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 IN OPPOSITION

JOSHUA L. KAUL
Wisconsin Attorney General

GABE JOHNSON-KARP
Assistant Attorney General
Counsel of Record

Wisconsin Department of Justice
17 West Main Street
Madison, WI 53703
(608) 267-8904
johnsonkarpg@doj.state.wi.us

QUESTION PRESENTED

Petitioners are the John K. MacIver Institute for Public Policy, "a Wisconsin-based think tank that promotes free-markets, individual freedom, personal responsibility, and limited government," as well as one of its staff members. Wisconsin's Governor excluded petitioners from limited-access press events, concluding that petitioners were not bona fide press, based on a set of neutral criteria the Governor's Office uses to determine press access.

Did the Seventh Circuit correctly apply this Court's forum-analysis precedents to hold that Wisconsin's Governor could exclude MacIver and its staff from limited-access press events?

TABLE OF CONTENTS

QUESTION PRESENTED i

INTRODUCTION 1

STATEMENT OF THE CASE 2

I. Factual background... 2

II. District court proceedings. 7

III. The Seventh Circuit's decision....................... 10

A. Forum analysis applies, and the Governor's limited-access press events are nonpublic forums. 10

B. The Governor's media-access criteria are reasonable and viewpoint neutral, including as applied to MacIver. 13

C. The Seventh Circuit rejected MacIver's theory of constitutionally mandated access for anyone who self-identifies as press. 14

REASONS FOR DENYING THE PETITION.......... 17

I. There is no conflict among the circuits on the question actually presented in this case. 19

II. The Seventh Circuit's decision is correct and consistent with this Court's precedents. 25

III. In light of undisputed evidence in the record, this case is an improper vehicle to address the question MacIver raises. 31

CONCLUSION 33

TABLE OF AUTHORITIES

Cases

Am. Broad. Companies, Inc. v. Cuomo,
570 F.2d 1080 (2d Cir. 1977)...................19, *passim*

Anderson v. Cryovac, Inc.,
805 F.2d 1 (1st Cir. 1986)............................... 22, 24

Ark. Educ. Television Comm'n v. Forbes,
523 U.S. 666 (1998) ....10, *passim*

Ark. Writers' Project, Inc. v. Ragland,
481 U.S. 221 (1987) 15, 27

Branzburg v. Hayes,
408 U.S. 665 (1972) 14, 27, 28, 30

Capital Cities Media, Inc. v. Chester,
797 F.2d 1164 (3d Cir. 1986)................................ 28

Cornelius v. NAACP,
473 U.S. 788 (1985) 10, 12, 25, 26

Globe Newspaper Co. v. Superior Court for Norfolk Cty.,
457 U.S. 596 (1982) 21–22

Grosjean v. Am. Press Co.,
297 U.S. 233 (1936) 28

Houchins v. KQED, Inc.,
438 U.S. 1 (1978) ....14, *passim*

Huminski v. Corsones,
396 F.3d 53 (2d Cir. 2005).............................. 21, 22

Int'l Soc'y for Krishna Consciousness, Inc. v. Lee,
505 U.S. 672 (1992) 25

Karem v. Trump,
960 F.3d 656 (D.C. Cir. 2020) 23, 24

Los Angeles Police Dep't v. United Reporting Publ'g Corp.,
528 U.S. 32 (1999) 27

McBurney v. Young,
569 U.S. 221 (2013) 27

Mills v. State of Ala.,
384 U.S. 214 (1966) 28

Minn. Star & Tribune Co. v. Minn. Comm'r of Revenue,
460 U.S. 575 (1983) 15, 27

Minn. Voters All. v. Mansky,
138 S. Ct. 1876 (2018) 12, 25

Pell v. Procunier,
417 U.S. 817 (1974) 14

Perry Educ. Ass'n v. Perry Local Educators' Ass'n,
460 U.S. 37 (1983) ....10, *passim*

Sherrill v. Knight,
569 F.2d 124 (D.C. Cir. 1977) 23, 24

The Baltimore Sun Co. v. Ehrlich,
437 F.3d 410 (4th Cir. 2006) 24

Zemel v. Rusk,
381 U.S. 1 (1965) 14, 27, 30

Other Authority

Fed. R. Civ. P. 65(a)(2) 9

INTRODUCTION

The First Amendment does not grant unlimited access to governmental events or facilities. Instead, where the government applies selective criteria to determine who may access the event or facility, those access determinations will be upheld as long as they are reasonable and viewpoint-neutral. Under this Court's precedents, this rule applies equally to all—the public as well as members of the press.

This case involves an asserted First Amendment right to attend limited-access press events held by Wisconsin's Governor, Tony Evers. Applying a set of media-access criteria similar to those used by Congress, the Governor's Office declined to grant press access to the John K. MacIver Institute for Public Policy, which is "a Wisconsin-based think tank that promotes free-markets, individual freedom, personal responsibility, and limited government." The Governor's Office found that MacIver is not principally a news organization and that its lobbying activity, policy advocacy, and self-described status as a "think tank" did not meet the Office's access criteria.

The district court upheld that determination, and the Seventh Circuit affirmed. Both courts concluded that the Governor's determination was properly analyzed under this Court's "forum analysis" precedents regarding access to government events and facilities, rather than under MacIver's novel theory of "equal access" for the press, which would require strict scrutiny anytime access was restricted for someone "*acting* as a member of the press."

Applying this Court's forum precedents, both lower courts found that the Governor reasonably declined MacIver's request to attend limited-access press events, based on the clear evidence of MacIver's operation as an advocacy and lobbying organization.

The Seventh Circuit correctly applied this Court's forum precedents to hold that MacIver was properly excluded from the Governor's limited-access press events. The petition should be denied.

STATEMENT OF THE CASE

I. Factual background.

Petitioner John K. MacIver Institute for Public Policy, Inc. is "a Wisconsin-based think tank that promotes free-markets, individual freedom, personal responsibility, and limited government." (Dkt. 9:1.) The institute "sponsors" the "MacIver News Service," a website that posts articles written by Petitioner William Osmulski.[1] (Dkt. 1:2–4; 16:1–3.)

Respondent Tony Evers is Wisconsin's Governor.

MacIver challenges how the Governor's Office determined access to multiple types of events during which Governor Evers answered questions from members of the press and the public. (Dkt. 11:2–3; Pet. App. 60–68.) The record in this case is based on events as they were held before the COVID-19 pandemic.

---

[1] This brief refers to both Petitioners collectively as "MacIver."

On February 28, 2019, the Governor's Office held an invitation-only press briefing for a small group of journalists to allow the State Budget Office to preview the Governor's 2019–2020 Executive Budget in advance of public release. The purpose of the event was to allow invited journalists to provide comprehensive press coverage contemporaneous to the budget's public release. (Pet. App. 66–67.)

MacIver staff were not invited to this event and were therefore not permitted to attend. (*Id.* at 63–64.) The Governor's communications department had determined that MacIver did not "qualify as [a] bona fide press" organization. (*Id*. at 64; *see* Dkt. 15-1:1.)

A memo from the Governor's Office of Legal Counsel to the communications department states that when evaluating media access requests, the "most important consideration is that access is based on neutral criteria." (Dkt. 15-1:1.) The memo lays out a set of criteria the Office applies when determining whether an organization or its staff may be granted access to the Governor for exclusive or limited-access events. (Dkt. 15-1:1.) In addition to space and security considerations, requests for media access will be evaluated using the following criteria:

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?

(Dkt. 15-1:1.)

A requestor that meets the access criteria may be added to the Governor's media-advisory list, which is a list of organizations and journalists that are considered bona fide media and therefore may be invited to limited-access press events.[2] (Pet. App. 62–64.) The Governor's media-access standards are drawn from similar standards used by the United States Congress and the Wisconsin Capitol Correspondents Board. (Dkt. 15-1:1 n.1.)

The Governor's Office has determined that limiting attendance at certain events to bona fide media outlets serves multiple important functions. These include the fact that bona fide journalists can be expected to adhere to journalistic norms like respecting embargoes (*i.e.*, requests that information or documents the Governor's Office provides will not be made public until a designated time) and preserving the distinction between on- and off-the-record statements. (*See* Pet. App. 64–68.) Other media-access criteria (*e.g.*, being an established news organization with a print, radio, or television presence) serve other interests, like prioritizing

---

[2] The Governor's Office does not issue formal credentials and makes its media-access determinations separate from the Wisconsin Legislature. (Pet. App. 67.) MacIver's references to the Legislature's credentialing process (*e.g.*, Pet. 8, 23) are therefore irrelevant.

access for journalists whose reporting will reach wider audiences. (*See id*. at 63–65; *see also id*. at 14.)

The Governor's media advisory list includes bona fide media outlets often perceived as "conservative leaning," such as the Washington Times, Wall Street Journal, and Fox News; as well as others perceived as "liberal leaning," such as the Capitol Times, the New York Times, and the Huffington Post. (Dkt. 15:5–6.)

Applying these criteria, the Governor's Office determined that MacIver was not eligible to be included on the media-access list or to attend limited-access events, including the February 2019 briefing at issue in this case. (Pet. App. 63–65.) This was because the organization is not principally a news organization and is instead a think tank that engages in substantial lobbying and policy advocacy.[3] (*Id*. at 63–64.)

In addition to MacIver, many other organizations also were not allowed to attend the Governor's budget briefing in February 2019. (*See id*. at 67–68.) Indeed, hundreds of journalists, news organizations, bloggers,

---

[3] MacIver has not alleged that it has been denied entry or access to Governor Evers's public events or to any publicly available documents or information from the Governor. (Pet. App. 6.) MacIver also does not claim that it has a right to attend the Governor's one-on-one interviews. (*Id*. at 7.) This case therefore relates only to a small subset of the Governor's limited-access press events, including press conferences and press briefings. (*Id*. at 6–7.) Information about the other types of press events is available in the record for context. (*See id*. at 60–61, 68.)

think tanks, and internet personalities who cover Wisconsin politics were not invited to this small-scale briefing held in the Governor's conference room. (*See id.*)

As one important example, the Governor's Office received a request to attend from Jason Stein, a journalist who had previously worked for two major news outlets in Wisconsin. (*See id.*) However, the Governor's Office denied Stein's request because he is no longer affiliated with an invited news organization and instead works for the Wisconsin Policy Forum, an organization that describes itself as a nonpartisan, independent policy research organization. (*See id.*)

Individuals and organizations that do not meet the media-access criteria can learn about the Governor's events and announcements in other ways. The Office distributes information through its press releases and social media feeds, which are accessible and available to anyone who signs up. (*See id.* at 60.) Similarly, for events that are not limited-access, any members of the public may attend (space permitting), regardless of whether they are on the media-access list. (*See id.*)

MacIver, just like any other member of the public, can attend these public events, follow the Governor's feeds on the various social media platforms, and sign up for press releases. (*Id.*)

II. District court proceedings.

In August 2019, MacIver filed the current action alleging three claims: (1) a First Amendment claim

that Governor Evers denied them freedom of the press by "targeting" them for exclusion from the Governor's media-access list and events announced via that list; (2) a First Amendment free-speech claim that its exclusion from those events and the invitation lists constitutes viewpoint discrimination; and (3) a Fourteenth Amendment equal protection claim that it had been denied equal access to those events and lists. (Dkt. 1:7–9.) MacIver sought an order declaring its exclusion unconstitutional and effectively ordering the Governor to invite MacIver in the future. (*See* Dkt. 1:9–10.)

MacIver also moved for a preliminary injunction, effectively seeking an order requiring Governor Evers to invite MacIver journalists to "generally available press briefings and events and lists announcing such events." (Dkt. 6:1.) MacIver did not explain which events it meant by "generally available press briefings," and made no distinction between limited-access events like press conferences and narrower events such as briefings, which often have even more limited attendance than press conferences. (*See* Dkt. 1:9–10; 11:3–5.)

Governor Evers opposed the injunction request, arguing that attendance at the Governor's press events is appropriately analyzed under the First Amendment's "forum analysis" and that the use of the media-access criteria was a reasonable, viewpoint neutral method to limit access for certain events, thereby satisfying the First Amendment. (*See* Dkt. 14; 15.)

Six months later, with no decision on its injunction request, MacIver moved to consolidate the decision on the preliminary injunction with a decision on the merits under Fed. R. Civ. P. 65(a)(2), affirming that "[t]he vital evidence is all contained in the declarations supporting the briefs for and against the motion for preliminary injunction." (Dkt. 28; 29:2.) The next day, the district court granted MacIver's motion to consolidate, denied the preliminary injunction motion, and gave MacIver ten days to show why the court should not grant summary judgment against them on all claims. (Pet. App. 52.)

In response, MacIver requested permission to file a renewed motion for summary judgment, including new declarations from MacIver representatives. (Dkt. 31.) Along with the new evidence, MacIver sought to present a new legal argument about who counts as the "press," on the theory that the answer hinges on the qualifications of individual journalists rather than the entity that employs them. (*See* Dkt. 31.)

The district court denied the request, reasoning that when MacIver "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." (Pet. App. 26.) The court found "[i]t would be unfair to give the plaintiffs a do-over because they don't like the court's decision on the merits." (*Id.*)

The court then granted summary judgment in favor of Governor Evers, applying the First Amendment's forum analysis to hold that the undisputed facts show that the Governor uses "reasonable, viewpoint-neutral criteria" for granting press access and that MacIver adduced no evidence that the Governor had applied those criteria "unreasonably or to disadvantage [MacIver's] viewpoint." (*Id.* at 27.)

III. The Seventh Circuit's decision.

A unanimous panel of the Seventh Circuit affirmed summary judgment for Governor Evers. (*See* Pet. App. A.) After summarizing the multiple types of events to which the Governor may grant access for the media, the court began by recognizing that the First Amendment's forum analysis is the appropriate framework for analyzing claims like MacIver's, which involve access to public property. (*See id.* at 10.)

A. Forum analysis applies, and the Governor's limited-access press events are nonpublic forums.

The court first summarized the three categories of forums under this Court's forum-analysis precedents. (*Id.* at 10–12 (discussing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998); *Cornelius v. NAACP*, 473 U.S. 788, 804–06 (1985); and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983)).) First are "traditional" public forums like sidewalks and parks, in which courts have

"the least tolerance for restrictions on First Amendment freedoms" and where regulations on speech must satisfy strict scrutiny. (Pet. App. 10–11.) There is "no question" that this case does not involve a traditional public forum. (*Id.*)

The court also held that this case does not involve the second type of forum, those held open by "designation." (*Id.* at 11.) These designated public forums arise "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." (*Id.* (citing *Ark. Educ. Television Comm'n*, 523 U.S. at 678).) "[E]xtensive admission criteria" like the Governor's media-access standards, the court noted, are a "sign[ ] that the government has not created a designated public forum." (*Id.* (quoting *Ark. Educ. Television Comm'n*, 523 U.S. at 679–80).)

The court concluded that the Governor's limited-access events fall into the third type of forum—the "nonpublic forum," which includes all forums that are not either traditional or designated public forums. (*Id*. at 11–12.) These nonpublic forums are controlled by the rule that the government, just like any property holder, may reserve property for an intended use "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." (*Id*. at 12 (quoting *Perry Educ. Ass'n*, 460 U.S. at 46).) The Seventh Circuit noted examples of nonpublic forums that this Court has identified: a school's internal mail system to which the school

board allowed limited access for the teachers' union, but not for other requestors, *see Perry Educ. Ass'n*, 460 U.S. at 48–51; and the Combined Federal Campaign by which federal employees may make donations to certain charitable organizations that meet the "appropriateness" criteria, as determined by the Director of the Office of Personnel Management, *see Cornelius*, 473 U.S. at 794–95.[4] (*See* Pet. App. 12.)

The Seventh Circuit found that the Governor's limited-access press events are comfortably classified as a nonpublic forum. (*Id.* at 12–13.) The events are by definition limited only to bona fide journalists who meet the Governor's media-access criteria, and even then, are open only to those who can be accommodated in light of "space constraints and security concerns." (*Id.* at 13.)

---

[4] The Seventh Circuit also cited two other forum decisions from this Court, *Arkansas Educational Television Commission*, 523 U.S. 666; and *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018). (Pet. App. 11–21.) Of those, *Arkansas Educational Television Commission* is particularly relevant here, as that case suggested an outer boundary for when forum analysis is applicable *at all*, given that "in most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming." *Ark. Educ. Television Comm'n*, 523 U.S. at 675.

For this reason, as explained in briefing below (7th Cir. Dkt. 9:24–27), the standard for nonpublic forums is the *most rigorous* level of scrutiny that would be applicable here. The Seventh Circuit concluded that forum analysis is the appropriate framework. (Pet. App. 13 n.1.)

B. The Governor's media-access criteria are reasonable and viewpoint neutral, including as applied to MacIver.

Turning to the question of the validity of the Governor's media-access criteria, the Seventh Circuit concluded that the criteria easily satisfied the requirement of reasonableness and viewpoint neutrality. (*Id*. at 14–15.) Rejecting MacIver's argument that the criteria themselves are a means of arbitrarily excluding individuals with disfavored viewpoints, the court highlighted that the media-access list includes organizations from across the ideological spectrum. (*Id*. at 15.)

The court emphasized that MacIver failed to point to any record evidence supporting its discrimination argument. The court found that nothing in the record suggested that the Governor discriminated against MacIver based on its viewpoint, rather than the Governor's Office's stated reasons—that MacIver's practices "run afoul of the neutral [media-access] factors." (*Id*. (quoting Dkt. 15:6).) Further undermining MacIver's viewpoint-focused argument, the court held, is that the Governor's Office treated the Wisconsin Policy Forum—a "liberal think tank"—exactly the same as it treated MacIver by excluding its staff from the February 2019 media briefing. (*Id*.) In light of the undisputed evidence of record, the court rebuffed MacIver's multiple attempts to prop up its viewpoint-discrimination argument with "evidence gleaned from the internet" and "other naked assertions of bias . . . unsupported by references to the record." (*Id*. at 16.)

C. The Seventh Circuit rejected MacIver's theory of constitutionally mandated access for anyone who self-identifies as press.

The court next rejected MacIver's argument that the case should instead be governed by the novel principle that "any restriction on someone *acting as a member of the press* must be subject to strict scrutiny." (*Id.* at 17 (emphasis added).) The first reason this argument fails, the court held, is that this Court's decisions clearly state that "[t]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." (*Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972)); *see also Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978); *Pell v. Procunier*, 417 U.S. 817, 834–35 (1974); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).) "Members of the press," the court noted, are "routinely excluded from places that other members of the public may not access," like grand jury proceedings, appellate court conferences, and the meetings of official bodies convened in executive session, among others. (Pet. App. 17–18 (citing *Branzburg*, 408 U.S. at 684–85).)

The Seventh Circuit also noted "the havoc that might ensue if government entities could not exclude members of the press from any non-public part of a government building." (*Id.* at 18); *see also Branzburg*, 408 U.S. at 703–04. "[N]o one's needs would be served," the court recognized, "if the government were

required to allow access to everyone or no one at all." (Pet. App. 22.)

The Seventh Circuit also rejected McIver's suggestion that this case should be governed by two of this Court's precedents about taxes on newspapers, *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983); and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).[5] Both cases, the court held, "reinforce[d] the Governor's argument . . . that states can subject the press to generally applicable regulations without offending the First Amendment." (Pet. App. 20.) In both cases, this Court applied strict scrutiny for different reasons: In *Arkansas Writers' Project*, the discriminatory treatment was based on the content of the material being published. *Ark. Writers' Project, Inc.*, 481 U.S. at 229. And *Minneapolis Star & Tribune* involved a tax targeted at the press. *Minn. Star & Tribune Co.*, 460 U.S. at 584, 591. Neither case, the Seventh Circuit held, provided the appropriate lens through which to review the Governor's access criteria. (Pet. App. 20–21.)

The Seventh Circuit then took on MacIver's argument that because its staff were "qualified" journalists, the First Amendment guaranteed them access to the Governor's press events. (*Id*. at 21–22.) The court first found that MacIver had forfeited this

---

[5] The court also addressed MacIver's citation of multiple out-of-circuit decisions. (Pet. App. 18–19.) Those decisions are discussed in detail *infra*, Reasons for Denying the Petition § I.

argument by not raising it in the district court. (*Id*. at 21.)

And putting aside forfeiture, the court nonetheless rejected the underlying notion that the constitutional analysis would rest on an assessment of whether someone was sufficiently "qualified" as a journalist. (*Id*. at 22.) "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."[6] (*Id*.)

The court closed by reiterating the importance of newsgathering and dissemination, which this Court has recognized on multiple occasions. (*Id*. at 23.) But this, the court said, "does not mean . . . that members of the press have special access," that they are "exempt from laws and rules of general application," or that courts "must disallow a government's set of viewpoint-neutral criteria" simply because another system for regulating access is conceivable. (*Id*. at 23–24.) The court thus affirmed the district court's grant of summary judgment for Governor Evers. (*Id*. at 24.)

---

[6] The Seventh Circuit also found that MacIver forfeited its equal-protection claim, which MacIver itself described as "coterminous" with its First Amendment theory. (Pet. App. 22–23.) MacIver has not pursued its equal protection theory in its petition. (*See* Pet. ii. (limiting question presented to First Amendment claim).)

REASONS FOR DENYING THE PETITION

This case is not about impingements on the right to publish or the right to speak. MacIver has never alleged (nor would the record support) that Governor Evers has somehow limited what MacIver can write or say.

Instead, this case is about MacIver's claimed constitutional right to be in the room with Wisconsin's Governor any time the Governor is addressing a gathering of journalists. Under MacIver's theory, this constitutional right apparently belongs to anyone who expresses a desire to write or speak about the Governor (perhaps limited to those with a journalism degree or past work experience).

The Seventh Circuit rightly rejected this novel right in favor of analyzing MacIver's claim through this Court's forum analysis. Applying that framework, the Governor's media-access criteria establish a reasonable and viewpoint-neutral method to determine who may access the Governor's events. MacIver's petition should be rejected for three reasons.

First, the petition should be rejected because the decision below neither creates nor deepens a circuit split. The cases MacIver discusses involved arbitrary treatment among bona fide media outlets—for example, barring an ABC news crew but allowing in crews from NBC and CBS, without any reference to reasonable, neutral criteria for the disparate treatment. Other cases on which MacIver

relies involved access to courts and court documents—nothing like the claimed right to attend a governor's limited-access events like what was at issue here. None of these cases conflicts with the Seventh Circuit's application of forum analysis in this case.

Second, the Seventh Circuit's decision is correct and consistent with this Court's First Amendment precedents. The Seventh Circuit rightly held that Governor Evers's limited-access press events are properly analyzed as nonpublic forums and that the media-access criteria are a reasonable and viewpoint-neutral method for determining access to those events. And the record easily supports the Governor's Office's determination that MacIver—a think tank engaged in policy advocacy and lobbying—is not principally a news organization and therefore was not entitled to attend the Governor's limited-access press events.

Third, this case is not a viable vehicle to review the question raised in the petition, which is based on two factual premises lacking in the current record. MacIver claims that this is a case about discriminatory treatment among "members of the press," but the record is clear that MacIver is *not* a member of the press—it is a think tank that engages in policy advocacy, albeit with a "NEWS" tab on its website. The record is equally clear that MacIver was treated exactly like a similarly situated think tank, so discriminatory treatment is also lacking in this record.

With no circuit split, a well-reasoned and correct decision below, and factual problems preventing consideration of the question raised in the petition, the petition for a writ of certiorari should be denied.

I. There is no conflict among the circuits on the question actually presented in this case.

To support its argument that this case raises an issue about discriminatory exclusion among members of the press, MacIver points to a handful of out-of-circuit cases about discriminatory treatment and press access, claiming that those cases "squarely" conflict with the Seventh Circuit's decision here. (Pet. 3.) MacIver's framing of the issue presents its own problems—most notably, that on the current record, MacIver is not a "member of the press," nor is there any evidence of discriminatory treatment. These factual problems with the petition are addressed further in Section III., *infra*. As for MacIver's purported circuit split, with the issue properly framed, there is no conflict between the decision below and those MacIver cites.

MacIver first points to *American Broadcasting Companies, Inc. v. Cuomo ("ABC")*, 570 F.2d 1080, 1083 (2d Cir. 1977), which involved discriminatory treatment of one of the three major media outlets operating at the time (ABC, in relation to NBC and CBS). In that case, the mayoral candidates were effectively excluding ABC from campaign events because ABC was engaged in a labor dispute. *Id.* at 1082. The campaigns allowed NBC and CBS

crews to enter campaign events, but those networks' crews threatened to leave if the campaigns permitted ABC's management crew onto the premises. *See id.* So the campaigns refused to allow ABC's management crews into campaign facilities and threatened prosecution for trespass if they entered. *See id.*

The court enjoined prosecution of ABC's crew, but only on the condition "that CBS and NBC participate simultaneously in the broadcasts in question." *Id.* at 1084. If those other networks "refuse[d] to either cross the picket line or have their managerial crew operate," the court's injunction would be inoperative. *See id.*

The fact-bound decision in *ABC* is distinguishable on multiple grounds. Most simply, the case hinged on two components that are lacking here: a claimant who the government unquestionably considered bona fide press, and discriminatory treatment of the claimant in relation to others in that group. *See id.*

This disparity is highlighted in MacIver's reliance on a single quote from *ABC*—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." *Id.* at 1083 (emphasis added); (*see also* Pet. 11–12). Here, the only evidence of record shows that the Governor's Office reasonably concluded that MacIver is not a member of the bona fide "media" as was at issue in *ABC*.

ABC is distinguishable for additional reasons. The central question in that case was not whether ABC itself had a constitutional right to access the campaign events, but whether it was necessary to enjoin prosecution of ABC's crew to ensure that the "viewing public" would not be "limited to a single channel." *ABC*, 570 F.2d at 1082, 1084. Here, there is no threat of prosecution nor any evidence that the public would be "limited to a single channel" by application of the media-access criteria for certain press events.[7] *ABC* has no relevance to—and certainly does not conflict with—the decision below.

MacIver next points to a more recent Second Circuit decision, *Huminski v. Corsones*, 396 F.3d 53 (2d Cir. 2005), but that case is even more off-point because it did not involve "the press" at all. Instead, it involved a claim by a member of the public who had made threatening statements about certain judges and, as a result, was barred from being on court property. *See id.* at 58–59. The *Huminski* court's focus was on the appropriate standard for assessing claims relating to the "right of access to courtrooms, judicial proceedings, and judicial records." *Id.* at 80; *see also, e.g.*, *id.* at 83 (noting this Court's decisions "firmly establish[ing]" the right of "the press and general public" to access criminal

[7] As the Seventh Circuit noted, *ABC* is distinguishable for yet another reason, which is that it predated this Court's modern forum decisions. (*See* Pet. App. 18–19.) MacIver makes no showing that the Second Circuit (or any other circuit, for that matter) has struggled to properly apply the forum analysis in more recent and truly analogous cases.

trials) (quoting *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 603–04 (1982)); *see also id.* at 80–85. Thus, contrary to MacIver's characterization (*see* Pet. 12–13), *Huminski* did not mandate equal access to all governmental events, and instead simply applied this Court's longstanding precedents requiring broad access to courts and court papers. *See Huminski*, 396 F.3d at 83–85. The decision says nothing about MacIver's claimed right to attend the Governor's limited-access event.

The First Circuit case on which MacIver relies, *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986), is equally "off the mark." (Pet. App. 19.) That case, like *Huminski*, also involved access to court documents and is distinguishable on that basis alone. *See Anderson*, 805 F.2d at 9. *Anderson* is further distinguishable because, similar to the Second Circuit's decision in *ABC*, it involved a protective order that gave preferential access to a single media entity, WGBH, to the detriment of other, *equally bona fide* media outlets. *See id.* The case therefore involved two premises lacking here: an entity with undisputed journalistic bona fides, and discriminatory treatment of that entity in relation to similarly qualified media outlets.[8] *See id.*; *see also infra* § III. (discussing factual

---

[8] As below, MacIver proffers a string citation of cases that have supposedly adopted the "equal access" rule that MacIver proposes should govern here. (Pet. 16.) The Seventh Circuit correctly rejected this shotgun approach to argument. (*See* Pet. App. 19.) And more to the point, none of the string-cited cases shows any conflict on the issue presented in this case. (*See, e.g.*, 7th Cir. Dkt. 9:39–40 (appellee's brief distinguishing cited cases).)

problems with MacIver's framing of the question presented).

Even further afield are the D.C. Circuit's decisions in *Sherrill v. Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977), and *Karem v. Trump*, 960 F.3d 656, 660 (D.C. Cir. 2020). (*See* Pet. 13–14.) Both cases again involved the arbitrary revocation of access for an undisputedly bona fide journalist. *See Karem*, 960 F.3d at 660, 665; *Sherrill*, 569 F.2d at 131–32. Notably, the court in *Sherrill* emphasized that heightened scrutiny was appropriate only because no one questioned whether the reporter met the professional norms for bona fide journalists, and the White House voluntarily opened press facilities that were "perceived as being open to all *bona fide Washington-based journalists*." *Sherrill*, 569 F.2d at 129 (emphasis added); *accord Karem*, 960 F.3d at 665 (focusing on the "interest of a bona fide Washington correspondent in obtaining a White House press pass") (citation omitted).

Additionally, as the Seventh Circuit recognized, both *Sherrill* and *Karem* are more properly read as relating to the procedural protections for those who hold media credentials, not as stating a rule that the government may not establish or implement such criteria at all. (Pet. App. 19.) For example, *Sherrill* emphasized the importance of "notice, opportunity to rebut, and a written decision" pertaining to "the

denial of a [press] pass."[9] *Sherrill*, 569 F.2d at 128; *see also id*. at 131. And *Karem* emphasized that its "stringent vagueness and fair-notice test" was driven by the fact that the case involved a "bona fide Washington correspondent." *Karem*, 960 F.3d at 665.

Finally, the one case that MacIver claims to be in line with the Seventh Circuit's decision here, *The Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 417–19 (4th Cir. 2006), is also materially distinguishable from the decision below. *Baltimore Sun* involved a reporter's retaliation claim against the Governor, following his directive that "no one in the Executive Department or Agencies is to speak with [the Sun reporter or certain associates]." *Id.* at 413 (citation omitted). Appropriately, the court's holding was squarely grounded in retaliation precedent, *see id.* at 416–20, not, as MacIver claims, in a novel theory under the Press Clause (*see* Pet. 17–19). In light of its focus on retaliation, the Fourth Circuit's broad statements about "giving preferential access to some reporters and refusing to give access to" or answer the questions of other reporters does not point up a conflict *at all*, much less in this case. (*Contra id*. at 17–19.)

Baltimore Sun did, however, share a feature with the other cases on which MacIver relies. In *Baltimore Sun*, just as in *ABC*, *Anderson*, *Sherrill*, and *Karem*, the court was operating on a factual record in

---

[9] Notably, despite relying heavily on *Sherrill* (and later *Karem*), MacIver has never framed its claim as grounded in due process. (*See, e.g.*, Dkt. 1; 7th Cir. Dkt. 14:3–6.)

which there was no dispute that the challenger was a bona fide media outlet. None of these cases had occasion to assess the question actually presented in this case, which is whether a governor may use reasonable, viewpoint-neutral criteria to decide who may attend limited-access governmental events. MacIver points to no conflict among the circuits on this issue. There is none.

II. The Seventh Circuit's decision is correct and consistent with this Court's precedents.

There is no circuit split on the issue of whether MacIver was reasonably excluded from the Governor's limited-access press events. This Court's review also is unnecessary because the Seventh Circuit's decision was correct and was consistent with this Court's First Amendment precedents.

First, the Seventh Circuit's decision is perfectly consistent with this Court's "'forum based' approach for assessing restrictions that the government seeks to place on the use of its property." *Minn. Voters All.*, 138 S. Ct. at 1885 (quoting *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)); *see also Ark. Educ. Television Comm'n*, 523 U.S. at 673–75, 679–81; *Cornelius*, 473 U.S. at 803–05; *Perry Educ. Ass'n*, 460 U.S. at 46–47; (Pet. App. 12–18). Applying this established approach to the facts here, the Seventh Circuit correctly held that the Governor's limited-access press events are nonpublic forums from which MacIver and its staff were reasonably excluded. (Pet. App. 12–16.) This

comports with this Court's recognition that the use of "extensive admission criteria" is a strong indicator that the facility or event at issue is nonpublic, such that any restrictions on access need only be reasonable and neutral. *See, e.g.*, *Cornelius*, 473 U.S. at 803–05; *Ark. Educ. Television Comm'n*, 523 U.S. at 680.

The record amply supports the lower courts' conclusions about the reasonableness and neutrality of the Governor's determination that MacIver was not eligible to attend limited-access press events. Both the Seventh Circuit and the district court correctly recognized that MacIver—a think tank dedicated to policy advocacy and lobbying—did not meet the Governor's media-access criteria and was therefore properly excluded from the press event at issue. (*See* Pet. App. 12–17, 49.)

The Seventh Circuit was also correct in rejecting each of MacIver's counterarguments in support of its novel right of "equal access" grounded in the First Amendment's Press Clause.[10] (*Id.* at 16–18.) This

---

[10] As the Seventh Circuit noted, MacIver abandoned its Equal Protection claim in favor of pursuing its "equal access for the press" claim under the First Amendment. (*See* Pet. App. 22–23.) Amicus Scott Walker's equal-protection argument is therefore unpersuasive for two reasons. (*See* Scott Walker Br. 10–14.) It's wrong procedurally because it urges this Court to grant the petition on a ground that even Petitioners have disavowed and abandoned. It's also wrong on the merits because, with no showing of any fundamental right or suspect class, the claim would fail on the same "reasonableness" analysis applicable in the First Amendment inquiry. *See Perry Educ. Ass'n*, 460 U.S. at 54 (recognizing that a failed First Amendment claim "fares no better in equal protection garb").

Court has squarely and consistently rejected the notion that the Constitution guarantees special protections for "the press" above what is accorded the public. *See Houchins*, 438 U.S. at 15–16 (plurality op.); *Branzburg*, 408 U.S. at 681–84; *Zemel*, 381 U.S. at 17. The decision below thus heeded this Court's admonition that "until the political branches decree otherwise . . . the media have no special right of access to [governmental information] different from or greater than that accorded the public generally." *Houchins*, 438 U.S. at 16 (plurality op.); *see also id.* (Stewart, J., concurring in the judgment); *McBurney v. Young*, 569 U.S. 221, 232 (2013) (reaffirming *Houchins's* rejection of a constitutional right of access to governmental information); *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999) (rejecting facial attack to statute governing access to government records, recognizing government "could decide not to give out . . . information at all without violating the First Amendment").[11]

[11] In light of the clear statements from this Court rejecting the type of special press access that MacIver claims, the Seventh Circuit was also correct to reject MacIver's analogy to this Court's decisions in *Minneapolis Star & Tribute Co.*, 460 U.S. 575; and *Arkansas Writers' Project, Inc.*, 481 U.S. 221. (Pet. App. 20–21.) Those cases involved tax laws that directly and discriminatorily burdened newspapers as an industry, *see Minn. Star & Tribute Co.*, 460 U.S. at 581; including on the basis of the content being published, *see Ark. Writers' Project, Inc.*, 481 U.S. at 229–30. These precedents about taxing newspapers have no bearing on this case asserting a constitutional right to attend a governor's limited-access events.

The decision below likewise comports with the original public meaning of the First Amendment's protection of a free press. That protection has never been understood to "invalidate every incidental burdening of the press" that may result from generally applicable regulations. *Branzburg*, 408 U.S. at 682. Instead, it pertains to restrictions on writing, publishing, and dissemination—none of which are even arguably impinged by the media-access criteria here. *See id.* at 683–84; *Houchins*, 438 U.S. at 9–10 (plurality op.); *Mills v. State of Ala.*, 384 U.S. 214, 219 (1966); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249 (1936); *see also Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1168–71 (3d Cir. 1986) (examining original meaning of First Amendment protections as not including a guarantee of access). The Seventh Circuit was therefore correct to recognize this case as governed by the principle that "[t]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." (Pet. App. 17 (quoting *Branzburg*, 408 U.S. at 684).)

The Seventh Circuit was also correct to reject MacIver's arguments about how the access criteria have allegedly been applied to *others*, given the lack of any factual support for those arguments. (*Id*. at 15–16.) The Seventh Circuit found those arguments were based solely on "naked assertions . . . unsupported by references to the record." (*Id*. at 16.) Indeed, as the court recognized, the only evidence of record is to the contrary: MacIver was treated exactly the same as another (supposedly "liberal") think tank, the Wisconsin Policy Forum, whose staff was also

excluded from the same press briefing at issue here. (*Id*. at 15.) While raising the same "naked assertions" of bias here (*see* Pet. 25–27), MacIver still provides no explanation why this Court should venture beyond the record, much less why those assertions support the creation of a novel constitutional right of special access for "the press."

Finally, strong and serious practical considerations support the Seventh Circuit's decision. In upholding the Governor's media-access criteria, the Seventh Circuit correctly noted the practical difficulties that would arise if government entities were not allowed to apply reasonable, neutral criteria to determine who may attend limited-access events. For one, the media-access criteria at issue here are not unique—indeed, the Governor's criteria are drawn from Congress's media-access criteria. (*See* Dkt. 15-1:1.) Invalidating Governor Evers's criteria could have dramatic, wide-ranging impacts across all levels of government. (Pet. App. 22–23.)

More fundamentally, the Seventh Circuit correctly recognized that adopting MacIver's novel position would effectively constitutionalize the task of defining who is and who is not "press." (*See id*. at 21–23.) Contrary to MacIver's assertion, this *would* require courts to engage in precisely the type of line drawing between "every person with a Twitter handle." (*Contra* Pet. 33.) Under MacIver's approach, it would be for courts to decide, as a constitutional matter, which bloggers *must* be admitted to a governor's press

events and whose attendance could permissibly be limited along with all other members of the public.[12]

But this Court's decisions already make clear that "until the political branches decree otherwise, as they are free to do, the media have no special right of access" beyond that enjoyed by every citizen, *Houchins*, 438 U.S. at 16, and that there is no "First Amendment right" to demand "entry into the White House," *Zemel*, 381 U.S. at 16–17—or, as the Seventh Circuit correctly concluded, Wisconsin's Governor's conference room. As the decision below illustrates, this Court's precedents already provide a clear, workable framework for assessing questions of press access like that presented here. (Pet. App. 12–21.)

---

[12] Multiple amici likewise urge that there is a role for courts to play in defining the class of constitutionally protected "press" (*see, e.g.*, Atlantic Legal Foundation Br. 13–17; Center for Constitutional Jurisprudence Br. 6–11), or at least suggest that "the press" should *not* be defined by the political branches (*see, e.g.*, Goldwater Institute, et al. Br. 17–25). Those arguments fail to grapple with this Court's precedents squarely recognizing that decisions about who is and who is not "press" is not a constitutional question for the courts to decide, *see, e.g.*, *Houchins*, 438 U.S. at 15–16; *Branzburg*, 408 U.S. at 684; *Zemel*, 381 U.S. 17, and that if there is any role for the First Amendment to play in deciding access to governmental facilities, that analysis is properly situated under this Court's forum analysis, *see, e.g.*, *Ark. Educ. Television Comm'n*, 523 U.S. at 675–76. The Seventh Circuit correctly applied those principles here. (Pet. App. 12–18.)

III. In light of undisputed evidence in the record, this case is an improper vehicle to address the question MacIver raises.

MacIver's petition frames the question presented as whether Governor Evers's "selective exclusion of members of the press implicates the equal treatment guarantee of the First Amendment's Press Clause." (Pet. ii.) This framing rests on two premises that are squarely refuted by the record: one, that MacIver is a "member[ ] of the press;" and two, that there is some ideologically motivated "selective exclusion" at play in this case. (*Id.*) Given the centrality of both premises in MacIver's petition, the absence of any record support for these premises makes this case an improper vehicle to address the question presented.

The petition's first flawed premise is that MacIver and its staff are "members of the press." (*Id.*) Contrary to MacIver's unsupported identification as "press" and its claim for access on that basis, the Governor's Office determined that MacIver "do[es] not qualify as bona fide press," based on the neutral access criteria. (Pet. App. 63; *see* Dkt. 15-1:1.) The district court found that to be a reasonable determination based on what the record shows about MacIver. (Pet. App. 49.) This included finding that MacIver "publicly brands itself as a think tank," it "engages in policy-driven political advocacy, including advocating for specific initiatives," and, while it "has a 'news' tab on its website, . . . it does not maintain a news-gathering organization separate from its overall ideological mission." (*Id.*)

The Seventh Circuit upheld these findings, pointing out that MacIver made "no effort to distinguish" its "News Service" from the think tank's policy-driven mission. (*Id*. at 15 (citation omitted).) Thus, there is no support in this record for MacIver's premise that it is a "member of the press." Its petition can be rejected on this basis alone.

Second, both the district court and the Seventh Circuit held there is also no record support for the premise that Governor Evers "selective[ly]" excluded MacIver in the way MacIver suggests—namely, that MacIver was "target[ed]" based on its perceived viewpoint. (*See* Pet. ii, 2, 21–23.) To the contrary, the district court found, and the Seventh Circuit affirmed, that the record easily supported the Governor's Office's determination that MacIver did not meet the neutral media-access criteria. Indeed, the Seventh Circuit directly rebuffed MacIver's "naked assertions of bias" as "unsupported by references to the record." (Pet. App. 16.) Other than these "naked assertions" and MacIver's say-so, there is simply nothing in this record to support the petition's second flawed premise of selective, viewpoint-based exclusion.

Therefore, contrary to the petition, this record does not present any issue relating to MacIver as a "member[ ] of the press" and the case is thus

an inappropriate vehicle to review the question presented in the petition.[13] (*Contra* Pet. ii.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

GABE JOHNSON-KARP
Assistant Attorney General
Counsel of Record

Attorneys for Respondent

Wisconsin Department of Justice
17 West Main Street
Madison, WI 53703
(608) 267-8904
johnsonkarpg@doj.state.wi.us

November 9, 2021

---

[13] Two of the four amici rest their arguments for granting the petition exclusively on these mistaken premises. (*See, e.g.*, Atlantic Legal Foundation Br. 5 (framing issue as involving "[s]electively [e]xcluding [m]embers of the [p]ress"); Center for Constitutional Jurisprudence Br. 9 (asserting that "[h]eightened scrutiny is required when government selectively excludes members of the press").) A third similarly couches the constitutional right at issue as belonging to "journalists." (*See* Goldwater Institute, et al. Br. 17–25.) All of these arguments therefore suffer the same fatal flaw that infects the petition and can be rejected just the same.