusion, instead of the heightened scrutiny the interest requires, Evers has not justified the exclusion as narrowly drawn.

The most common argument for excluding the press—entirely or selectively—is that the press's pres-

ence will disrupt government operations or pose security concerns. In his memo explaining the exclusion of certain outlets like MacIver from media advisories, Evers wrote that his office "face logistical and security concerns that prevent unlimited access to press events." Although the state has a legitimate interest in security, this Court has never held that a permanent exclusion of an individual member of the press, like MacIver's Bill Osmulski—who Evers agrees does not personally pose a safety risk or risk of disruption to the government—is a permissive means for advancing that interest.

In *Near v. Minnesota*, the Court emphasized the significance of the prior restraint's duration in considering the extent of the deprivation of the newspaper's First Amendment right: "where a newspaper or periodical has been suppressed . . . it would seem to be clear that the renewal of the publication . . . would constitute contempt, and that the judgment would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication." *Near*, 283 U.S. at 711–12.

This Court should grant review to determine whether permanently barring disfavored media outlets such as MacIver under the guise of "logistical and security concerns" is consistent with the Press Clause of the First Amendment.

CONCLUSION

Once the state undertakes to decide which media outlets will be permitted at government press events and which will not, it appears to resurrect the licensing schemes that the founding generation sought to outlaw with the First Amendment. This Court should grant review to determine whether Wisconsin's system of picking and choosing which media outlets are worthy enough to be allowed entry to the governor's press events is permitted under the Press Clause.

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