No. 20-1814

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

JOHN K. MACIVER INSTITUTE FOR PUBLIC POLICY, INC., et al.,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

APPEAL FROM A JUDGMENT ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, THE HONORABLE JAMES D. PETERSON, PRESIDING

# BRIEF OF DEFENDANT-APPELLEE

JOSHUA L. KAUL
Attorney General of Wisconsin

GABE JOHNSON-KARP*
Assistant Attorney General
State Bar #1084731

Attorneys for Defendant-Appellee

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8904

**Counsel of Record*

# TABLE OF CONTENTS

Page

Page

Page

## TABLE OF AUTHORITIES

**Cases**

Page

Page

Page



**Statutes**



**Other Authorities**

## INTRODUCTION

This case involves a request to recognize a new constitutional right. The John K. MacIver Institute for Public Policy, Inc. ("MacIver"), a Wisconsin-based think tank that describes itself as "The Free Market Voice for Wisconsin," claims that the First Amendment guarantees MacIver staff a right of "equal access" to attend any press events that Wisconsin's Governor holds, other than one-on-one interviews. There is no binding precedent that supports MacIver's novel view of the First Amendment.

On the contrary, the Supreme Court and this Court have made clear that when members of the media seek access to governmental events or information, the media's right is no different from members of the public. And for both the public and the press, when courts evaluate First Amendment claims of access to such events or information, courts apply the well-established forum doctrine.

Applying that doctrine here, the district court properly concluded that Governor Evers's press events are nonpublic forums, and therefore his media-access criteria must be only reasonable and viewpoint-neutral. The Governor's criteria easily meet those requirements, as the district court held.

As for MacIver's viewpoint-discrimination claim, nothing in the record supports it. This was clear below and is amplified in MacIver's briefing to this Court, where its arguments consist almost entirely of off-point citations to

websites and nonbinding case law. Nothing MacIver points to shows that Governor Evers discriminated based on viewpoint when he concluded that MacIver was not a bona fide press organization. Instead, the record shows that MacIver is a policy-focused think tank, not principally a news organization, which is what the Governor's criteria require for press access.

As the district court rightly held, both the record and the law squarely support Governor Evers. That court's judgment should be affirmed.

## JURISDICTIONAL STATEMENT

Plaintiffs-Appellants' jurisdictional statement is not complete and correct. Defendant-Appellee provides a complete jurisdictional statement as follows.

On August 6, 2019, Plaintiffs-Appellants filed a complaint under 42 U.S.C. § 1983, alleging violations of their rights under the First and Fourteenth Amendments to the United States Constitution. (Dkt. 1.) The district court had federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343, and venue was proper in the Western District under 28 U.S.C. § 130(b).

On April 14, 2020, the district court issued an order granting summary judgment in favor of Defendant-Appellee on all claims. (Dkt. 32.) A final judgment dismissing the case in its entirety was entered on April 14, 2020. (Dkt. 33.) Plaintiffs-Appellants filed a notice of appeal on May 14, 2020. (Dkt. 34.) This Court has jurisdiction to decide this appeal pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

Under the First Amendment forum doctrine, unless there is clear evidence of intent to create a public forum, a property or event will be held to be a nonpublic forum, in which access restrictions must simply be reasonable and viewpoint neutral. Here, Governor Evers has adopted media-access criteria for certain press events. These criteria are derived from similar standards applied by the U.S. Congress and the Wisconsin Capitol Correspondents Board. The criteria require, among other things, that applicants are affiliated with an organization whose principal business is news dissemination, with a periodical publication component or an established television or radio presence; that the correspondent and the organization be free of associations that would compromise journalistic integrity; and that the correspondent and organization not engage in any lobbying, paid advocacy, advertising, publicity or promotion work for any individual, political party, corporation, or organization.

Applying these criteria, the Governor's staff concluded that MacIver was not a bona fide media organization and therefore did not grant MacIver access to the Governor's limited-access press events. The district court, applying the forum doctrine, concluded that the Governor's press events are nonpublic forums; that the media-access criteria were a reasonable and viewpoint-neutral means to decide access to those events; and that the

Governor had appropriately declined to grant MacIver access to his limited-access press events. The district court also concluded that no record evidence supported MacIver's claim that the Governor discriminated against MacIver based on its viewpoint.

1. Based on controlling First Amendment precedent, including the forum doctrine, did the district court properly dismiss MacIver's equal-access claim?

2. Given that there is no evidence in the record showing that the Governor's media-access decision was based on MacIver's viewpoint, did the district court properly dismiss MacIver's viewpoint-discrimination claim?

## STATEMENT OF THE CASE

### I. Factual background.

#### A. The parties.

Plaintiff-Appellant John K. MacIver Institute for Public Policy, Inc. characterizes itself as "a Wisconsin-based think tank that promotes free-markets, individual freedom, personal responsibility, and limited government." (Dkt. 9:1.) One of the Institute's "activities" is "sponsor[ing] the MacIver News Service." (Dkt. 1:2, 4; 16:1, 2.) Plaintiff-Appellant William Osmulski is a reporter and news director for MacIver News Service. (Dkt. 1:2–3; 16:3.) This brief refers to these Plaintiffs-Appellants collectively as "MacIver."

Defendant-Appellee Tony Evers is the Governor of the State of Wisconsin. (Dkt. 15:1; 16:3.)

### B. The Governor's press events.

Governor Evers regularly holds events during which he answers questions from members of the press. (Dkt. 11:2–3; 15:2–11.) These events fall into four general categories: public events, press conferences, press briefings, and one-on-one interviews. (Dkt. 15:1.)

#### 1. Public events.

The Governor's public events sometimes include a period during which the press can ask questions, known as a "press avail." (Dkt. 15:2.) These events are open to all and may be publicized via press releases and social media. (Dkt. 15:2.) For other public events, notifications may be handled by other elected officials, state agencies, or organizations. (Dkt. 15:3.)

Examples of this type of public event that included press avails are the Governor's appearance at the opening ceremonies of the 2019 Wisconsin State Fair and his hosting of multiple budget listening sessions across the state in spring 2019. (Dkt. 15:2.) MacIver, just like any other member of the public, may attend this type of event, follow the Governor's feeds on the various social media platforms, and sign up for press releases. (Dkt. 15:2.)

**2. Press conferences.**

The Governor also holds limited access press conferences and other press-exclusive events to which only some members of the press are invited. (*See* Dkt. 15:2, 3–6, 8–10.) These events allow the media to learn about the Governor's different initiatives, plans, or priorities. (Dkt. 15:3.) Attendance at these events is necessarily limited due to time, space, and security, as well as other venue-specific factors. (Dkt. 15:3.) An example of this type of event is the Governor's tour of the UW-Milwaukee School of Freshwater Sciences, where a limited number of journalists were invited on the tour, which was followed by a press avail. (Dkt. 15:3.)

One way that members of the media are notified of this type of event is via the Governor's media advisory email list, described more fully below. (Dkt. 15:4.) After receiving email notification of limited-access events, invitees who wish to attend must RSVP so that the Governor's office, including security personnel, can plan and prepare for the event. (Dkt. 15:4.) Depending on the type of event, the Governor's office may also reach out to members of the press from a specific geographic area or those interested in the specific subject matter. (Dkt. 15:4.) For some events, invitations and logistics may be handled by other officials, agencies, or non-governmental organizations. (Dkt. 15:4.)

**3. Press briefings.**

The Governor or members of his staff also occasionally hold a smaller type of limited access press event called a press briefing. (Dkt. 15:8.) The Governor's office has historically held press briefings as a courtesy to members of the press to provide additional background before the release of large-scale initiatives. (Dkt. 15:8.) These are off-the-record events, which means that the information is not intended for public release or as an official representation or statement. (Dkt. 15:8.) Thus, some materials provided at this type of event might be subject to embargoes (i.e., requests that provided information will not be made public until a designated time). (Dkt. 15:7–8.)

**4. One-on-one interviews.**

Finally, the Governor sometimes grants interviews with individual reporters, just as he or members of his staff may meet with individual members of the public, advocacy organizations, or registered lobbyists. (Dkt. 15:10–11.) Meetings with individual reporters are subject to the expectation that the interview will adhere to established journalistic standards, including respecting embargoes and preserving the distinction between on- and off-the-record statements. (Dkt. 15:10–11.)

### C. The Governor's media advisory list.

The Governor's communications department maintains a media advisory list that it uses to notify members of the media of certain limited-access events. (Dkt. 15:3, 4.) The original version of the Governor's media advisory list was based on a list used during his campaign for governor. (Dkt. 15:5.) The Governor's media advisory list is now limited to journalists and news organizations that meet established criteria for determining whether the requestor is a bona fide press organization. (Dkt. 15:5–6.)

A memorandum from the Governor's office of legal counsel to the communications department provides "guidance for determining how and when media is granted access to the Governor for exclusive/limited-access events." (Dkt. 15-1:1.) It states that the "most important consideration is that access is based on neutral criteria." (Dkt. 15-1:1.) In addition to space and security considerations, the memo advises the communications staff to consider the following non-exhaustive factors when evaluating requests for access:

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.) These factors were modeled on press-access standards used by the Wisconsin Capitol Correspondents Board and the United States Congress. (Dkt. 15-1:1 n.1.)

The 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.)

MacIver is not included on the Governor's media advisory list because the communications department determined that MacIver does not "qualify as bona fide press" and "their practices run afoul of the neutral factors" set forth

in the memorandum. (Dkt. 15:6.) Because MacIver does not meet the criteria for inclusion on the media advisory list, its reporters are not typically invited to limited-access press events like press conferences and briefings. (Dkt. 15:4, 10.)

### D. Dispute that led to this lawsuit.

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 contemporaneously with the budget's public release. (Dkt. 15:8–9.) The Governor did not attend this event. (Dkt. 15:9.)

MacIver reporters were not invited to this event and were therefore not permitted to attend.[1] (Dkt. 15:10.) Other individuals and groups also were not invited and not permitted to attend—indeed, hundreds of journalists, news organizations, bloggers, think tanks, and internet personalities who cover Wisconsin politics were not invited to this small-scale briefing held in the

[1] The media advisory list is not used for invitations to small-scale press briefings like the one held on February 28, 2019. Instead, invitees to this type of event must meet the criteria for inclusion on the media advisory list *and* their organization must have a readership or viewership justifying inclusion. (Dkt. 15:9.) For example, media outlets that routinely cover capitol matters, including outlets that are on the Capitol Correspondents list, may be included. (*See* Dkt. 15:9–10 (noting that Governor's office does not decide inclusion on Capitol Correspondents list.) The Governor's office might also consider additional factors, such as subject-matter specialty. (Dkt. 15:9.)

Governor's conference room. (*See* Dkt. 15:10.) For example, Jason Stein, a journalist formerly with the Milwaukee Journal Sentinel and Wisconsin State Journal, asked to attend. (Dkt. 15:10.) However, he was denied admission because he is no longer affiliated with an invited organization and instead works for the Wisconsin Policy Forum, an organization that describes itself as a nonpartisan, independent policy research organization. (*See* Dkt. 15:10.[2])

In addition to denying MacIver's request for access to this small-scale press briefing, Governor Evers's office has repeatedly denied MacIver's requests to be included on the media advisory list, which would notify MacIver of limited-access press conferences. (Dkt. 16:4–5.)

## II. Procedural history.

On August 6, 2019, MacIver filed the current action alleging three claims: (1) a First Amendment claim that it had been denied equal access to certain events and press email lists announcing events; (2) a First Amendment claim that its exclusion from certain events and email 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

[2] *See also* https://wispolicyforum.org/about-us.

and effectively ordering the Governor to invite MacIver in the future. (*See* Dkt. 1:9–10.)

On August 20, 2019, MacIver moved for a preliminary injunction. (Dkt. 6–9.) As in its complaint, MacIver effectively sought 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 makes no distinction between limited-access events like press conferences and narrower events such as briefings. (Dkt. 1:9–10; 11:3–5.)

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. (Dkt. 30:20.)

In response to the show-cause order, MacIver requested permission to file a renewed motion for summary judgment, including new declarations from MacIver representatives. (Dkt. 31.) Along with the new evidence, the updated motion would develop a new legal argument about who counts as the

"press" (on the theory that the question hinges on the individual journalist rather than the entity that employs him). (*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." (Dkt. 32:1–2.) The court found that "[i]t would be unfair to give the plaintiffs a do-over because they don't like the court's decision on the merits." (Dkt. 32:2.)

The court then granted summary judgment in favor of Governor Evers. (Dkt. 32:2.) The court concluded that the undisputed facts show that the Governor uses "reasonable, viewpoint-neutral criteria for granting press credentials," and that MacIver adduced no evidence that the Governor had applied those criteria "unreasonably or to disadvantage [MacIver's] viewpoint." (Dkt. 32:2.) The court entered a final judgment dismissing the case on April 14, 2020. (Dkt. 33.) This appeal followed. (Dkt. 34.)

## SUMMARY OF THE ARGUMENT

MacIver's claims are based on a novel interpretation of the First Amendment, which would guarantee MacIver (and all self-identified members of the press) access to all of Governor Evers's press events other than one-on-one interviews. Unsurprisingly, no binding precedent supports MacIver's breathtaking position.

Rather, courts evaluate claims about access to governmental events under the rubric of nonpublic forums—if the events are forums at all. For example, some courts have concluded that press conferences are government speech, not subject to First Amendment protections; others have analyzed similar issues of government broadcasting in terms of the government's "proprietary" function, which simply requires that the action not be arbitrary or capricious, but with no limitation on viewpoint discrimination. But here, as the district court concluded, the Governor's limited-access press events are best analyzed as nonpublic forums, where access restrictions must simply be reasonable and viewpoint-neutral.

Applying that framework, the Governor's media-access criteria easily pass muster. The criteria, like those used in Congress and by the Wisconsin Capitol Correspondents Board, assess whether applicants for media access are affiliated with a bona fide press organization with wide readership or viewership, and whether the correspondent and organization adhere to widely accepted journalistic norms. Important here, this includes requiring that applicants not engage in lobbying or advocacy work for any individual, political party, corporation, or organization. The district court concluded that the Governor's criteria easily met the constitutional standard for access-limits for nonpublic forums.

The district court was also correct to reject MacIver's claim of viewpoint discrimination. The record shows that MacIver's access was denied because it is a think tank involved in policy advocacy, and not principally a news organization. As the district court found, there is simply no evidence in the record that the Governor denied MacIver media access based on MacIver's viewpoint. The record hasn't changed on appeal, and MacIver's citations to internet sites and inapplicable case law don't help.

None of MacIver's other arguments help either. MacIver asks that this Court declare it a member of "the press," but this argument is irrelevant and unsupported by case law. Even accepting that MacIver and its staff are "press," the question is still whether the First Amendment guarantees them access to the Governor's limited-access press events, or, conversely, whether the Governor may impose reasonable and viewpoint neutral standards to limit access to those events.

The district court properly rejected MacIver's claims challenging the Governor's media-access limits, and this Court should affirm that court's decision.

## STANDARDS OF REVIEW

This Court reviews a grant of summary judgment de novo, construing all facts and reasonable inferences in the light most favorable to the non-moving party. *Zaya v. Sood*, 836 F.3d 800, 804 (7th Cir. 2016). Summary judgment

should be affirmed where there are no genuine issues of material fact and the defendants are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

The decision to consolidate a decision on a preliminary injunction with a decision on the merits is reviewed for an abuse of discretion. *See Am. Train Dispatchers Dep't of Int'l Bhd. of Locomotive Eng'rs v. Fort Smith R. Co.*, 121 F.3d 267, 270 (7th Cir. 1997).

## ARGUMENT

MacIver's constitutional claims rest on the premise that any time Wisconsin's Governor grants access to *some* journalists or news organizations, the Constitution requires the Governor to grant access to *all*. There is no legal support for MacIver's position. Governor Evers is free to limit access to his events so long any restrictions are reasonable and viewpoint neutral. The record evidence amply supports the reasonableness and neutrality of the Governor's media access criteria, both as a general matter and as applied to MacIver.

### I. The district court was correct to reject MacIver's equal-access claim.

The district court properly rejected MacIver's claim to a right of "equal access" to Governor Evers's press events. Because there is no such fundamental right to equal access, the Governor's media-access criteria are properly evaluated (at most) under the well-established forum doctrine. Under

that approach, the Governor's media events are nonpublic forums, and the media-access criteria must simply be reasonable and viewpoint neutral, which they are.

### A. There is no basis in binding precedent to support a strict-scrutiny approach for analyzing access to governmental press conferences.

"[T]he First Amendment provides no special solicitude for members of the press." *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 946 (7th Cir. 2015). So while newsgathering "is not without its First Amendment protections," courts have "repeatedly declined to confer on the media an expansive right to gather information, concluding that such an approach would 'present practical and conceptual difficulties of a high order.'" *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 703–04, 707 (1972)).

As one example of these "practical and conceptual difficulties," the Supreme Court has acknowledged that there is "is no discernible basis" in the constitution for "standards governing disclosure of or access to information." *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality op.). Without any constitutionally ascertainable guidelines, "decisions as to how much governmental information must be disclosed in order to make democracy work historically have been regarded as political decisions to be made by the people and their elected representatives." *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1171 (3d Cir. 1986). The judiciary, on the other hand, "has never

asserted the institutional competence to make such decisions. The reason seems apparent. Neither the free speech clause nor the structure of the government described by the Constitution yields any principled basis for deciding which government information must be made available to the citizenry and which need not." *Id.* So "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 15–16 (plurality op.); *accord Dahlstrom*, 777 F.3d at 946; *see also 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 Pub. 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").

In contrast to what is at issue here, courts have recognized limited rights of access to certain governmental proceedings and documents, namely, judicial proceedings and some court documents. *See Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1069 (7th Cir. 2018) (recognizing "press's right of access to civil proceedings and documents"), *cert. denied*, 140 S. Ct. 384 (2019); *see also Dahlstrom*, 777 F.3d at 947 (discussing limited right of access). But even these rights of access are qualified and are "rooted in the access that the

public and press historically enjoyed to such proceedings, which led to a presumption of openness." *Dahlstrom*, 777 F.3d at 947. No court has recognized a broad right of access for members of the media to attend (or be invited to) governmental events such as press conferences or briefings, and precedent strongly suggests that none exists. *See Houchins*, 438 U.S. at 15–16; *Dahlstrom*, 777 F.3d at 947; *see also Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (recognizing difficulty posed by requiring judiciary "to define and approve[ ] pre-established criteria for [media] access").

Outside of the narrow rights of access previously recognized under the First Amendment, courts analyze questions of access to information under rational basis review. *See Dahlstrom*, 777 F.3d at 949 (applying this "residual level of scrutiny" to evaluate asserted right of media access to motor vehicle database information (quoting *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 652–53, 657 n.12 (7th Cir. 2013)). Stated otherwise, there is no basis in binding precedent to support MacIver's strict-scrutiny approach to analyze their asserted "right to equal press access amongst members of the news media." (MacIver Br. 7.) Instead, based on controlling precedent, the most rigorous standard possibly applicable here is the nonpublic forum's standard of reasonableness and viewpoint neutrality, as discussed next.

### B. Forum analysis provides the appropriate framework by which to evaluate the Governor's media-access criteria.

Because "the Government, 'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated,'" the Court has adopted a forum analysis to determine "when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)). The extent to which the government may limit access to a particular forum depends on the characteristics of the forum. *See id.* Courts recognize three types of forum: the traditional public forum; the public forum created by government designation ("designated public forum"); and the nonpublic forum. *Forbes*, 523 U.S. at 677.

#### 1. Traditional public forums.

Traditional public forums include streets, sidewalks, parks, and other property that by tradition has been "devoted to assembly and debate." *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). In traditional public forums, the government can exclude speakers "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id.* (citation omitted).

**2. Designated public forums.**

Whereas traditional public forums are defined based on historical practice, a designated public forum is "created by purposeful governmental action," *id.*, on public property that the government "has opened for use by the public as a place for expressive activity," *Perry Educ. Ass'n*, 460 U.S. at 45. Granting access to one individual, or even several individuals or groups, is not sufficient to show that the government intended to designate a public forum. *Forbes*, 523 U.S. at 678. Rather, to create a public forum the government must "open[ ] a nontraditional forum for public discourse," "intend[ing] to designate a place not traditionally open to assembly and debate as a public forum" and to "make the property 'generally available' to a class of speakers." *Id.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 264 (1981)). "A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers." *Id.* at 679. Relevant factors in the analysis include "the policy and practice of the government" and "the nature of the property and its compatibility with expressive activity." *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 864–65 (7th Cir. 2008) (quoting *Cornelius*, 473 U.S. at 802). Where a designated public forum exists, restrictions on access are subject to the same heightened level of scrutiny as traditional public forums. *See Forbes*, 523 U.S. at 677.

**3. Nonpublic forums.**

Where the government property or event at issue is not a traditional or designated public forum, the forum "is either a nonpublic forum or not a forum at all." *Id.* at 678. In a nonpublic forum, the government can restrict access if the restrictions are reasonable in light of the forum's purpose and are viewpoint neutral. *See id.* at 677–78. This recognizes that "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Perry Educ. Ass'n*, 460 U.S. at 46 (citation omitted).

While the characteristics of a physical property are relevant to forum analysis, the nature of the property is not dispositive. *See Cornelius*, 473 U.S. at 801. Rather, "the access sought by the speaker" controls the inquiry. *Id.* Under this approach, nonpublic forums have been found where individuals sought to distribute flyers through an internal school mail system, *see Perry Educ. Ass'n*, 460 U.S. at 48; to participate as qualifying charities in a charity drive created by the federal government for federal employees, *see Cornelius*, 473 U.S. at 805; and to participate as a candidate in a televised presidential debate on a state-owned public television station, *see Forbes*, 523 U.S. at 680.

The Supreme Court's analyses in *Cornelius* and *Perry* are instructive for analyzing forums where the First Amendment activity is not tied to a

particular location, or to physical property at all. *See Cornelius*, 473 U.S. at 801–02. For example, when the Court in *Cornelius* concluded that an ongoing fundraiser open to all federal employees was a nonpublic forum, it focused on the fundraiser itself as the "means of communication" to which the challengers sought access, rather than focusing on the "federal workplace." *Id.* Similarly, in *Perry* the Court evaluated the schools' "internal mail system" as opposed to the school facilities generally. *See Perry Educ. Ass'n*, 460 U.S. at 46–47. In both cases, the Court emphasized that prevailing practice and governmental policy guided the forum inquiry and led the Court to conclude that the forums at issue were nonpublic. *See, e.g.*, *Cornelius*, 473 U.S. at 804–05.

In both cases, the Court gave significant weight to the government's practice of limiting participation to "appropriate" participants, noting that participation had traditionally been governed by "extensive admission criteria." *Id.* at 804 (citing *Perry*). Such selective access, the Court held, combined with the lack of "evidence of a purposeful designation for public use," meant that no public forum existed. *Id.* at 805.

Also instructive is the Court's application of the forum doctrine in *Forbes*, which involved an independent presidential candidate's demand to participate in a debate broadcast on public television. There, the Court was hesitant to apply forum doctrine *at all*, noting that the doctrine's insistence on viewpoint

neutrality was a rough fit with broadcasting, since "the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination." *Forbes*, 523 U.S. at 673. The Court thus confirmed that, "in most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming." *Id.* at 675. Nonetheless, the Court concluded that "candidate debates present the narrow exception to the rule," such that forum analysis was appropriate, and held that the broadcast was a nonpublic forum. *See id.* at 675–76.

#### 4. Forum analysis is inapplicable to "proprietary" governmental activity and "government speech."

Finally, in at least two contexts, forum analysis is not applicable at all. These include, first, where the government acts in a "proprietary" capacity—i.e., when the government is "managing its internal operations, rather than acting as [a] lawmaker with the power to regulate or license." *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). In those instances, the government's actions "will not be subjected to the heightened review to which its actions as a lawmaker may be subject." *See Wis. Interscholastic Athletic Ass'n v. Gannett Co. ("WIAA")*, 658 F.3d 614, 622 (7th Cir. 2011) (quoting *Lee*, 505 U.S. at 678). When government acts in a proprietary capacity, "the First Amendment mandates that government action be reasonable, i.e., it may not be 'arbitrary, capricious, or invidious.'" *Id.* (quoting *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974)).

Second, under the "government speech" doctrine, a governmental entity "may say what it wishes and select the viewpoints that it wants to express." *O'Brien v. Vill. of Lincolnshire*, 955 F.3d 616, 624–25 (7th Cir. 2020). Where an activity is deemed government speech, First Amendment speech protections do not apply, and the government officials are instead subject only "to the check of political process, where objecting citizens may hold public officials to account through the ballot box." *Id.* at 624, 625. At least one Circuit has applied the government speech doctrine to governmental press conferences. *See Brandborg v. Bull*, 276 F. App'x 618, 620 (9th Cir. 2008).

### C. The press events at issue are at most nonpublic forums, and the Governor's access limitations satisfy the standards of reasonableness and viewpoint-neutrality.

MacIver seeks admission to limited-access press events like press conferences and briefings, as well as the email list used for announcing some of those events.[3] (Dkt. 1:9–10; 11:3–5.) In its brief, MacIver does not address the forum inquiry in any meaningful way. It therefore concedes that, if forum

[3] MacIver has not clearly stated the types of events to which it believes it is entitled access. (*See, e.g.*, Dkt. 1:10 (complaint, seeking admission to limited-access press briefing, but describing the event as a "generally available press event[ ]"); *see also* Dkt. 7:9 (preliminary injunction motion; same); MacIver Br. 6 (same)). MacIver does not seem to assert a right to attend one-on-one interviews with the Governor, and seems to concede that nothing in the media-access criteria bar it from attending the Governor's public events. MacIver thus seems to confine its asserted right of equal access to the limited-access press conferences and even narrower press briefings described above in subsections I.B.2. and 3. of the factual background. (*See* Dkt. 1:9–10; 11:3–5.)

analysis applies, the decision below was correct about the type of forum at issue. *See Hackett v. City of S. Bend*, 956 F.3d 504, 510 (7th Cir. 2020) ("An appellant who does not address the rulings and reasoning of the district court forfeits any arguments he might have that those rulings were wrong."). Accordingly, if selective-access events at issue here are forums at all, they are nonpublic forums and the Governor's access criteria will be evaluated for reasonableness and viewpoint neutrality.

### 1. If the Governor's press events are proprietary functions or government speech, any restrictions are subject to, at most, simple rational-basis review, without any viewpoint-neutrality requirement.

As an initial matter, it is important to note that the standard applicable to nonpublic forums is the *most* demanding that could reasonably be applicable here. So if the Governor prevails under the standard for nonpublic forums, the Governor would necessarily prevail under the other doctrines some courts apply separate from the forum inquiry.

For example, in one case where this Court found forum analysis inapplicable, the Court held that the governmental activity at issue was a "proprietary" activity, entitled to even less First Amendment scrutiny than under the forum doctrine's standard for nonpublic forums. *See WIAA*, 658 F.3d at 623. The Court in *WIAA* recognized that when government officials establish or implement certain governmental functions (like promulgating media

policies for interscholastic athletics broadcasting), the government "has the discretion to promote policies and values of its own choosing free from . . . the viewpoint neutrality requirement." *Id.* at 623 (quoting *Chiras v. Miller*, 432 F.3d 606, 613 (5th Cir. 2005)); *see also Chi. Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695, 701 (7th Cir. 1998).

Similarly, in the context of governmental speech, First Amendment protections are simply inapplicable. *See O'Brien*, 955 F.3d at 624. At least one Circuit has analyzed governmental press conferences as government speech and easily rejected a First Amendment challenge based on allegations similar to MacIver's. *See Brandborg*, 276 F. App'x at 619–20. There, the Ninth Circuit held that a United States Forest Service press conference "involved government speech" and that the challengers' exclusion "was not a violation of the First Amendment" since "only proponents of the government's point of view were to speak" at the conference. *Id.* If this Court were to conclude that the Governor's press events are government speech, the same would hold true here.

**2. Under forum analysis, the Governor's press events are nonpublic forums and the media-access criteria are reasonable and viewpoint neutral.**

Assuming application of the *most* rigorous standard potentially available—for nonpublic forums—the Governor's limited-access media events fit comfortably within that standard's governing principles. Here, MacIver is

not seeking access to particular facilities such as a press room or the Governor's conference room. (*See* Dkt. 1; 7.) Instead, MacIver appears to seek access wherever press events might occur. The Supreme Court's analyses in *Cornelius*, *Perry*, and *Forbes* are instructive.

**a. The Governor's press events are nonpublic forums.**

In *Cornelius* and *Perry*, the Court examined governmental policies and practices to determine whether the government had "opened" a forum in a school district's internal mail system for teachers, *see Perry Educ. Ass'n*, 460 U.S. at 46–47, and a charity drive in which federal employees could contribute to pre-approved charities, *see Cornelius*, 473 U.S. at 804–05. In both instances, policy and practice showed that the government had not intended to create a forum open for public expressive activity. *See, e.g.*, *id.* So despite the government in each case having allowed "limited access" to organizations the government deemed "appropriate," the Court found both forums "nonpublic." *See id.* at 803–05 (discussing *Perry*).

Notably, in both cases the use of "extensive admission criteria" was not problematic; to the contrary, the use of such selective criteria in the absence of a "purposeful designation for public use" drove the conclusion that the government had not intended to create a public forum for expressive activity. *See id.* at 804, 805. Likewise, in *Forbes*, 523 U.S. at 680, the Court emphasized

that allowing governmental intent to drive the forum analysis "does not render it unprotective of speech"; instead, "it reflects the reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for a specified class of speakers."

These principles make clear that the Governor's press conferences, briefings, and email lists announcing the same are nonpublic forums. Rather than being open-access events, the Governor's press conferences are open only to invited journalists who meet the criteria for bona fide press. (Dkt. 15:3–6, 8–10.) The Governor and his staff hold these events to provide information about the Governor's policy initiatives and programs. (*See* Dkt. 15:3–4, 8–10.) While these types of events *might* include time for some attendees to ask questions, both policy and practicality mean that any questioning will be limited depending on the Governor's schedule and logistical considerations of the event (e.g., space, timing, security). (*See* Dkt. 15:3, 8–10.)

The nonpublic nature of these limited-access events is underscored when comparing them with the "public events" the Governor might attend, such as an appearance at the opening of the Wisconsin State Fair. (*See* Dkt. 15:2.) Those events, which are open to the public and often include a "press avail" component, are arguably *closer* to a public forum, in that they often take place in traditional public spaces. But even for those events, governmental intent matters, *see Forbes*, 523 U.S. at 680, so by not intending to create an "open

mic" format or opening the floor to all members of a particular class of speakers, even those "public events" are still likely nonpublic forums. Comparatively, then, it is even clearer that the Governor's limited-access events are nonpublic forums. As such, "not all speech is equally situated," and the Governor "may draw distinctions which relate to the special purpose for which the property is used." *Perry Educ. Ass'n*, 460 U.S. at 55.

The existence of the media-access criteria only bolsters this conclusion. *See Cornelius*, 473 U.S. at 803–05. The fact that the Governor has applied "selective access" criteria to limit attendance highlights that the Governor does not schedule these events "for purposes of providing a forum for expressive activity" by the press or members of the public, *id.* at 805, but as a means of communicating his own updates and initiatives. Thus, just as in *Cornelius* and *Forbes*, the Governor's "practice in limiting access" supports the conclusion that the limited-access events, and the email list announcing the same, are nonpublic forums. *Id.* at 806; *see also Forbes*, 523 U.S. at 679–80.

**b. The Governor's media-access criteria are reasonable and viewpoint-neutral.**

Because the Governor's press events are, at most, nonpublic forums, the question then is whether the Governor's media-access criteria "are reasonable and are not an effort to suppress expression merely because [the Governor]

oppose[s] the speaker's views." *Forbes*, 523 U.S. at 677–78 (quoting *Cornelius*, 473 U.S. at 800). The media-access criteria easily meet this standard.

Derived from similar criteria used by the United States Congress and the Wisconsin Capitol Correspondents Board, the Governor's criteria set forth standards by which to evaluate applicants' adherence to professional standards of journalistic integrity. (Dkt. 15:7–8; 15-1.) Without such standards, any media-access list would be "virtually indistinguishable from any public mailing list." (Dkt. 15:7.) And since it is not possible or practical to allow every media outlet to attend every press event, the criteria are one method by which the Governor can limit attendance based on space constraints, security concerns, and expectations of journalistic integrity. (Dkt. 15:3.) The criteria are thus reasonably related to at least two legitimate goals regarding governmental communication with and through the press.

For one, the Governor has reasonably concluded that limited space and time are most effectively used by prioritizing access by journalists whose reporting will reach wider audiences. This is both reasonable and viewpoint-neutral, as demonstrated by the variety of perceived "liberal leaning" and "conservative leaning" outlets included on the media advisory list. (Dkt. 15:5–6; 15-2.) Indeed, including a wide variety of bona fide news organizations and journalists from across the state and nation, across the ideological spectrum, and from some unique markets that may not otherwise be reached (e.g., tribal

publications) has the benefit of reaching wide viewership or readership. Providing access to journalists from those organizations thus maximizes the public's access to newsworthy information. (Dkt. 15:9–10; 15-2.)

Second, the criteria are also reasonably related to ensuring journalistic integrity and separation between objective reporting and policy-driven advocacy. For example, individuals seeking access must be "employed by or affiliated with an organization whose principal business is news dissemination" and the parent news organization must have "published news continuously for at least 18 months" and have a "periodical publication component or an established television or radio presence." (Dkt. 15-1:1; *see also* Dkt. 15:5.) The organization must also "avoid real or perceived conflicts of interest," "resist pressures from advertisers, donors, or any other special interests to influence coverage," and not engage in any "lobbying, paid advocacy, advertising, publicity or promotion work for any individual, political party, corporation or organization." (Dkt. 15-1:1; *see also* Dkt. 15:5.)

It is eminently reasonable for the Governor to expect that journalists to whom he grants access will adhere to widely recognized professional standards, such as honoring embargoes and respecting the distinction between off-the-record and on-the-record communications. It is equally reasonable to expect that those journalists and organizations will provide an objective

account of the Governor's statements. Nothing about these expectations rests on the journalists or the organization's "viewpoint."

The access limitations the Governor uses here are just as reasonable and viewpoint neutral as the access restrictions the Supreme Court approved in *Perry*, *Cornelius*, and *Forbes*, all of which serve the government's "legitimate interest in 'preserving the [forum] . . . for the use to which it is lawfully dedicated.'" *Perry Educ. Ass'n*, 460 U.S. at 50–51 (citation omitted). Here, that lawful use is the Governor's communicating information to members of the media and, if he chooses, taking and responding to questions. The district court was correct to grant Governor Evers summary judgment on MacIver's media-access claim.[4]

### D. MacIver's arguments in support of strict scrutiny rest on an unsupported view of the First Amendment and ignore the forum doctrine.

Despite the clear precedent that supports treating the Governor's media events as (at most) nonpublic forums, MacIver fails to meaningfully address

[4] Since MacIver all but abandons any equal-protection argument, it has forfeited any challenge to the district court's decision on that claim. *See United States v. Banas*, 712 F.3d 1006, 1010 n.1 (7th Cir. 2013). But even if this Court were to reach the issue, the district court's analysis was correct. The Governor's access restrictions do not infringe on a fundamental right and are, therefore, subject to rational basis review. And as the Court noted in *Perry*, a failed First Amendment claim of this type "fares no better in equal protection garb." *See Perry Educ. Ass'n*, 460 U.S. at 54; *see also Turkhan v. Perryman*, 188 F.3d 814, 828 (7th Cir. 1999) (state action that does not target a suspect class or infringe on a fundamental right will be upheld if it bears a rational relation to some legitimate end).

the forum inquiry. Instead, MacIver asks this Court to ignore binding precedent, establish a new constitutional right of "equal access" for press, and apply strict scrutiny. MacIver is incorrect about the existence of this novel First Amendment right, and its proposed bases for applying strict scrutiny are unpersuasive.

### 1. MacIver forfeited its argument about who qualifies as "the press"; but the argument is irrelevant anyway.

In conjunction with its argument for strict scrutiny, MacIver includes an argument about qualifying as "the press" and whether that qualification entitles it to strict scrutiny. (MacIver Br. 12–15.)

For one thing, MacIver forfeited any argument on this point by failing to raise it below. MacIver asked that the case be decided solely on the preliminary-injunction record. (*See* Dkt. 29.) Once the district court did so—against MacIver—MacIver demurred, asking for another opportunity to present evidence; namely, declarations from MacIver representatives on the question of "who counts as 'the press' and whether the locus of the right lies with the employing entity, the journalist, or the news-gathering activity." (Dkt. 31:2.) The district court declined to allow that belated effort, but MacIver nonetheless presents this Court with pages of internet citations to support its argument about the right of the "equal access" for the press. The Court should deem this argument forfeited.

But even taking up the argument about "the press," it is irrelevant. This case is not about whether this Court concludes that MacIver qualifies as "the press." Indeed, as courts have consistently reaffirmed, defining the scope of rights for "the press" "present[s] practical and conceptual difficulties of a high order," *Dahlstrom*, 777 F.3d at 946 (quoting *Branzburg*, 408 U.S. at 703–04), best left to the political branches due to the political responsiveness of those branches and the lack of any constitutional or statutory standards to guide the judiciary. *See Houchins*, 438 U.S. at 15–16 (plurality op.); *see also Capital Cities Media*, 797 F.2d at 1171. So even accepting MacIver's assertion that the organization qualifies as "press," this case is about whether the Governor can implement reasonable, neutral criteria to decide whether MacIver should be granted access to the Governor's media events. And as for Osmulski, while the Governor has no reason to question his employment history or his professional accomplishments, the issue here is that the organization he currently works for simply does not meet the neutral media-access criteria. (*See* Dkt. 15:6–8; *see also* Dkt. 15-1.) None of MacIver's arguments about who is "press" helps decide this controlling issue.

**2. MacIver incorrectly ignores forum analysis to argue that strict scrutiny applies.**

MacIver's argument in favor of strict scrutiny rests on a faulty premise—that "forum analysis is a First Amendment freedom of *speech*

doctrine," and that it has no place in evaluating "a journalist's right to attend a press briefing under the freedom of press clause." (MacIver Br. 9.) For one thing, as discussed *supra* Argument § I.A., there is no fundamental "right to attend a press briefing." MacIver simply does not engage with the Supreme Court's decision in *Houchins* (and media-access cases discussed therein), this Court's decision in *Dahlstrom*, or binding precedent applying the forum doctrine. Instead, MacIver points to numerous out-of-circuit district court cases, most of which predate the Supreme Court's decisions on the modern forum doctrine. (*See* MacIver Br. 7–11.)

As the district court here correctly observed, "courts now routinely analyze press-access issues under public forum doctrine." (Dkt. 30:11.) At least four district courts have done so since *Perry* and *Cornelius* established the modern public forum doctrine.[5] Applying modern forum analysis to press-access issues after *Perry* and *Cornelius* is perfectly natural; as explained above, the limited-access events to which MacIver seeks access are readily comparable to the forums at issue in those cases. *See, e.g.*, *Cornelius*, 473 U.S. at 802–05.

[5] *See Youngstown Pub. Co. v. McKelvey*, No. 4:05-CV-00625, 2005 WL 1153996, at *6 (N.D. Ohio May 16, 2005), *op. vacated on other grounds, appeal dismissed sub nom. Youngstown Publ'g Co. v. McKelvey*, 189 F. App'x 402 (6th Cir. 2006); *Telemundo of Los Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095, 1101–02 (C.D. Cal. 2003); *Getty Images News Servs. Corp. v. Dep't of Def.*, 193 F. Supp. 2d 112, 119 (D.D.C. 2002); *Nation Magazine v. U.S. Dep't of Def.*, 762 F. Supp. 1558, 1573 (S.D.N.Y. 1991).

In arguing against the contemporary rule, MacIver relies principally on *Sherrill v. Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977), which held that the denial of a press pass to Robert Sherrill, a bona fide Washington correspondent for *The Nation* magazine, required a compelling government interest.

As an initial matter, as the district court pointed out, the court in *Sherrill* did not invoke forum doctrine (which had not yet been recognized), and "MacIver doesn't cite any more recent authority for its contention that press-credentialing is subject to strict scrutiny." (Dkt. 30:11.)

Indeed, the *Sherrill* court did not even go as far as holding that all press access issues must be subject to strict scrutiny. *See Sherrill*, 569 F.2d at 131–32. The court was careful to point out that its requirement of a compelling interest only applied because no one questioned whether Sherrill met the professional norms for bona fide journalists, and "the White House has voluntarily decided to establish press facilities" that are "perceived as being open to all bona fide Washington-based journalists." *Id.* at 129. Here, the ultimate question is whether the Governor's office could reasonably conclude that MacIver and its journalists were not "bona fide" under the Governor's media-access criteria. *Sherrill* is inapposite for this reason alone.

*Sherrill* is also unavailing because the decision is more properly read as relating to due process than it is to establishing any First Amendment right. This is clear in the court's holding that "notice, opportunity to rebut, and a written decision are required because the denial of a [press] pass *potentially* infringes upon First Amendment guarantees." *Id.* at 128; *see also id.* at 131.

And even with that holding, the court expressly rejected the notion that the government should be required to "develop 'narrow and specific standards' for press pass denials," *id.* at 132, instead requiring only that the government publicize some meaningful press-pass standards and that it give notice of the factual basis for denials, subject to "appropriately deferential" judicial review.[6] *Id.* at 129–30. MacIver fails to explain how this supports its strict scrutiny argument here.

In addition to *Sherrill*, MacIver cites eleven district court decisions to support its claim that the "vast majority" of district courts apply strict scrutiny to press-access issues. (MacIver Br. 16 n.4.) But like *Sherrill*, eight of these

[6] MacIver does not point to any decision from this Circuit adopting this methodology from *Sherrill*.

eleven cases predate the Court's modern forum doctrine cases.[7] The remaining cases MacIver cites in support of strict scrutiny are equally inapt. For example, *United Teachers of Dade v. Stierheim*, 213 F. Supp. 2d 1368, 1372–75 (S.D. Fla. 2002), relies almost entirely on the pre-*Perry* reasoning in *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 365 F. Supp. 18, 22 (D.D.C. 1973), and accepted as a given that viewpoint discrimination occurred. Likewise, in *Times-Picayune Pub. Corp. v. Lee*, CIV. A. No. 88-1325, 1988 WL 36491 at *2 (E.D. La. Apr. 15, 1988) (*see* MacIver Br. 10, 13), the county sheriff singled out a newspaper by name for restricted media access based on "dissatisfaction with the contents of [its] news coverage." *Lee*, 1988 WL 36491, at *10. MacIver makes no showing why *United Teachers* or *Times-Picayune* mandates strict scrutiny here. Despite MacIver's

[7] *Karem v. Trump*, 960 F.3d 656, 659 (D.C. Cir. 2020) (*see* MacIver Br. 10), involved a suspension of the same type of White House press pass as in *Sherrill*. And as in *Sherrill*, the pass-holder had already been deemed a bona fide journalist. *See id.* at 660, 665. "[T]he interest of a bona fide Washington correspondent in obtaining a White House press pass" was central to the *Karem* court's application of "a particularly 'stringent vagueness and fair-notice test.'" *Id.* at 665 (citation omitted); (*see also* MacIver Br. 16). *Karem* is unavailing here for the same reasons as *Sherrill*.

insinuations, it points to no evidence in the record showing *any* discrimination here, much less discrimination comparable to the cited cases. [8]

Many other cases MacIver relies on involved denial of access to documents or court proceedings. (*See* MacIver Br. 7, 15.) For example, *Huminski v. Corsones*, 386 F.3d 116, 145 (2d Cir. 2004), involved the right of access to "court proceedings and papers." Courts have consistently recognized these types of courtroom- and document-access rights. *See, e.g.*, *Courthouse News Serv.*, 908 F.3d at 1069 (discussing widely agreed upon rights of access to "civil proceedings and associated records and documents"). These

[8] MacIver's other string-cited cases are equally unpersuasive. (*See* MacIver Br. 10, 24.) For example, *Borreca v. Fasi*, 369 F. Supp. 906, 910 (D. Haw. 1974), involved a mayor's targeted exclusion of a single journalist, based on the journalist's unfavorable coverage of the mayor. Even assuming that *Borreca* was correctly decided on the facts there, its holding is inapplicable here, where there is no evidence of any such targeting. The same goes for *Citicasters Co. v. Finkbeiner*, No. 07-CV-00117, 2007 WL 9753682 (N.D. Ohio Jan. 31, 2007), in which the court ordered that the mayor of Toledo admit a certain talk show host into press conferences. Not only did that decision rest on the conclusion that those conferences were "public event[s]," *id.* at *2, it also runs counter to controlling precedents regarding mandated admission to government events. *See, e.g.*, *Houchins*, 438 U.S. at 15–16 (plurality op.); *Dahlstrom*, 777 F.3d at 946.

Further, MacIver's numerous string citations throughout its brief, without meaningful explanation, fall far short of what is required to press a point on appeal. *See Colburn v. Trs. of Ind. Univ.*, 973 F.2d 581, 593 (7th Cir. 1992) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim." (quoting *United States v. Haddon*, 927 F.2d 942, 956 (7th Cir. 1991)); *Di Joseph v. Standard Ins. Co.*, 776 F. App'x 343, 349 (7th Cir. 2019) (unexplained citation to off-point case insufficient to preserve argument on appeal). The Governor declines to respond to each of these unexplained, nonbinding decisions.

courtroom- and document-access cases are thus inapposite and distinguishable from the novel "right of access to press conferences" that MacIver asserts, which has not been recognized in any binding precedent.

MacIver also refers to cases involving "target[ing] the news media as a class," claiming that those cases "fit[ ] well doctrinally" with MacIver's strict-scrutiny argument. (MacIver Br. 10–11.) MacIver's reference to these cases adds nothing here, where there is no evidence of class-based targeting.

In sum, the district court correctly applied public forum analysis in this case, as has been routine since forum analysis was introduced in *Perry* and *Cornelius* and confirmed in *Forbes*. MacIver provides no persuasive or binding authority that supports departing from those precedents.

## II. The district court properly concluded that MacIver failed to establish viewpoint discrimination.

At bottom, MacIver's First Amendment claim is that Governor Evers has impermissibly restricted MacIver's access to certain events because of its viewpoint. (MacIver Br. 14–29.) MacIver has presented no evidence to support this assertion. As discussed above, the Governor's criteria for press access are reasonable and viewpoint neutral on their face, and there is no evidence that the Governor has applied the criteria to MacIver in a discriminatory way.

### A. The Governor's application of the media-access criteria to MacIver is reasonable and viewpoint-neutral.

The Governor's application of the press access criteria to MacIver was reasonable and non-discriminatory. As the record shows, the Governor has a reasonable basis to conclude that MacIver does not meet the criteria for a bona fide press organization. This has nothing to do with any viewpoint.

According to its own website, MacIver is not principally a news organization. (Dkt. 15:6–7.) It characterizes itself as "a Wisconsin-based think tank that promotes free markets, individual freedom, personal responsibility and limited government." (Dkt. 15:6.) The organization engages in policy-driven advocacy, including advocating for specific initiatives and policy approaches. (Dkt. 15:6–7.) As one example, MacIver joined "other free market groups and individuals" in urging a repeal of provisions of the Affordable Care Act. (Dkt. 15:6–7 (quoting MacIver website).)

And contrary to MacIver's appellate argument, the record shows that the "News" tab on MacIver's website is not meaningfully distinct from the organization's policy-driven mission. (Dkt. 15:6–7.) The Governor's communications director, who has substantial experience in media and politics, concluded that there was no meaningful distinction between the MacIver Institute and its "News Service," and that the organization does not comply with the standards for journalistic integrity in the Governor's

media-access criteria. (Dkt. 15:6–7.) Based on these assessments of MacIver's practices, the Governor's office concluded that neither "the MacIver News Service" nor its reporter Osmulski qualify as a bona fide press, and no evidence shows that that was an unreasonable conclusion. (Dkt. 15:6.)

The only evidence of record thus amply supports the Governor's conclusion that MacIver is not a bona fide press organization. Nothing about that conclusion rests on MacIver's "viewpoint," and the district court was therefore correct to enter summary judgment for the Governor on this claim as well.

### B. MacIver presented no evidence that the Governor restricted its access to certain events based on MacIver's viewpoint, and none of its arguments overcome that lack of evidence.

Despite the foregoing evidence, MacIver argues that Governor Evers excluded it from press events and the media advisory list because he disagrees with its conservative viewpoint. (MacIver Br. 14–29.) MacIver has presented no facts of record to support this.

In an attempt to counter the record evidence, which shows absolutely no discrimination, MacIver proffers 15 pages of internet citations, a discussion about the rise of think tanks, some references to "progressive" reporting outfits, and a comparison of Twitter logos. (*Id.*) If MacIver wants to prove a claim of

viewpoint discrimination, it needs to do so; it cannot simply offer its thoughts about the media or the qualifications of other outlets and journalists. For this reason alone, this Court should decline to engage MacIver's arguments about purported viewpoint discrimination.[9] *United States v. Stevens*, 500 F.3d 625, 628 (7th Cir. 2007) (arguments in brief "unsupported by documentary evidence, are *not* evidence"); *see also Jaworski v. Master Hand Contractors, Inc.*, 882 F.3d 686, 691 (7th Cir. 2018) (court not required to scour record for supporting evidence).

But even if the Court were to take up MacIver's arguments about discrimination, none are persuasive. (*See* Dkt. 30:14–19.)

*First*, all of MacIver's complaints about "progressive" outlets being granted access (*see* MacIver Br. 21–22), are simply nonstarters since there are multiple outlets perceived as "conservative leaning" which have equal access with all of those perceived "liberal" outlets (*see* Dkt. 15:5–6; 15-2). MacIver does not even grapple with this on appeal. And below, its only response was to say that those

[9] MacIver's internet materials underscore the importance of citing actual evidence of record, previously tested in the adversarial process. For example, where MacIver points to "the Governor's COVID-19 press conferences" (MacIver Br. 16 n.8), its citations link to the Wisconsin Department of Health Services' YouTube videos, not anything published by the Governor's office. The Governor's media-access criteria do not govern attendance at the Department of Health Services' events.

"conservative" outlets are national outfits with limited local presence, so their viewpoints should not count in the discrimination calculus. (Dkt. 19:9–10.) But as the district court pointed out, whether an authorized journalist chooses to attend the Governor's events is outside the Governor's control.[10] (Dkt. 30:15.) Moreover, as the district court also noted, MacIver does not point to any other local "conservative" media outlets that meet the media-access criteria but were still excluded. (Dkt. 30:15.) MacIver's failure to address these holes in its viewpoint-discrimination argument should end the analysis.

*Second*, MacIver's claim that "'think tank journalism' is a real phenomenon" (MacIver Br. 18–20) (citation omitted), says nothing about viewpoint discrimination. The Governor's media-access criteria have been applied to other think tanks in the same manner that they have been applied to

[10] MacIver's argument also ignores the reality that these national news organizations and their local affiliates routinely cover state politics. Indeed, Wisconsin politics have been a regular presence in national media coverage. (*See, e.g.*, https://www.wsj.com/articles/wisconsin-election-boosts-democratic-optimism-11586952164; https://www.foxnews.com/politics/wisconsins-supreme-court-strikes-down-governors-safer-at-home-order).

MacIver.[11] (*See* Dkt. 15:10; 15-4.) And the argument that think tanks *should be* treated as "press" is precisely the type of line-drawing that courts have concluded is best left to the political branches—and certainly is not mandated

[11] MacIver's attempt to distinguish itself from another excluded think tank, the Wisconsin Policy Forum, falls flat, primarily because it is not supported by any evidence of record. But even accepting MacIver's approach of relying on internet citations, MacIver's own website shows that any purported distinction between it and the Wisconsin Policy Forum is illusory.

For example, MacIver claims that the official titles of Wisconsin Policy Forum staff show that the Forum is exclusively a think tank that does not meet the Governor's journalism criteria. (MacIver Br. 24–25 (discussing Jason Stein as Policy Forum's "Research Director"; Mark Sommerhauser as "Communications Director/Policy Researcher").)

But MacIver's own "Research Director" is one of the most frequent contributors to MacIver's "News" tab. *See, e.g.*, Ola Lisowski, *CARES Act and K-12 Education: What Does It Mean For Wisconsin?*, MacIver Institute: The Free Market Voice for Wisconsin (June 27, 2020), https://www.maciverinstitute.com/2020/06/cares-act-and-k-12-education-what-does-it-mean-for-wisconsin/ ("Ola Lisowski is a Research Director at the MacIver Institute who focuses on education and tax policy."). And Lisowski describes her job and daily activities as "research[ing] and writ[ing] about Wisconsin policy," making no allusion to journalism or news dissemination. *See* Nicole Cline, *Center Stage: Ola Lisowski*, The Policy Circle (Aug. 15, 2019), https://www.thepolicycircle.org/center-stage-ola-lisowski/.

MacIver further argues that the "News" tab on its website is "separate from the 'Research' or 'Perspectives' tabs." (MacIver Br. 26.) But this separation, like the News Service's separate Twitter logo, is purely nominal. Many of the articles MacIver posts to its "News" tab are displayed on two or three of the website's multiple tabs. *Compare* https://www.maciverinstitute.com/category/news/; *with* https://www.maciverinstitute.com/category/perspectives/; *and* https://www.maciverinstitute.com/category/research/. Similarly, the anonymous "MacIverNews" authors articles in MacIver's "Perspectives" tab that are not featured in the "News" tab. *See* https://www.maciverinstitute.com/category/perspectives/.

The pervasive overlap between the MacIver website's "News" tab and the other tabs it displays, especially its "Perspectives" tab, undermines MacIver's contention that its news service is meaningfully distinct from the rest of the think tank.

by the Constitution. *See, e.g.*, *Houchins*, 438 U.S. at 15–16 (plurality op.); *see also Capital Cities Media*, 797 F.2d at 1171.

*Third*, MacIver's belief about whether other, included entities should be excluded for their own lobbying or editorializing is both irrelevant and unsupported. (*See* MacIver Br. 20–21.) It is irrelevant because MacIver does not suggest that any of these other entities actually has a different viewpoint from MacIver. Without making that showing, it is meaningless to suggest that MacIver's viewpoint was the distinguishing factor. And again, MacIver points to no evidence of record to support its claims about differential treatment.

*Fourth*, and finally, MacIver's complaints about perceived subjectivity in the media-access criteria (*id.* at 22–23), are also irrelevant and unmoored from binding precedent. They're irrelevant because, again, MacIver points to no evidence showing that the Governor applied these supposedly "subjective" criteria discriminatorily to MacIver. And the mere fact that such "selective access" determinations like these include some built-in discretion has been unproblematic for the Supreme Court. *See Perry Educ. Ass'n*, 460 U.S. at 47, *Cornelius*, 473 U.S. at 804, and *Forbes*, 523 U.S. at 673. In *Forbes* especially, the Court confirmed the exercise of governmental discretion in broadcasting decisions, acknowledging that "[w]ere the judiciary to require, and so to define and approve, pre-established criteria for access, it would risk implicating the courts in judgments that should be left to the exercise of journalistic

discretion." *Forbes*, 523 U.S. at 673. MacIver's subjectivity argument fails to confront these precedents.

With no evidence of discrimination, and no persuasive argument to depart from binding precedent, MacIver's First Amendment claims were rightly dismissed.

## CONCLUSION

This Court should affirm the district court' final judgment.

Dated this 23rd day of July, 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Gabe Johnson-Karp*
GABE JOHNSON-KARP
Assistant Attorney General
State Bar #1084731

KARLA Z. KECKHAVER
Assistant Attorney General
State Bar #1028242

Attorneys for Defendant-Appellee

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8904 (GJK)
(608) 264-6365 (KZK)
(608) 294-2907 (Fax)
johnsonkarpg@doj.state.wi.us
keckhaverkz@doj.state.wi.us

*Counsel of Record

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), typeface requirements of Fed. R. App. P. 32(a)(5), and type style requirements of Fed. R. App. P. 32(a)(6).

> This brief contains 10,818 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 13 point Century Schoolbook.

Dated this 23rd day of July, 2020.

s/ Gabe Johnson-Karp
GABE JOHNSON-KARP
Assistant Attorney General

## CERTIFICATE OF SERVICE

I certify that on July 23, 2020, I electronically filed the foregoing Brief of Defendant-Appellee with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 23rd day of July, 2020.

s/ Gabe Johnson-Karp
GABE JOHNSON-KARP
Assistant Attorney General