20-1814

United States Court of Appeals
for the Seventh Circuit

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Wisconsin
Case No. 3:19-cv-00649
Honorable James D. Peterson

APPELLANTS' BRIEF AND SHORT APPENDIX

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DISCLOSURE STATEMENT

1. The full name of every party that the undersigned attorney represents in the case: Appellants John K. MacIver Institute for Public Policy, Inc., and William Osmulski.

2. The name of all law firms whose partners or associates have appeared on behalf of the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this Court: the Liberty Justice Center.[1]

3. If the party or amicus is a corporation: the MacIver Institute is a nonprofit, nonstock charitable corporation registered in the State of Wisconsin.

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[1] Liberty Justice Center is technically not a law firm, but a legal aid foundation.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, because it arises under the United States Constitution, and pursuant to 28 U.S.C. § 1343, because relief is sought under 42 U.S.C. § 1983. On May 14, 2020, Plaintiffs Appellants MacIver Institute and Osmulski filed a timely notice of appeal of the district court's April 14, 2020, Judgment (Short Appendix ("S.A." 24)) granting judgment to the Defendant. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

(1) Every court to have addressed the question has found a guarantee of equal access among members of the press to a government official's press conferences either from the First Amendment's freedom of the press clause or the Fourteenth Amendment's equal-protection clause. Does this Court recognize a constitutional guarantee of equal access among members of the press to a government official's press conferences, and, if so, is such a guarantee founded in the First Amendment's freedom of the press clause or the Fourteenth Amendment's equal-protection clause?

(2) Does the constitutional guarantee of equal access among the press apply to the MacIver News Service and other nonprofit news outlets, or does it only cover traditional legacy media?

(3) Are government decisions denying equal access of the press subject to strict scrutiny, or a lower form of scrutiny based on forum analysis? Does the Governor's decision to exclude the MacIver News Service survive the level scrutiny that applies to government decisions denying equal access of the press?

STATEMENT OF THE CASE

During the relevant time-period of this case, Bill Osmulski and Matt Kittle were both award-winning reporters for the MacIver News Service credentialed by the Wisconsin State Legislature.[2] Dkt. 8, ¶¶ 1-3; Dkt. 9, ¶¶ 6-7. They delivered their reporting online (www.MacIverInstitute.com/News), on social media (Twitter: @NewsMacIver), and on television (the weekly MacIver News Bulletin on Milwaukee's WVCY-30). Dkt. 8, ¶ 4.

On February 28, 2019, the pair received a tip from a press-corps colleague that the Governor's office would be providing a background briefing that afternoon on the major initiatives in the Governor's budget address, scheduled for delivery that evening. *Id*. at ¶ 7. They emailed in their RSVP to the Governor's staff, and assembled with other journalists outside the ornate entrance to the conference room. *Id*. at ¶ 8. But while the other reporters filed past they were stopped by the Governor's staff. They were informed that they were not on the RSVP list, and so could not be admitted. *Id*. They were told that they could talk to the Governor's communications director, Melissa Baldauff, but she was not currently available to hear any appeal. *Id*. at ¶ 9. They returned to their desks and emailed her, but never received a response. *Id*. at ¶ 11. Upon further investigation, they learned that this circumstance was not unique; that they were in fact being blocked from all media access by the Governor's team, including press conferences, gaggles, and media advisories. *Id*. at ¶ 5.

[2] Kittle has since moved on in his career.

After securing legal representation, they sent a letter to the Governor demanding fair and equal treatment in the press corps as guaranteed by the First Amendment. Dkt. 7, Ex. 4. The Governor's chief legal counsel responded by letter stating that the Governor's communications office permits "some journalists to limited access events, such as exclusive interviews, on a case-by-case basis using neutral criteria, namely newspaper circulation, radio listenership, and TV viewership." Dkt. 7, Ex. 5. The Plaintiffs sent a reply seeking clarification and filing an open records request. Dkt. 7, Ex. 6. The Governor's office fulfilled the request, providing a media advisory list of over 1,000 news organizations, lobbyists, and political operatives. Dkt. 7, Ex. 1. MacIver saw this list as confirmation that its exclusion was ideologically motivated, Dkt. 7, at 12, and this suit followed.

In his response to Plaintiffs' motion for a preliminary injunction, the Governor made two substantial revelations. First, the Governor's office admitted that when the initial decision to exclude MacIver was made as the new administration took office in January 2019, no neutral criteria were used. Dkt. 15, ¶ 26. Rather, the Governor's communications director, a career partisan political operative, concluded "based on my experience with media and politics" that the MacIver News Service staff were not "bona fide journalists." *Id*. at ¶¶ 24–27.

Second, the Governor's office revealed that six days after fulfilling the records request, it adopted a new set of "neutral criteria" which very conveniently vindicated its previous decisions. Dkt. 15, Ex. 1. Those criteria are:

> 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?

However, the memorandum itself describes these as a "non-exhaustive" list of "factors" and as "guidance," Dkt. 15, Ex. 2, and the Governor's communications director admitted that these were not necessarily hard-and-fast criteria to by applied, but non-exhaustive "factors" that the office would weigh and balance when deciding whom to admit. Dkt. 15, ¶¶ 18, 22.

According to the Governor's office, the new criteria are based on a blend of the criteria set by the U.S. Congress and the Wisconsin State Legislature. Dkt. 15, ¶ 18.

If the office had simply adopted the criteria set by the Wisconsin State Legislature, then the MacIver journalists would have been admitted, since they were already credentialed by the Legislature, Dkt. 9, ¶ 7, and the Governor knew this fact at the time he made the new criteria, Dkt. 7, Ex. 4. The new press list, based on the new criteria, includes over 780 email addresses for a variety of reporters. Dkt. 15, Ex. 2.

The District Court decided the preliminary injunction in favor of the Defendant, primarily finding the Plaintiffs were not likely to succeed on the merits. Short Appendix (S.A.) 8, 12. First, the Court concluded that "[c]laims challenging government-imposed restrictions on access to government property or events have been generally governed by public forum doctrine, which establishes a framework for analyzing such restrictions based on the type of government property or event at issue." *Id*. at 9. The District Court concluded that press conferences were nonpublic fora, and thus that any criteria would be acceptable as long as they were "(1) reasonable and (2) not an effort to suppress an opposing viewpoint." *Id*. at 10.

Second, the District Court characterized the case primarily as a matter of viewpoint discrimination, that MacIver was allegedly treated differently than others under the criteria based on its free-market editorial views. *Id*. at 14. The Court concluded, however, that though MacIver's "journalists, including plaintiff Osmulski, have sufficient professional experience to make them credible state capitol correspondents," nevertheless "Evers has reasonably concluded that MacIver is not a bona fide news organization," but rather an ideological think tank. *Id*. at 17. This

preliminary decision was soon thereafter converted to a final decision on the merits, S.A. 24, and this appeal timely ensued.

SUMMARY OF ARGUMENT

Whether analyzed under the First Amendment or the Fourteenth Amendment, courts universally recognize that news media are entitled to equal access to generally available information and events. Government officials like Gov. Evers cannot pick and choose which journalists cover them based on whether or not they like their coverage. This is a fundamental guarantee, and it is protected by strict scrutiny. In this case, strict scrutiny means just that — a searching, even skeptical review of the Governor's decision to target one organization's journalists for exclusion.

Here, that skeptical review leads inexorably to the conclusion that the Governor violated the MacIver journalists' rights. The MacIver News Service is a project of the free-market MacIver Institute. Its professional journalists are credentialed to cover the Wisconsin State Legislature and won a 2018 "excellence in journalism" from the Milwaukee Press Club. When a new Democrat governor took office, his partisan operative *cum* communications director made a standards-free judgment call that the MacIver journalists were not, in her opinion, bona fide journalists, and so banned them from the Governor's press corps. When called on that fact, the Governor's office offered one set of neutral criteria for the decision. Then in briefing below the office revealed a new set of neutral criteria that conveniently coincided with their previous two decisions. But even these new supposedly neutral criteria are not applied fairly. This single paragraph of facts tells this Court all it needs to know about the

ideologically motivated mistreatment of the MacIver News Service and its journalists. The District Court's judgment must be reversed.

ARGUMENT

I. Claims for equal press access are subject to strict scrutiny.

Although the United States Supreme Court and this Court have not yet recognized the right to equal press access, every Circuit Court to address it has concluded that such a right exists. This Court has come close twice, but resolved those cases on other grounds. *Reeder v. Madigan*, 780 F.3d 799 (7th Cir. 2015) (holding that the legislature has absolute control of access to its floor, and thus its media credentialing decisions are not subject to judicial review); *Wis. Interscholastic Ath. Ass'n v. Gannett Co.*, 658 F.3d 614, 622 (7th Cir. 2011) (holding that in its proprietary capacity, a government actor may grant an exclusive license to broadcast school sporting events).

However, a number of other circuits have recognized a right to equal press access amongst members of the news media. Most ground this right in the First Amendment's freedom of the press guarantee. *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986) ("Neither the courts nor any other branch of the government can be allowed to affect the content or tenor of the news by choreographing which news organizations have access to relevant information."); *Huminski v. Corsones*, 386 F.3d 116, 146-47 (2d Cir. 2004); *Am. Broadcasting Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) ("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."); *Sherrill v. Knight*, 569 F.2d 124, 129-30 (D.C. Cir. 1977); *Frank v. Herter*, 269 F.2d 245, 247

(1959) (Burger, J., concurring). *See Courthouse News v. Planet*, 947 F.3d 581, 595 n.8 (9th Cir. 2020). Other decisions place the right in the Fourteenth Amendment's equal-protection clause. *McCoy v. Providence Journal Co.*, 190 F.2d 760, 766 (1st Cir. 1951); *Quad-City Cmty. News Serv., Inc. v. Jebens*, 334 F. Supp. 8, 15 (S.D. Iowa 1971). *See Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1176 (3d Cir. 1986) (en banc). This case offers the Seventh Circuit its first opportunity to join the uniform conclusion of its sister circuits in squarely holding that the Constitution protects a right to equal treatment among journalists by government officials.

When defining the scope of that right for the first time, it's worth noting it is only the right to equal access, not special access. There is no right to an off-the-record tidbit, an early scoop, or an exclusive interview. *See Balt. Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006); *Youngstown Publ'g Co. v. McKelvey*, No. 4:05 CV 00625, 2005 U.S. Dist. LEXIS 9476, at *17-18 (N.D. Ohio May 16, 2005), *opinion vacated, appeal dismissed as moot*, 189 F. App'x 402 (6th Cir. 2006). But that is not the type of access Plaintiffs seek here. Instead, they want only the same access that all members of the Capitol press corps receive to attend the Governor's press events and briefings.

In the First Amendment context, a holding recognizing a guarantee of equal access is grounded in the doctrine that government officials may not favor or disfavor one news source among others similarly situated. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). *See also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 659 (1994). Though these are holdings under the press clause, they fit well with the

numerous cases under the speech clause holding that government may not discriminate between similarly situated speakers. *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Such discrimination is especially odious when based on the speaker's viewpoint. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). In the equal-protection context, it is a simple question of permitting competitors access to government information while denying it to plaintiffs. *McCoy*, 190 F.2d at 766.

Having recognized such a right, the next question is how to analyze claimed violations of the right. The District Court here joined four other district courts in using forum analysis. S.A. 9-10.[3] However, forum analysis is a First Amendment freedom of *speech* doctrine, governing when a private speaker has a right to speak on government property. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799-800 (1985). It is inapposite to the claim here, namely a journalist's right to attend a press briefing under the freedom of the press clause. *See Wis. Interscholastic Ath. Ass'n*, 658 F.3d at 624 (giving a narrow scope to settings in which to employ forum doctrine). Categorizing the Governor's press conference as a government-created forum in which the journalists speak their own views does not accurately or entirely describe the value of access by journalists to the Governor's press conference. For example, journalists still value access to the press conference even if they don't ask any

[3] *Citing Youngstown Pub. Co*, 2005 U.S. Dist. LEXIS 9476, at *6; *Telemundo of Los Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095, 1101–02 (C.D. Cal. 2003); *Getty Images New Servs. Corp. v. Dep't of Defense*, 193 F. Supp. 2d 112, 119 (D.D.C. 2002). *See Nation Magazine v. United States Dep't of Def.*, 762 F. Supp. 1558, 1573 (S.D.N.Y. 1991) (same).

questions or say anything at all (for instance, to get their own camera footage).

Instead, this Court should follow the D.C. Circuit and the vast majority of district and state courts in extending the highest level of protection against the violation of a fundamental liberty like the freedom of the press. *Sherrill v. Knight*, 569 F.2d at 130 ("compelling interest" necessary to deny press pass).[4] *See United States ex rel. Fitzgerald v. Jordan,* 747 F.2d 1120, 1135 (7th Cir. 1984) (Pell, J., dissenting) (summarizing *Sherrill*: "Given these important first amendment rights implicated by refusal to grant White House press passes to bona fide Washington journalists, such refusal must be based on a compelling governmental interest"). *See also Karem v. Trump*, No. 19-5255, 2020 U.S. App. LEXIS 17709, at *18 (D.C. Cir. June 5, 2020) (applying "a particularly stringent vagueness and fair-notice test" to due-process claim regarding denial of a press credential).

Affording strict scrutiny to such claims fits well doctrinally. Strict scrutiny is the

[4] *United Teachers of Dade v. Stierheim*, 213 F. Supp. 2d 1368, 1375 (S.D. Fla. 2002) (requiring a compelling interest and "requisite nexus with the state's asserted goal"); *Times-Picayune Pub. Corp. v. Lee*, Civil Action No. 88-1325, 1988 U.S. Dist. LEXIS 3506, at *25 (E.D. La. Apr. 15, 1988) (compelling interest and least restrictive means); *Forcade v. Knight*, 416 F. Supp. 1025, 1035 (D.D.C. 1976), *aff'd sub nom. Sherrill v. Knight*, 569 F.2d 125 (D.C. Cir. 1977) (compelling interest and narrow tailoring); *Westinghouse Broad. Co. v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1976) (compelling interest); *Borreca v. Fasi*, 369 F. Supp. 906, 909-10 (D. Haw. 1974) (compelling interest and least restrictive means); *Lewis v. Baxley*, 368 F. Supp. 768, 778 (M.D. Ala. 1973) (compelling interest and requisite nexus); *Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n*, 365 F. Supp. 18, 22-23 (D.D.C. 1973), *rev'd on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975) (compelling interest and least restrictive means); *Savage v. Pac. Gas & Elec. Co.*, 26 Cal. Rptr. 2d 305, 317 (Cal. App. 1993) (compelling interest and least restrictive means); *Sw. Newspapers Corp. v. Curtis*, 584 S.W.2d 362, 365 (Tex. Civ. App. 1979) (compelling interest). *See Quad-City Cmty. News Serv., Inc. v. Jebens*, 334 F. Supp. 8, 15 (S.D. Iowa 1971) (compelling interest necessary under the Fourteenth Amendment's equal protection clause).

correct standard when the government targets the news media as a class for differential treatment. *Minneapolis Star & Tribune Co.*, 460 U.S. at 585 (tax on paper and ink used to make newspapers). Strict scrutiny is also what courts apply when the government targets particular types or classes of outlets within the news media for differential treatment. *Ark. Writers' Project, Inc.*, 481 U.S. at 231 (tax on news magazines but not other print publications). Thus, it makes sense to say that strict scrutiny applies when the government targets a specific news outlet for differential treatment, as happened here. It also makes sense because strict scrutiny is applied to government classifications that interfere with First Amendment liberty interests. *See Sherrill*, 569 F.2d at 130.

Finally, "strict scrutiny" refers not only to a formula or test (compelling interest/narrow tailoring), but also to the "searching examination" the court must apply to the government's actions and motives. *Fisher v. Univ. of Tex.*, 570 U.S. 297, 310 (2013). Strict scrutiny requires "the utmost skepticism" of the government's purpose in establishing a policy or taking an action. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 412 (2000) (Thomas, J., dissenting); *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 333 (6th Cir. 2009) ("this most skeptical level of review").

In sum, then, the Constitution protects a right of journalists to equal access to events and information made generally available to the press corps. That right is protected by strict scrutiny. The district court failed to apply the correct analysis, which corrupts its subsequent conclusions as to Plaintiffs' claims.

II. The MacIver News Service and other new, nonprofit news outlets are entitled to equal treatment as "the press," just like traditional, legacy media outlets.

Having established that a right to equal press access exists under the First Amendment, the natural next question is whether the MacIver News Service qualifies as press entitled to the right. That should be an easy one: the name "MacIver News Service" is a strong hint as to its mission and activities. The job titles of its operators — news director (Osmulski), investigative reporter (Kittle) — are also a good clue. Dkt. 8, ¶¶ 1, 7. So are its stories and tweets (@NewsMacIver) and its weekly "MacIver News Bulletin" with original reporting on state government during the news shows on WVCY Television Channel 30 (Milwaukee).[5] *See* Dkt. 8, ¶ 4.

Moreover, the fact that the MacIver News Service is part of a nonprofit think tank rather than the local affiliate of NBC TV or Gannett is no barrier to its status as "press." "When the Framers thought of the press, they did not envision the large, corporate newspaper and television establishments of our modern world. Instead, they employed the term 'the press' to refer to the many independent printers who circulated small newspapers or published writers' pamphlets for a fee." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring). "[L]iberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972). "The

[5] Available online at http://www.maciverinstitute.comcom/news, http://www.twitter.com/NewsMacIver, and https://www.maciverinstitute.com/tag/maciver-news-bulletin/.

liberty of the press is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. Griffin*, 303 U.S. 444, 452 (1938).

And this vision of the press includes a robust variety of viewpoints, both in the news covered, *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 151-54 (1973) (Douglas, J., concurring), and the editorial opinions expressed, *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257 (1974). Objectivity is not a prerequisite to be considered "press"; no one would have considered the pamphleteers and early newspapers to be objective. *Id.* at 248 (in the Founding era, "many of the newspapers were intensely partisan and narrow in their views"). And we certainly do not want the government official being covered to be the one determining which press reporters are sufficiently objective in their coverage. *Times-Picayune Pub. Corp. v. Lee*, Civil Action No. 88-1325, 1988 U.S. Dist. LEXIS 3506, at *25-26 (E.D. La. Apr. 15, 1988); Clay Calvert, *And you call yourself a journalist? Wrestling with a definition of "journalist" in the law*, 103 DICK. L. REV. 411, 432 (1999).

The original understanding of the First Amendment's freedom of the press, in other words, embraces a wide range of publishers, from the large and corporate to the small and scrappy. It covers straight news on C-SPAN and opinionated news from *National Review* and *The Progressive*. Though we may live in an age "of rapidly developing technology and with novel and expanding forms of the exercise of the freedom of the press," *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728, 732 (2d Cir. 1985), the fundamental rule remains the same: the press clause is read broadly to cover outlets

that share news, information, and opinion with the citizenry. And so the MacIver News Service and its corporate parent the MacIver Institute are entitled to the protections of the First Amendment's press clause.

III. The Governor's decision to exclude the MacIver News Service fails strict scrutiny.

With this or any right protected by strict scrutiny, the government may still adopt narrowly tailored limits on press access when a compelling need justifies it. There are only so many seats on Air Force One, and the government may parcel them out based on neutral criteria. *Frank*, 269 F.2d at 248-49 (Burger, J., concurring) (Secretary of State may use neutral criteria to allocate press seats on his plane for a foreign trip).[6] War zones are dangerous places, and the military may allocate embed slots using neutral criteria. *Getty Images News Servs. v. DOD*, 193 F. Supp. 2d 112, 120 (D.D.C. 2002); *Nation Magazine v. DOD*, 762 F. Supp. 1558, 1573 (S.D.N.Y. 1991). Press corps access also puts journalists in close proximity to prominent elected officials, so security and background checks are also compelling interests. *Sherrill*, 569 F.2d at 129; *Watson v. Cronin*, 384 F. Supp. 652, 658 (D. Colo. 1974).

[6] The U.S. Supreme Court, for instance, has limited seats for journalists in its courtroom and press room. Thus, it limits permanent passes to "full-time professional journalists employed by media organizations that have records of substantial and original news coverage of the Court and a demonstrated need for regular access to the Court's press facilities." "Requirements And Procedures For Issuing Supreme Court Press Credentials," Office of Public Information, https://www.supremecourt.gov/publicinfo/press/Media_Requirements_And_Procedures_Revised_070717.pdf. Even so, the Supreme Court has extended press credentials to "Howe on the Court," a news outlet that only exists as a website and Twitter feed. "Hard Pass Holders for the October 2019 Term," Office of Public Information, https://www.supremecourt.gov/publicinfo/Hard_Pass_List_OT_19.pdf.

Of greatest relevance to this case, the governor may demonstrate a compelling interest in limiting press access to "bona fide journalists" with appropriate professional credentials. *See Sherrill*, 569 F.2d at 129 & n. 9. A right to equal press access, even with the press broadly defined, is not a warrant for every person with a Twitter handle to demand a seat at the Governor's press conferences. The District Court worried that "[a]ny citizen journalist could make the same case MacIver has made, forcing Evers to either permit unrestricted access at every event . . ." S.A. 19. This is a false fear: the MacIver journalists are professional, full-time reporters who observe journalistic standards of behavior, *see* Dkt. 8, ¶1, Dkt. 9, ¶ 8; they won awards in their previous jobs working for other news outlets, Dkt. 8, ¶ 3; they won an award in this job for excellence in journalism, *id*., Dkt. 9, ¶ 6; and they are credentialed by the Wisconsin State Legislature, *id*. at ¶ 7. They also fit the definition of journalist and news organization under Wisconsin's "reporters' shield" law. Wis. Stat. § 885.14.

That said, some courts have concluded that "citizen journalists" are entitled to equal treatment with traditional media. *Huminski v. Corsones*, 386 F.3d 116, 122 (2d Cir. 2004) (a self-described "citizen reporter" successfully asserts First Amendment press rights); *Toll v. Wilson*, 453 P.3d 1215, 1216 (Nev. 2019) (personal website operator meets statutory definition of "reporter"). *See Obsidian Fin. Grp., LLC v. Cox,* 740 F.3d 1284, 1291 (9th Cir. 2014) (as to blogger: "The protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others' writings, or tried to get both sides of a story.").

It's also worth recalling that the Governor's office takes a capacious view of "bona fide news organization" — its current press list is over 780 emails long, and includes college newspapers, small-town weekly newspapers, highly specialized trade publications like Cheese Market News, online-only publications, non-commercial "community" radio, and monthly magazines, many of which reach far fewer Wisconsinites than the MacIver News Service's reporting.[7] And many of these outlets are highly ideological, explicitly progressive outlets.[8]

What the governor may not do, however, is target a single bona fide news outlet for a ban from equal press access. And a court should be especially skeptical when the excluded news source has an editorial viewpoint often at odds with the governor, and the governor has contrived two conveniently timed sets of supposedly neutral criteria that validate its original standards-less decision to exclude that outlet.

A. The Governor's office used a jumble of non-exhaustive factors to reach the ideologically motivated conclusion that the MacIver News Service was not a "bona fide news organization."

First the Governor's communications director rejected the MacIver journalists' request for access because she determined that they were not "bona fide journalists"

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[7] The MacIver News Service's Twitter feed alone (separate from its website readers or TV news-bulletin viewers) has more followers than over 60 Wisconsin weekly newspapers. *Compare* https://twitter.com/newsmaciver *with* "Wisconsin Newspapers," https://www.officialusa.com/stateguides/media/newspapers/wisconsin.html.

[8] In addition to the *Capital Times*, *The Progressive,* and the Devil's Advocate radio show (Doc. 15, Ex. 2), the Governor's COVID-19 press conferences included reporters from The Wisconsin Examiner and UpNorthNews. *See, e.g.*, https://www.youtube.com/watch?v=mB7YZJ50RVo (Governor's video press conference on March 24, 2020); https://www.youtube.com/watch?v=XmXeGrPuyu0 (Governor's video press conference on March 23, 2020), both of which explicitly describe themselves as "progressive" news organizations. *See infra*. n. 20.

"based on [her] experience with media and politics." Dkt. 15, ¶¶ 24, 26.

Then the Governor's legal counsel explained they were excluded from the budget briefing based on one set of neutral criteria. Dkt. 7, Ex. 5. Then in his response briefing below, the Governor disclosed that his office was using a new set of neutral criteria, Dkt. 15, Ex. 2, and it was these criteria on which the District Court focused.

These criteria, though, are really "non-exhaustive factors" for the staff to consider when making press access decisions. *See* S.A. 5; Dkt. 15-1. Of course, a non-exhaustive list of five factors with six additional sub-factors is hardly a test. Rather, it is an invitation to mask subjective judgments in the façade of objective standards. And that is what has happened here: The MacIver News Service, tagged with the free-market views of its affiliated think tank, is out, but a whole bunch of other groups that fail various "factors" are in.

The Governor's Office excluded the MacIver News Service's journalists because the MacIver Institute's "political advocacy, lobbying activity, and status as a think tank demonstrate that MacIver Institute is not a bona fide press organization under the standards adopted by the Office." Dkt. 15, ¶ 25.

This makes three major errors, all of which betray the viewpoint discrimination that actually motivated the decision. First, it fails to separate the MacIver News Service from the MacIver Institute. The News Service is a separately branded organization of professional journalists who do their work as reporters, not as think-tank fellows. The entity being judged by the press office must be the news service, not the corporate parent. Otherwise CNN or NBC would have to be judged (and presumably

disqualified) based on their ownership by Time Warner and Comcast, respectively, both of which donate huge sums of soft money to political organizations.[9]

Second, the MacIver Institute itself does not engage in political advocacy (it cannot, by law, as a charitable/educational 501(c)(3) organization; Dkt. 8, ¶ 2) and does not engage in lobbying activity. Dkt. 8, ¶ 5. True, it is a think tank. But the "neutral criteria" have no explicit ban on news services sponsored by think tanks. Nor could they; many think tanks sponsor news organizations. The first to invest in news reporting in a major way was the liberal Center for American Progress, which launched its ThinkProgress.org news brand in 2005. *See* Ben Smith & Kenneth P. Vogel, "CAP news team takes aim at GOP," POLITICO (April 12, 2011)[10] ("The group's downtown, Washington, D.C. offices look like any other medium-sized newsroom, with young reporters working intently on computers in a set of cubicles. Like reporters elsewhere, they've been known to gripe when they're not given credit for scoops, and obsess about their place atop Technorati's ranking of the most-linked political blogs.").

CAP's counterpart on the right, the Heritage Foundation, launched its own

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[9] Comcast has given more than $1,000,000 to the Democratic Governors Association since 2010. Center for Responsive Politics, https://www.opensecrets.org/527s/527cmtedetail_donors.php?url=527cmtedetail_donors.php%3Fcycle%3D2018%26ein%3D521304889&cname=comcast&ein=521304889&cycle=2018;

Time Warner has given nearly $200,000 to the Democratic Governors Association since 2010. *Id*. at https://www.opensecrets.org/527s/527cmtedetail_donors.php?url=527cmtedetail_donors.php%3Fcycle%3D2018%26ein%3D521304889&cname=time+warner&ein=521304889&cycle=2018.

[10] Available online at https://www.niemanlab.org/2009/09/nonprofits-with-a-perspective-hiring-journalists-a-sign-of-things-to-come/.

multimedia news organization almost a decade later. Paul Farhi, "Heritage Foundation starts online site to cover news it says is unreported or under-reported," WASH. POST (June 2, 2014).[11] The *Washington Post* reported at the time: "It's not enough to be a newsmaker these days, as the conservative Heritage Foundation surely has been . . . Nowadays, you have to cover the news, too. Or so says the Heritage Foundation, which on Tuesday will start doing just that. Call it think-tank journalism, or maybe just journalism." *Id.* And sometimes the child becomes the parent; today, William F. Buckley's *National Review* magazine is a wholly owned subsidiary of the National Review Institute, a think tank that sponsors fellows, conferences, and seminars.[12] Despite being owned by a think tank, *National Review* is accredited by the Periodical Press Gallery of Congress.[13]

Closer to the center of the political spectrum, the Pew Center for the States has published Stateline since 1998, with "daily reporting and analysis on trends in state policy."[14] Similarly, the Kaiser Family Foundation think tank owns the Kaiser Health News, "a nonprofit news service committed to in-depth coverage of health care policy

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

[12] National Review Institute, "About NRI," available online https://nrinstitute.org/about-nri/.

[13] Periodical Press Gallery, "Credentialed publications," available online at https://periodical.house.gov/membership/credentialed-publications-115th-congress-first-session.

[14] "What is Stateline," Pew Charitable Trusts, available online at https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/about.

and politics."[15] All of these examples illustrate the observation that "think tank journalism" is a real phenomenon; in the words of *The Economist*, "[t]he divide between having ideas and reporting on them is dissolving." "Making the headlines: think tanks and journalism," THE ECONOMIST (Sept. 20, 2014).[16] "[M]aybe think tanks (of all political and ideological stripes) will become a new bridge to an economically sustainable web-based journalism." Keith Kloor, "Think tank journalism," DISCOVER MAGAZINE (Sept. 11, 2009).[17]

Third, the Governor does not apply these neutral criteria fairly or honestly. His media list includes reporters employed by entities that are actually registered to lobby. For instance, the list includes the editors of *Kalihwisaks* and the *Menominee Nation News*, the official newspapers of the Oneida Nation and Menominee Indian Tribe, both of which are registered lobbying principals in Wisconsin. The list includes reporters for WUWM, the public radio station by UW-Milwaukee, and Wisconsin Public Television (WPT), which is a service of the UW Board of Regents. The UW retains legislative liaisons who engage in paid advocacy on its behalf.[18] In these instances, the Governor apparently separates the corporate parent from the news outlet.

Though these entities actually lobby, many other news outlets engage in "political advocacy" if those terms are defined as broadly as they have been applied to the

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[15] "About Us," Kaiser Health News, available online at https://khn.org/about-us/.

[16] Available online at https://www.economist.com/international/2014/09/20/making-the-headlines.

[17] Available online at https://www.discovermagazine.com/the-sciences/think-tank-journalism.

[18] *See* Dkt. 15, Ex. 2, and Wis. Ethics Commission, lobbying.wi.gov.

MacIver Institute (*See, e.g.,* Dkt. 15, ¶ 24). Any news outlet that has an editorial page could be disqualified under such a broad standard for "lobbying" or "political advocacy." The *Milwaukee Journal Sentinel* and *Wisconsin State Journal* run editorials endorsing candidates — does this not constitute "promotion" for individuals or political parties? *See, e.g.,* "Editorial: First, say no to Donald Trump," MILW. J. SENTINEL (Nov. 4, 2016) (reluctantly endorsing Hillary Clinton for president). They also regularly promote particular legislation on their editorial pages. *See, e.g.,* Editorial, "Good start on helping the homeless," WIS. STATE J. (Nov. 28, 2018) (endorsing state budgetary proposal to fund homelessness efforts).

The District Court dismissed both the lobbying entities and editorial pages by saying this is fine, "so long as the opinion staff and the news staff are separated. Again, MacIver has not demonstrated any separation between the ideological mission of the think tank and its news organization." S.A. 16. First, nothing in the First Amendment limits the concept of "press" to those who separate opinion from news, and many would question whether it's possible to report news free from any opinion.

Second, though some may question whether the news staff at the *Milwaukee Journal Sentinel* or *Wisconsin State Journal* are angelically non-ideological, other examples more readily disprove the District Court's conclusion. For starters, the Governor's press list includes not only the "news staff" from the *Milwaukee Journal Sentinel* and *Wisconsin State Journal*, but also the opinion page editor for each. Dkt. 15-2. It includes writers for Madison-based *The Progressive* magazine, which makes no

distinction between news and opinion when it comes to its editorial approach.[19] It includes pure opinion columnists, like *The Progressive's* Bill Lueders and the *Capital Times'* Dave Zweifel. *Id*. It includes Mike Crute and Dominic Salvia from the Devil's Advocate Radio Show, an explicitly progressive opinion radio show. *Id.* The Governor's COVID-19 press conferences, held subsequent to briefing below, included reporters from the explicitly progressive Wisconsin Examiner and UpNorthNews.[20] In other words, the Governor does not insist that "the opinion staff and the news staff are separated," except in the case of the MacIver Institute and its News Service.

The foregoing paragraphs show that the Governor's purportedly "neutral criteria" are really "factors" that his press staff consider, not hard-and-fast rules. *See* Dkt. 15, ¶ 22; Dkt. 15, Ex. 1; and S.A. 5. The staff apparently look at all the factors holistically,

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[19] The Progressive, "About Us," available online at https://progressive.org/about-us/mission-and-history.

[20] *Supra* n. 8. The Wisconsin Examiner identifies itself as working "[i]n Wisconsin's great progressive tradition." (https://wisconsinexaminer.com/about/). The Wisconsin Examiner's managing editor is a former communications director for the Democratic Party of Wisconsin, who identified the Examiner's perspective by saying: "We're progressive—we don't hide that." Patrick Marley & Mary Spicuzza, "Liberal 'news' websites launching in Wisconsin, where conservative versions have thrived," MILW. J. SENTINEL (Aug. 20, 2019), https://www.jsonline.com/story/news/politics/2019/08/20/liberal-groups-take-cue-right-new-websites-wisconsin/2002077001/).

UpNorthNews describes itself as "a progressive news site" (https://upnorthnewswi.com/about-us/). The site is the Wisconsin news bureau for a for-profit company, Courier Newsroom. Bloomberg News described Courier's mission as "deliver[ing] the facts favorable to Democrats that [its publisher] thinks voters are missing," especially in battleground states. Josh Green, "The Left's Plan to Slip Vote-Swaying News Into Facebook Feeds," Bloomberg Businessweek (Nov. 25, 2019), https://www.bloomberg.com/news/features/2019-11-25/acronym-s-newsrooms-are-a-liberal-digital-spin-on-local-news. "Courier publications aren't actually traditional hometown newspapers but political instruments designed to get them to vote for Democrats." *Id*.

weigh them "based on [their] experience with media and politics," and then arrive at judgment calls as to which reporters or outlets engage in "too much" advocacy or "not enough" news dissemination. When the Governor's staff can simply pick and choose which factors it will take into consideration on a case-by-case basis, it is clear that the Governor is not applying "neutral criteria" at all when determining which reporters will be invited to press conference. *See Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 899 (D.C. Cir. 1984) ("guidelines" that "involve[] an exercise of discretion and subjective judgment" are not neutral time, place, and manner restrictions). Rather, the Governor's press staff simply apply their own opinions about who should and should not be invited. Then the staff justifies its decision *post hoc* by figuring out which factors should apply to deny the journalist access. This reduces, then, to MacIver's original complaint: that the Defendant's staff are deciding who gets press access based on their own judgments of which outlets they deem worthy. In this instance, the Democratic Governor's communications director, a career partisan political operative, determined that the only Madison-based news service with full-time journalists whose parent organization is a free-market think tank were not worthy. The Governor has denied these reporters access to his press conferences based on their viewpoint or editorial tone (or that of their employing corporate parent). The First Amendment precludes the Governor from arbitrarily denying journalists access to press conferences based on viewpoint. *McBride v. Vill. of Michiana*, 100 F.3d 457,

461-62 (6th Cir. 1996).[21] The District Court's decision should be reversed.

B. The District Court used a thoroughly flawed comparison between two vastly different organizations to conclude the MacIver News Service was not a "bona fide news organization."

The District Court's decision upholding the Governor's Office conclusion essentially comes down to a "truly relevant comparator," placing Bill Osmulski and the MacIver News Service alongside Jason Stein and the Wisconsin Policy Forum. S.A. 16-17. Because Stein sought but was also denied access to the February 2019 budget briefing for media, the District Court concluded the Governor's office was fairly applying its standards to conclude that any think tank "is not a bona fide news organization." *Id.* at 17. This comparison between the MacIver Institute and its MacIver News Service and the Wisconsin Policy Forum is flawed top to bottom.

The Wisconsin Policy Forum is only a think tank, and everything about it reflects that fact. Jason Stein, formerly a reporter with the *Milwaukee Journal Sentinel*, is the Forum's "Research Director." Mark Sommerhauser, who recently departed the *Wisconsin State Journal*, is the group's "Communications Director/Policy Researcher." "Staff," Wis. Policy Forum.[22] According to a press release issued when Stein was hired, his job is to "lead a team of seven researchers in Madison and Milwaukee for the Wisconsin Policy Forum, an independent, nonpartisan research

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[21] *Accord Citicasters Co. v. Finkbeiner*, No. 07-CV-00117, 2007 U.S. Dist. LEXIS 113246, at *5 (N.D. Ohio Jan. 31, 2007); *United Teachers of Dade*, 213 F.Supp.2d 1368; *Times-Picayune Pub. Corp.*, 1988 U.S. Dist. LEXIS 3506, at *25; *Borreca*, 369 F. Supp. 906; *Quad-City Cmty. News Serv., Inc.*, 334 F. Supp. at 13 (all rejecting targeting journalists for exclusion based on coverage or editorial viewpoint).

[22] Available online at https://wispolicyforum.org/staff-board/.

organization analyzing Wisconsin state and local government finance, education, and economic development." "Jason Stein Named Wisconsin Policy Forum Research Director," Wis. Policy Forum (April 17, 2018).[23] The Forum's most recent report was a 23-page white paper on "a high-level scan of Milwaukee's youth sports landscape," commissioned by the Milwaukee Youth Sports Alliance and paid for by the Milwaukee Bucks and Bader Philanthropies. "Above the Rim," Wis. Policy Forum (June 2020).[24] The Forum's "News" page on its website simply posts its press releases. "News," Wis. Policy Forum.[25] It just tweets link to its reports or news outlets' coverage of its reports (@WisPolicyForum). The Wisconsin Policy Forum is, in short, exclusively a think tank, and the former journalists on its staff are just that, *former* journalists who are now think tank policy researchers.

The MacIver Institute, by contrast, sponsors a separately branded "MacIver News Service," which can be found on Twitter, @NewsMacIver, separate from the think tank's policy/advocacy account at @MacIverWisc. The News Service is led by a professional journalist with the title "News Director." Dkt. 8, ¶ 1. At the time of the February 2019 briefing, his colleague was a professional journalist with the title "investigative reporter." *Id.* at ¶ 7. The News Service maintains its own separate logo:

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[23] Available online at https://urbanmilwaukee.com/pressrelease/jason-stein-named-wisconsin-policy-forum-research-director/.

[24] Available online at https://wispolicyforum.org/wp-content/uploads/2020/06/AboveTheRim_Full.pdf.

[25] Available online at https://wispolicyforum.org/news/our-news/.

Compare  (Twitter logo for @MacIverWisc) *with*  (Twitter logo for @NewsMacIver).

The "News" tab on the MacIver Institute's website (www.MacIverInstitute.com/news) publishes short, original news stories about topics across Wisconsin (and occasionally the nation). It is separate from the "Research" or "Perspectives" tabs on the website, which contain the policy analysis and ideological content. Other journalism outlets frequently cite their original reporting as coming from the "MacIver News Service." *See, e.g.,* Riley Vetterkind, "Transportation Secretary Craig Thompson gets committee nod," WIS. STATE J. (Aug. 9, 2019)[26]; D.L. Davis, "Wisconsin senator makes point, but goes overboard with birth cost recovery claim," Politifact.com (May 10, 2019)[27]; "State Debate: James Rowen frets at size of Foxconn's destruction of Racine area wetlands," THE CAPITAL TIMES (Jan. 10, 2018).[28] It is categorized as a "news source" within Google News and its stories are available in LexisNexis's News database.[29]

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[26] Available online at https://madison.com/wsj/news/local/govt-and-politics/transportation-secretary-craig-thompson-gets-committee-nod/article_61a1c709-8dcd-5ddd-b4d0-929e0e3b3cb0.html.

[27] Available online at https://www.politifact.com/factchecks/2019/may/10/dale-kooyenga/state-senator-makes-point-then-goes-overboard-birt/.

[28] Available online at https://madison.com/ct/news/local/roundup/state-debate-james-rowen-frets-at-size-of-foxconn-s/article_facb0b50-f568-11e7-b4bd-d7dd3fa91c17.html.

[29] Google News: https://news.google.com/publications/CAAqMQg-KItDQklTR2dnTWFoWUtGRzFoWTJsMlpYSnBibk4wY-VhSMWRHVXVZMjl0S0FBUAE?hl=en-US&gl=US&ceid=US%3Aen.

Lexis: advance.lexis.com, designate category as "News" and search "MacIver News

Finally, MacIver's journalists are credentialed by the Wisconsin State Legislature and its reporting has been honored by the Milwaukee Press Club's annual "excellence in journalism" awards, recognition never bestowed on (and likely never sought by) the Wisconsin Policy Forum.[30]

This failure to separate the parent think tank from the subsidiary news service is a fatal flaw in the District Court's analysis. As discussed above, numerous think tanks are getting into the news business, launching separately branded, subsidiary news outlets as part of their nonprofit missions to inform the public about the workings of government. *See* Dkt. 9, ¶ 4 (the News Service advances the MacIver Institute's overall mission "to make government more transparent for the taxpayers."). This evolution of think tanks into the news-reporting space is a natural consequence of shifting news-industry market dynamics: "These groups typically have relied on newspapers to do their spade work, so when newspaper coverage evaporates, they have a clear interest in ensuring that the work of journalists goes on." Jim Barnett, "Nonprofits with a perspective hiring journalists: A sign of things to come?," Harvard University Nieman Lab (Sept. 10, 2009).[31]

Many think tanks have found that one of the best ways to advance their missions to promote good public policy is by providing the public and scholars with a foundation

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Service."

[30] Dkt. 8, ¶ 3; Dkt. 9, ¶ 7. *See* "2018 Excellence in Journalism Awardees," Milwaukee Press Club, available online at https://milwaukeepressclub.org/2018-excellence-in-journalism-awardees/.

[31] Available online at https://www.niemanlab.org/2009/09/nonprofits-with-a-perspective-hiring-journalists-a-sign-of-things-to-come/.

of good news reporting. And that news reporting, often but not always carried under a subsidiary brand (like the MacIver News Service) runs alongside the policy scholarship within the same parent organization. The touchstones of such work are accurate and quality reporting from dedicated journalists who comply with accepted professional standards (like respecting embargoes or on- versus off-the-record comments. *See* Dkt. 15, ¶ 27). There is no evidence in this case that MacIver News Service journalists ever violated professional standards, *see* Dkt. 9, ¶ 8; they were refused access solely for their affiliation with this particular think tank, Dkt. 15, ¶¶ 22-26.

Moreover, even if MacIver and the Wisconsin Policy Forum are comparable entities — which they are not — that still does not justify the denial of access to MacIver here. Its anomalous to assert that because the government is excluding several people because of their viewpoints, suddenly such exclusion is okay. If the governor adopted a neutral criterion that all think tanks are not bona fide news organizations, that would hardly be narrowly tailored to the government's compelling interest in ensuring only bona fide journalists cover the governor. Rather, it would be presumptively unconstitutional as discrimination against an entire class of outlets, which the Supreme Court warned against in *Ark. Writers' Project, Inc.*, 481 U.S. at 228-29. And it would reflect a troubling attitude toward the viewpoints of newer, non-traditional outlets as opposed to the viewpoints of legacy, mainstream media. *See Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, 307 F.3d 566, 594 (7th Cir. 2002) (under free-speech clause, university funding policy may not privilege "historically popular viewpoints . . . compared with newer viewpoints").

The professional journalists at the MacIver News Service deserve to be treated like other members of the press corps. They stand in similar stead to the journalists whose rights were violated in *Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n*, 365 F. Supp. 18, 22-23 (D.D.C. 1973), *rev'd on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975) and *United Teachers of Dade v. Stierheim*, 213 F.Supp.2d 1368 (S.D. Fla. 2002). In *Consumers Union*, the District Court protected the rights of journalists from *Consumer Reports* magazine even though their employing organization was a lobbying and advocacy group, saying "The Constitution requires that congressional press galleries remain available to all members of the working press, regardless of their affiliation." *Id*. at 26. In *United Teachers of Dade*, the District Court upheld the rights of a monthly union paper to be treated the same as other media in covering a school board's meetings, even though the paper's corporate parent, the union, had business before that very board. 213 F.Supp.2d at 1374. These two cases provide a good guide to a simple principle: Journalists and news services must be judged on their own merits, and their sponsorship by a corporate parent or affiliation with an editorial board that separately engages in the public square does not disqualify them from recognition as bona fide journalists and news organizations.

CONCLUSION

The MacIver News Service's news director and investigative reporter are award-winning journalists credentialed by the Wisconsin State Legislature. Though their corporate parent is a think tank, they operate as professional reporters under a separate brand, and their content is posted to a separate Twitter account and syndicated

on WVCY-30 TV's news show.

Nevertheless, as the new Evers administration came into office they were left off every press list after they requested access. And they were physically blocked by the Governor's staff from joining their press corps colleagues at the February 2019 budget briefing. The Governor's communications director, a career partisan political operator, made that decision initially on her own accord. The Governor's office defended the decision by claiming it was based on neutral criteria. Later, as the record shows, a second set of supposedly neutral criteria were surreptitiously developed that conveniently correlated with the previous decisions to bar MacIver's journalists. The Governor's office calls this "guidance" a "nonexhaustive list" of "factors." As such, they cannot be neutral. Rather, the Governor's office simply arbitrarily applies the factors to some journalists but not to others, so that many other journalists whose employers flunk various factors are permitted to remain, while plaintiffs are barred.

Under the First and Fourteenth Amendments, that sort of treatment cannot stand.

The District Court's decision should be reversed.

Dated: June 23, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type limitations provided in Federal Rule of Appellate Procedure 32(a)(7). The foregoing brief was prepared using Microsoft Word 2010 and contains 7,134 words in 12-point proportionately-spaced Century Schoolbook font.

/s/ Daniel R. Suhr
Daniel R. Suhr

Counsel of Record for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2020, I electronically filed the foregoing Appellants' Brief with the Clerk of the Court for the U.S. Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Daniel R. Suhr
Daniel R. Suhr

Counsel of Record for Appellants

REQUIRED SHORT APPENDIX

Contents

Certificate

Pursuant to Circuit Rule 30(d), I hereby certify that this short appendix includes all the materials required by Circuit Rules 30(a) and (b).

/s/ Daniel R. Suhr
Daniel R. Suhr

Counsel of Record for Appellants

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN K. MACIVER INSTITUTE FOR PUBLIC POLICY and WILLIAM OSMULSKI,

Plaintiffs,

v.

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

Defendant.

OPINION and ORDER

19-cv-649-jdp

This case involves a dispute over credentials for press conferences held by Governor Tony Evers. Plaintiffs contend that they have a First Amendment right to press credentials, but that Evers withholds credentials because of plaintiffs' conservative viewpoint. Plaintiffs seek no damages; they ask only that the court order Evers to grant them access to his press conferences.

Plaintiffs moved for a preliminary injunction. Dkt. 6. The case calls for a straight-forward application of public forum doctrine, as articulated in *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983) and cases following it. An Evers press conference is a non-public forum, to which Evers may restrict access using reasonable, viewpoint-neutral criteria. After this suit was filed, Evers adopted press credentialing criteria based on those used by Congress and the Wisconsin Legislature. The court is not persuaded by plaintiff's argument that these criteria, or Evers's expressed interest in "fair and unbiased reporting," embody any viewpoint discrimination. Nor is the court persuaded that Evers has applied these criteria in a discriminatory way.

While the motion for preliminary injunction was under advisement, plaintiffs moved under Rule 65(a)(2) to consolidate the decision on the injunction with a decision on the merits, effectively converting the motion to one for summary judgment. Dkt. 28. Plaintiffs state that the material facts are undisputed; the court will grant the motion to consolidate. (Because the court is denying plaintiffs' request for an injunction, there is no prejudice to Evers, so there is no need to wait for a response from Evers on the motion to consolidate.) For reasons explained more fully below, plaintiffs' consolidated motion for preliminary injunction and for summary judgment is denied.

BACKGROUND

The following facts are drawn from plaintiffs' proposed findings of fact and Evers's responses to them, Dkt. 16, as well as from the parties' declarations and exhibits. Neither side has requested a hearing, and the material facts are not disputed.

The first plaintiff, the MacIver Institute, describes itself as "a Wisconsin-based think tank that promotes free markets, individual freedom, personal responsibility and limited government." Dkt. 9, ¶ 3. Plaintiffs provide little information about the activities of the MacIver Institute other than the MacIver News Service, which "investigates and reports on what is happening in state and local institutions of government across Wisconsin." *Id.* ¶ 4. The second plaintiff is William Osmulski, the news director for the MacIver Institute. Dkt. 8, ¶ 1. The president of the MacIver Institute, Brett Healy, describes it as "nonpartisan," but that is true only in the sense that it cannot lobby or expressly endorse political candidates without jeopardizing its non-profit status. Its website (at www.maciverinstitute.com), where its news reporting can be found, conveys consistently conservative political news and opinion

supportive of Republican politicians. The court will refer to the plaintiffs together as "MacIver," unless its necessary to identify them separately.

Tony Evers is the governor of Wisconsin, a Democrat elected in November 2018. Evers regularly participates in events where he answers questions from journalists. These events fall into four categories, described below in order of increasing exclusivity. *See also* Dkt. 15 (declaration from Evers's deputy chief of staff).

The first category consists of "public events." Public events are open to all members of the public, including journalists. Sometimes public events include a "press avail" component where Evers will answer questions from journalists. Evers does not restrict who attends public events, and MacIver does not object to Evers's handling of public events.

The second category consists of traditional "press conferences." Attendance at press conferences is necessarily limited for capacity and security. Journalists are typically informed of press conferences through the "media advisory email list" maintained by Evers's communication department. To attend a press conference, journalists on the media advisory email list must submit an RSVP to the communication department. MacIver's main objection in this case is that it is not included on the media advisory email list, and thus its journalists are not invited to press conferences.

The third category consists of "press briefings," which are off-the-record events to provide background on significant initiatives before they are announced to the public. Attendance at press briefings is by specific invitation only. Invitations go to a selected sub-set of the media advisory list—typically journalists who have a particularly substantial readership or viewership or a relevant subject matter specialty. (MacIver does not separately discuss press briefings in its motion for preliminary injunction, but the court assumes that MacIver believes

it is entitled to be on the media advisory list, and that as a result it would get some invitations to press briefings as well.)

The fourth category includes "one-on-one meetings" with journalists. MacIver acknowledges that Evers can grant exclusive interviews to specific journalists without violating the rights of other journalists. MacIver does not object to Evers's handling of one-on-one meetings with the press.

The dispute that led to this lawsuit arose shortly after Evers took office in January 2019. Osmulski requested that MacIver journalists be added to the media email advisory list, but Evers's staff didn't respond to the request. On February 28, the governor's office hosted an invitation-only press briefing to preview the 2019–2020 executive budget before its public release. Osmulski heard about the press briefing second-hand, and he emailed Evers's press staff to RSVP for himself and another MacIver journalist. But when Osmulski and his colleague arrived at the briefing, they were told that they weren't on the RSVP list and were turned away. Other journalists were also turned away that day.

Over the next few weeks, Osmulski complained, without success, to Evers's staff about being excluded from press conferences and press briefings. In May, counsel for MacIver made a public-records request for documents or communications related to any "neutral criteria the Communications Department of the Governor's Office uses to determine which journalists are allowed access to briefings or other events." Dkt. 7-6, at 2. The governor's office produced some responsive documents on June 20, but it withheld records that it considered privileged attorney-client communications, including records about its press-access criteria. Dkt. 17-1.

Six days later, on June 26, the governor's office of legal counsel circulated an internal memorandum to the communications department, providing "guidance for determining how

and when media is granted access to the Governor for exclusive/limited-access events." Dkt. 15-1, at 1. The media memorandum stated that the "most important consideration is that access is based on neutral criteria." It advised the communications staff that in response to requests for access, communication staff should consider the following non-exhaustive factors:

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?

Id. A footnote explained that the factors were drawn from the press-access standards used by the Wisconsin Capitol Correspondents Board and the United States Congress. *See id.* at 1, n.1.

Evers's original media advisory list was apparently based on the one used during his campaign for the governorship. In the months following the circulation of the media memorandum, the communications department made substantial changes to the media advisory email list to reflect the criteria. *Compare* Dkt. 7-1 (original list), *with* Dkt. 15-2 (current list). Recipients affiliated with the Democratic Party of Wisconsin and other political organizations were removed from the list.

The media memorandum was not made available to MacIver, so MacIver didn't know the basis for the administration's refusal to include its journalists on the list. In August, MacIver and Osmulski filed this suit, asserting claims under the First and Fourteenth Amendments and moving for a preliminary injunction. MacIver learned about the administration's media criteria and the updated media advisory email list for the first time when Evers included them with his brief in opposition to the motion for preliminary injunction. Evers says that MacIver journalists are excluded from the media advisory email list under its press-access criteria because MacIver is not principally a news organization. According to Evers, the MacIver Institute is a think tank with an affiliated news service that makes no effort to distinguish the work of the news service from the overall advocacy-focused mission of the think tank.

ANALYSIS

MacIver asserts three claims in its complaint: (1) a First Amendment equal-access claim premised on the theory that any denial of press access is subject to strict scrutiny; (2) a First Amendment viewpoint discrimination claim; and (3) a Fourteenth Amendment equal

protection claim. MacIver does not ask for damages; it seeks only declaratory and injunctive relief, including an injunction enjoining Evers from excluding MacIver journalists from press conferences and press briefings.

A. Preliminary injunction and summary judgment standards

The court evaluates MacIver's motion for preliminary injunction under the familiar two-part framework. First, the plaintiff must make three threshold showings: (1) it will suffer irreparable harm before a final resolution of the merits; (2) traditional legal remedies are inadequate; and (3) there is some likelihood of success on the merits of the claim. *HH-Indianapolis, LLC v. Consol. City of Indianapolis and Cty. of Marion*, 889 F.3d 432, 437 (7th Cir. 2018). Second, if the plaintiff makes the threshold showings, the court assesses the competing harms and the interests of the public in light of the plaintiff's chances of success. *Id.* Preliminary injunctions that require an affirmative act by the defendant, instead of merely restraining action, are "ordinarily cautiously viewed and sparingly issued." *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 295 (7th Cir. 1997) (citation omitted).

Summary judgment is appropriate only if there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a). In ruling on a motion for summary judgment, the court views all facts and draws all inferences in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment will not be granted unless "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Sarver v. Experian Info. Sols.*, 390 F.3d 969, 970 (7th Cir. 2004) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986)). The court agrees with MacIver that the material facts are undisputed, so it's efficient to consider the motion as one for

summary judgment. But, for the reasons that follow, the court concludes that MacIver is not entitled to judgment as a matter of law.

B. Irreparable harm and adequacy of legal remedies

MacIver contends that its journalists suffer irreparable harm every day that they are excluded from Evers's limited-access press events. Because they are excluded, MacIver journalists must rely on the reporting of others and on after-the-fact press releases to cover the Evers administration. They have no opportunity to ask questions at press conferences or briefings. These are types of First Amendment harms that have been deemed to be irreparable. *See Karem v. Trump*, No. CV 19-2514, 2019 WL 4169824, at *10 (D.D.C. Sept. 3, 2019) (temporary suspension of journalist's White House press pass "undoubtedly constitutes a concrete, unrecoverable harm sufficient to warrant preliminary relief"); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Traditional legal remedies would be inadequate. As in many cases involving restrictions on First Amendment rights, "the quantification of injury is difficult and damages are therefore not an adequate remedy." *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (citations and internal quotation marks omitted); *see also Karem*, 2019 WL 4169824, at *10 ("[T]he only way to remedy the injury is to return the [press] pass and the access that comes with it").

In cases implicating the First Amendment, the plaintiff's "likelihood of success on the merits will often be the determinative factor." *Higher Soc'y of Indiana v. Tippecanoe Cty., Ind.*, 858 F.3d 1113, 1116 (7th Cir. 2017) (citation omitted). That's the case here. MacIver has made the requisite showings of irreparable harm and inadequacy of traditional legal remedies;

the court turns to the merits. The material facts are undisputed, so from this point on, the analysis of the motion for preliminary injunction coincides with the evaluation of the motion for summary judgment.

C. Evaluation on the merits

1. Legal framework for press-access claims

Claims challenging government-imposed restrictions on access to government property or events have been generally governed by public forum doctrine, which establishes a framework for analyzing such restrictions based on the type of government property or event at issue. *See Perry Educ. Ass'n*, 460 U.S. at 44. "Traditional public forums," such as public streets or parks, are places open to anyone where citizens are traditionally free to speak without governmental approval or interference. Speakers cannot be excluded from a traditional public forum without a compelling government interest. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S 788, 800 (1985). A compelling government interest is also required to justify exclusions from "designated public forums," such as public theaters or other venues that the government has designated as a place for or a means of communication. *Id*. But in "nonpublic forums," access may be restricted "as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* (citations, quotation marks, and alterations omitted).

Public forum analysis has three steps. First, the court must decide whether the activity in which MacIver seeks to engage is protected by the First Amendment. *Cornelius*, 473 U.S. at 797. Here, there is no dispute that it is. *See Alvarez*, 679 F.3d at 597–600 ("[T]he First Amendment provides at least some degree of protection for gathering news and information, particularly news and information about the affairs of the government").

Second, the court must assess whether the forum at issue is public or nonpublic, to determine the appropriate level of constitutional scrutiny. *Cornelius*, 473 U.S. at 800. Evers contends that his press conferences and press briefings are nonpublic forums because he makes them available only to the select journalists who meet his access criteria. MacIver doesn't address this question. MacIver does not argue that the court should consider Evers's press events to be "designated public forums" that Evers has "opened up for expressive activity by part or all of the public." *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Evers's limited-access press events do not qualify as designated public forums under the Supreme Court's definition. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) ("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."). So the court concludes that Evers's limited-access press conferences and press briefings are nonpublic forums.

At the third step of the public forum analysis, the court must assess the access restrictions under the appropriate level of scrutiny, in this case the standard applicable to nonpublic forums. For a nonpublic forum, the question is whether the restrictions are (1) reasonable and (2) not an effort to suppress an opposing viewpoint. *Cornelius*, 473 U.S. at 800.

With that general framework in mind, the court turns to MacIver's three constitutional claims.

2. MacIver's First Amendment equal-access claim

MacIver says that the First Amendment's free press clause "includes a right of equal access for all journalists to information or events made generally available to the press corps." Dkt. 7, at 9.

MacIver contends that public forum analysis is relevant only for determining when a "speaker may speak" on government property, not for questions about press access, which MacIver says are always subject to strict scrutiny. Dkt. 19, at 2. For this proposition MacIver relies principally on *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977). *Sherrill* involved a correspondent for *The Nation* magazine who was denied a White House press pass for unspecified reasons, which were later identified as related to security. The court concluded that the denial of a press pass to a bona fide Washington correspondent must be based on a compelling government interest, and that it would require notice, an opportunity to rebut, and a written decision. *Id*. at 130. The analysis in *Sherrill* did not invoke public forum doctrine, but that isn't surprising because *Sherrill* predates *Cornelius* and *Perry*, the cases that established modern forum doctrine. In any case, the *Sherrill* court did *not* hold that governmental press-credentialing is subject to strict scrutiny. To the contrary, the court concluded that the Constitution did not require "the articulation of detailed criteria upon which the granting or denial of White House press passes is to be based." *Id*. at 128. MacIver doesn't cite any more recent authority for its contention that press-credentialing is subject to strict scrutiny.

Contrary to MacIver's central argument, courts now routinely analyze press-access issues under public forum doctrine following *Cornelius* and *Perry*. *See, e.g.*, *Youngstown Pub. Co. v. McKelvey*, No. 4:05 CV 00625, 2005 WL 1153996, at *6 (N.D. Ohio May 16, 2005) (applying public forum doctrine in newspaper's challenge to mayor's policy forbidding city

employees from speaking with newspaper's reporters), *opinion 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) (applying public forum doctrine in analyzing denial of equal access to a television broadcast corporation seeking to broadcast a public ceremony); *Getty Images New Servs. Corp. v. Dep't of Def.*, 193 F. Supp. 2d 112, 119 (D.D.C. 2002) (applying public forum doctrine in analyzing photojournalism company's claim that the government had denied it equal access to the detention facilities at Guantanamo Bay).

The court concludes that MacIver is not likely to prevail on its First Amendment equal access claim and is not entitled to summary judgment on that claim.

3. First Amendment viewpoint discrimination claim

Properly framed, MacIver's First Amendment claim is that it is a victim of viewpoint discrimination. This calls for an evaluation of restrictions placed on a non-public forum, so the question is whether Evers's press-credentialing process is (1) reasonable and (2) viewpoint neutral.

a. Reasonableness of press credential criteria

The government may restrict access to a non-public forum on the basis of "subject matter and speaker identity" so long as the restrictions are consistent with the purpose of the forum and do not discriminate on the basis of viewpoint. *Cornelius*, 473 U.S. at 806. The government interests need not be compelling ones. *Id.* at 809.

The court begins with Evers's proffered interests, which implicitly articulate the purpose of the forum at issue. Evers says that its press-access criteria are intended to serve two interests: (1) limiting attendance for space constraints; and (2) ensuring that those in attendance are

established, bona fide journalists who will (a) maximize the public's access to newsworthy information and (b) be more likely to abide by professional journalistic standards, such as honoring embargoes and respecting the distinction between on- and off-the-record communications. These interests apply to both press conferences and press briefings. Because MacIver does not separately address them, the court will consider them together.

Evers's interest in addressing space constraints is manifestly reasonable, even though Evers does not say specifically how many journalists can be accommodated at the capitol. And even if the space used for press conferences and briefings were not filled to capacity, it would be reasonable to limit attendance to some number that would afford those in attendance a reasonable opportunity to ask questions. MacIver doesn't dispute that Evers has a legitimate interest in controlling press access for space or security concerns, and MacIver does not challenge Evers's credentialing process on this ground.

Evers's interest in audience impact and journalistic ethics are also legitimate concerns. To facilitate greater public access to newsworthy information, Evers includes criteria nos. 1, 2, and 3, designed to gauge journalistic impact, favoring journalists from organizations that (1) focus principally on news dissemination, (2) have published news continuously for at least 18 months and maintain periodical or established television or radio components, and (3) employ professional journalists (or student journalists working for student-run publications). These criteria are reasonably related to the goal of making sure that the journalists who attend press conferences and briefings will reach larger audiences. MacIver does not dispute the legitimacy of Evers's interest in journalistic impact or dispute that these criteria are reasonably related to that interest.

Evers also includes criteria nos. 4 and 5, which concern journalistic integrity. Criterion no. 4 favors journalists and organizations who avoid real or perceived conflicts of interests, entanglement with special interest groups, and other associations that might compromise journalistic integrity. Criterion no. 5 addresses the independence of the journalist from groups that engage in lobbying or advocacy. These criteria are based on standards used by other governmental bodies—Congress and the Wisconsin legislature—and they reflect longstanding, well-established norms. The court concludes that these criteria reflect reasonable efforts to advance a legitimate government objective.

b. Viewpoint neutrality of press credential criteria

Evers's press-credentialing criteria are, at least as stated, viewpoint neutral. There is nothing about these traditional indicia of journalistic impact and integrity that favors one part of the political spectrum over another. MacIver does not contend otherwise.

MacIver's main argument is that the criteria are subjective, which vests broad discretion in Evers's staff, who apply the credentialing criteria unfairly, to the detriment of journalists with conservative viewpoints. MacIver relies primarily on three sets of comparators to demonstrate viewpoint discrimination.

First, MacIver contends that viewpoint discrimination may be inferred from the presence of three left-leaning outlets on the media advisory email list: *The Progressive*; *The Capital Times*; and *The Devil's Advocates Radio*, a liberal talk-radio show. But MacIver does not dispute that these three outlets are principally in the business of disseminating news and thus meet a threshold criterion that MacIver doesn't. As Evers points out, the media advisory email list includes several outlets that are widely viewed as conservative, including *The Washington Times*, *Fox News*, and *The Wall Street Journal*. MacIver argues that these are national outlets that

are unlikely to send journalists to cover Evers's press conferences. But that's not Evers's choice, and MacIver hasn't identified any local conservative media outlets that meet the credentialing criteria whose journalists have been excluded from the media advisory email list.

Second, MacIver contends that viewpoint discrimination can be inferred from the inclusion of comparators that are affiliated with organizations that engage in lobbying and advocacy activity. For instance, MacIver notes that the editors of two tribal newspapers—*Menominee Nation News* and *Kalihwisaks* (sponsored by the Oneida Nation)—are included on the list, even though both tribes are registered to lobby in Wisconsin. MacIver also cites WUWM (a public radio station operated by the University of Wisconsin-Milwaukee) and Wisconsin Public Television, both of which are on the list, even though both are affiliated with the University of Wisconsin Board of Regents, which retains legislative liaisons who engage in paid advocacy on behalf of the university system. MacIver says that many other entities on the list regularly engage in "lobbying" or "political advocacy" if those terms are defined as broadly as they have been applied to MacIver.

These are not helpful comparators because the media outlets are substantively independent from their parent organizations. Wisconsin Public Television, for example, operates as part of the University of Wisconsin and is thus under the auspices of the Board of Regents. But Wisconsin Public Television is not directly controlled by or funded exclusively by the Board of Regents. The *Menominee Nation News* may be affiliated with the tribe, and the tribe itself may engage in policy advocacy, but the *Menominee Nation News* functions as a stand-alone news organization. The relationship between these media outlets and their affiliated entities is nothing like the close connection between the MacIver Institute and the journalists who create content for its website.

Third, MacIver points out that some credentialled publications, such as the *Milwaukee Journal Sentinel* and the *Wisconsin State Journal* run editorials endorsing candidates in political races. And the media advisory email list includes many opinion journalists, columnists, and radio show hosts who regularly endorse causes, candidates, and legislation. Publishing editorials and endorsements does not disqualify an outlet under traditional standards of journalistic integrity, so long as the opinion staff and the news staff are separated. Again, MacIver has not demonstrated any separation between the ideological mission of the think tank and its news organization.

Fourth, MacIver contends that if Evers is serious about including only organizations whose "principal business" is "news dissemination," he should exclude journalists affiliated with most broadcast television networks and radio stations. After all, NBC, ABC, and CBS spend more time broadcasting sports and entertainment than news shows, and some of the radio stations on the media advisory email list dedicate more airtime to music than to news coverage. This is a variation on the argument made against Wisconsin Public Television, and it is based again on an overly expansive notion of "organization." The media advisory email list includes television and radio reporters who work for established news organizations, which in some cases are part of a larger media enterprise. Nothing in this supports the argument that Evers's press-credentialing process demonstrates viewpoint discrimination.

A truly relevant comparator would be a journalist from another think tank or advocacy group who is nevertheless included on the media advisory email list. For example, it would be probative of viewpoint discrimination if Jason Stein of the Wisconsin Policy Forum were on the list, because it would demonstrate that Evers includes journalists from some think tanks but not others. But Stein, a highly experienced journalist, isn't on the list and he was excluded

from Evers's press briefing on February 28, 2019, despite his express request to be included. *See* Dkt. 15-4. Stein's affiliation with a think tank rather than a journalistic enterprise resulted in his being treated just as Osmulki was treated.

None of the comparators that MacIver has identified raise an inference that Evers's press-access criteria have any viewpoint discriminatory effect. And without evidence of discriminatory effect, MacIver cannot prevail on its First Amendment claims. *See Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.*, 100 F.3d 1287, 1299 (7th Cir. 1996) ("[I]t is th[e] unconstitutional effect that ultimately matters.").

MacIver contends that it employs experienced journalists, and it is nonpartisan, not registered to lobby, and does not (and cannot) endorse political candidates. The court agrees that its journalists, including plaintiff Osmulski, have sufficient professional experience to make them credible state capitol correspondents. But their personal credentials have never been the problem. Evers has reasonably concluded that MacIver is not a bona fide news organization. MacIver publicly brands itself as a think tank committed to ideological principles. It engages in policy-driven political advocacy, including advocating for specific initiatives and policy approaches. It has a "news" tab on its website, but it does not maintain a news-gathering organization separate from its overall ideological mission. It stands on the same footing as the Wisconsin Policy Forum.

Much of MacIver's opening brief, Dkt. 7, is devoted to showing that Evers is motivated to discriminate against MacIver's conservative viewpoint. And in its reply brief, Dkt. 19, at 3–4, MacIver contends that Evers's expressed interest in a "fair and unbiased press corps," Dkt. 7, at 12, demonstrates his intent to censor journalists that he thinks are unfair and biased. The court assumes that Evers would prefer favorable press coverage, and that as a Democrat, he

would be less inclined to appreciate the work of the MacIver Institute than his Republican predecessor. But Evers's personal or political motives are simply not material: it only matters that he has reasonable, viewpoint neutral criteria for granting access to his press conferences and press briefings. *See Grossbaum*, 100 F.3d at 1293 ("We are governed by laws, not by the intentions of legislators. Just as we would never uphold a law with unconstitutional effect because its enactors were benignly motivated, an illicit intent behind an otherwise valid government action indicates nothing more than a failed attempt to violate the Constitution." (citation and internal quotation marks omitted)).

MacIver has adduced no evidence that Evers grants or denies press access unreasonably or on the basis of the journalist's viewpoint. The court concludes that MacIver will not succeed on its First Amendment viewpoint discrimination claim and is not entitled to summary judgment on that claim.

4. Equal protection claim

MacIver's Fourteenth Amendment equal protection claim repackages its First Amendment claims. The court has already concluded that MacIver will not succeed under the First Amendment. Because MacIver hasn't shown that Evers's criteria infringes on a fundamental right, MacIver is not entitled to heightened review under the Equal Protection Clause. *See Perry Educ. Ass'n*, 460 U.S. at 54 (concluding that the entitlement-to-access argument that the Supreme Court rejected under the First Amendment "fares no better in equal protection garb"); *Lyng v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW*, 485 U.S. 360, 370 (1988) (where a statute has no substantial impact on a fundamental interest, the classification does not garner heightened scrutiny under the Equal Protection Clause).

Accordingly, in deciding MacIver's equal protection claim, the court evaluates Evers's press-access criteria under the deferential rational basis standard. *See Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1071 (7th Cir. 2013). The press-access criteria easily survive rational-basis review, for the reasons explained above. The press-access criteria are reasonably related to Evers's asserted interests in accounting for space constraints, maximizing public access to information, and upholding journalistic standards. So the court concludes that MacIver will not succeed on its equal protection claim either.

D. Balance of hardship

Given the court's decision on the merits, the court will not consider the balance of harms at great length. MacIver says that the harms associated with its continued exclusion from the media advisory list are substantial, both to MacIver and its journalists and to the public at large, and that any hardship on Evers would be negligible because complying with an injunction would require nothing more than adding a few names to a listserv or setting out a few extra chairs at a press conference. Evers takes a broader view of the implications of an injunction. He contends that if he is ordered to grant access to MacIver, there will be no limiting principle by which he could restrict media access at all.

The court is persuaded that on balance, the harms of granting an injunction would outweigh the harms of maintaining the status quo. MacIver journalists won't have access to press conferences and briefings, but there is nothing to stop them from continuing to publish stories about Evers and his administration. But ordering Evers to grant access to MacIver journalists would establish an untenable precedent. Any citizen journalist could make the same case MacIver has made, forcing Evers to either permit unrestricted access at every event or

forego press events altogether. Under these circumstances, the balance of harms tips against an injunction.

E. Conclusion

The court concludes that the material facts are undisputed, but that the law supports Evers, not MacIver. Accordingly, the court will give MacIver ten days to show cause why summary judgment should not be granted to Evers.

ORDER

IT IS ORDERED that:

1. Plaintiffs' motion to consolidate the decision on the preliminary injunction with a decision on the merits under Federal Rule of Civil Procedure 65(a)(2), Dkt. 28, is GRANTED.

2. Plaintiffs' motion for preliminary injunction, Dkt. 6, is DENIED.

3. Plaintiffs must respond to the court's Rule 56(f) notice by April 10, 2020, showing why the court should not grant summary judgment against them on all claims.

Entered March 31, 2020.

BY THE COURT:

/s/

_____
JAMES D. PETERSON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN K. MACIVER INSTITUTE FOR PUBLIC POLICY and WILLIAM OSMULSKI,

Plaintiffs,

v.

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

Defendant.

ORDER

19-cv-649-jdp

At plaintiffs' request, Dkt. 28, the court consolidated plaintiffs' motion for preliminary injunction with a decision on the merits as provided by Federal Rule of Civil Procedure 65(a)(2), effectively converting plaintiffs' motion into one for summary judgment. The court denied the consolidated motion, concluding that plaintiffs had adduced no evidence that defendant Tony Evers violated their First or Fourteenth Amendment rights in denying them access to his limited-access press events. Dkt. 30. The court asked plaintiffs to show cause why it shouldn't grant summary judgment to Evers under Rule 56(f).

In response, plaintiffs now ask the court to permit them to file a motion for summary judgment that (1) develops legal arguments about who counts as "the press" (on the theory that the question should hinge on the individual journalist rather than the entity that employs him); and (2) develops the factual record about the extent of the MacIver News Service's news-gathering activities and its role within its parent organization, the MacIver Institute. Dkt. 31.

The court will deny plaintiffs' request. When plaintiffs 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. *See Proimos v. Fair Auto. Repair, Inc.*, 808 F.2d 1273, 1277–78 (7th Cir. 1987) ("Rule 65(a)(2) allows a judge to consolidate the hearing of a motion for preliminary injunction with the trial on the merits, but he may do this only if the parties consent or if they receive timely notice allowing them to gather and present all the evidence that would be pertinent at a trial on the merits."). It would be unfair to give the plaintiffs a do-over because they don't like the court's decision on the merits.

The decisive issue in this case is whether Evers has, and uses, reasonable, viewpoint-neutral criteria for granting press credentials. The undisputed facts show that he does. The application of the credentialing criteria will sometimes involve the exercise of judgment. Plaintiffs have adduced no evidence that Evers has exercised that judgment unreasonably or to disadvantage their viewpoint, so plaintiffs have no constitutional grievance.

The court will grant summary judgment to Evers under Rule 56(f) for the reasons explained in its March 31, 2020 opinion. The court will direct the clerk of court to enter judgment in Evers's favor and close the case.

ORDER

IT IS ORDERED that:

1. Summary judgment is GRANTED in favor of defendant Tony Evers under Federal Rule of Civil Procedure 56(f).

2. Plaintiffs' request for leave to file a supplemental summary judgment motion, Dkt. 31, is DENIED.

3. Plaintiffs' claims are DISMISSED with prejudice.

4. The clerk of court is directed to enter judgment in favor of defendant and close the case.

Entered April 14, 2020.

BY THE COURT:

/s/

_____
JAMES D. PETERSON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN K. MACIVER INSTITUTE FOR PUBLIC POLICY and WILLIAM OSMULSKI,

Plaintiffs,

Case No. 19-cv-649-jdp

v.

TONY EVERS,

Defendant.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendant Tony Evers against plaintiffs John K. MacIver Institute for Public Policy and William Osmulski dismissing this case.

s/ K. Frederickson, Deputy Clerk
Peter Oppeneer, Clerk of Court

April 14, 2020
Date