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' REPLY BRIEF

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I. Introduction.

If the Constitution's guarantee of the "freedom of the press" means anything, it must mean this: a government official may not selectively exclude a single news outlet perceived as skeptical of his policies from briefings and information available to everyone else in the press corps. That is what has happened here, and this Court must step in to safeguard these journalists' right to fair treatment.

The Defendant's response has two fundamental flaws. First, rather than treating this as a free-press case, he builds the entire legal framework of his argument around the free-speech clause's forum doctrine. He says the Plaintiffs' argument is "new" or "novel," when in fact it is well-recognized by five circuit court opinions and numerous district court decisions from the past seven decades. He dismisses these cases as predating modern forum doctrine, but in fact their ongoing vitality is recognized by courts today, even after the advent of forum doctrine. If the Court agrees with Plaintiffs that the First Amendment protects a right of equal access among journalists, then the question of viewpoint discrimination is irrelevant, because no equal-access case asks why equal access was denied; the fact of the denial was sufficient to resolve the case. And the Defendant has never argued that his media access criteria, as currently constituted, are the least restrictive means of ensuring only qualified journalists cover his activities.

Second, Defendant ignores the chronological unfolding of this case, acting as though the only evidence before this Court is the two-page policy the Defendant now

says he uses as the "neutral criteria" to decide press access. But the full record here reveals the real story: that upon taking office, the partisan political operative the Defendant hired as his communications director made a subjective decision to deny equal press access to the MacIver journalists, who were already credentialed members of the Capitol press corps. After Plaintiffs' counsel sent a letter explaining the unconstitutionality of the Defendant's treatment, the Defendant's lawyer offered one set of neutral criteria, which he applied to deny MacIver access while permitting others who failed those criteria to continue having access. After Plaintiffs filed this lawsuit, the Defendant revealed a second, longer set of neutral criteria, which he applies to continue denying MacIver access while still permitting others who fail the criteria to retain their access. These all-too-convenient criteria that continually vindicate the communications director's original subjective decision show the viewpoint targeting that is at the foundation of this case. And they show over and again that these "criteria" are really only "factors" that mask the subjective judgments of Defendant's staff.

II. Plaintiffs do not assert an inherent right of access to governmental information, but rather a right of equal access once government grants it.

The Defendant begins his response with a number of cases about the right of press and public to access to governmental information. Def.'s Resp. Br. at 17-19. He is quite right that under current precedent, the press has no inherent right to special access to governmental informational separate from the public at large. He is equally correct that under current precedent, there is no inherent right of access to governmental information. *See, e.g.,* Def.'s Resp. Br. at 18, *quoting Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 40 (1999) (government "could decide not

to give out . . . information at all without violating the First Amendment"). Governor Evers could decide never to hold a press conference and never to issue a press release, and the Plaintiffs would have no right to force him to do otherwise.

But that is not the Plaintiffs' claim here. The Governor *has* chosen to hold press conferences and briefings and to send media advisories, and he has decided to exclude the MacIver News Service from that information. This violates MacIver's right to equal access.[1] *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), and *Dahlstrom v. Sun-Times Media LLC,* 777 F.3d 937 (7th Cir. 2015), simply do not cover the situation here because they deal with an inherent right to access rather than a right to equal treatment once access has been granted.

The Defendant incorrectly asserts there is no right to equal access: "MacIver's constitutional claims rest on the premise that any time Wisconsin's Governor grants access to *some* journalists or news organizations, the Constitution requires the Governor to grant access to *all*. There is no legal support for MacIver's position." Def.'s Resp. Br. at 16 (emphasis original). Actually, Plaintiffs' position is exactly what the

[1] And this right exists under both the free press clause and the equal protection clause. Though MacIver concentrates on the free press precedents here and below, it hardly waived its equal protection claim, which is in all events coterminous. *See* Pls.' Principal Br. at 1 (mentioning equal protection twice in the statement of issues); *id.* at 8 & 9 (discussing *McCoy v. Providence Journal Co.*, 190 F.2d 760 (1st Cir. 1951) and other equal protection precedents); *id.* at 10, n.4 (citing *Quad-City Cmty. News Serv., Inc. v. Jebens*, 334 F. Supp. 8, 15 (S.D. Iowa 1971)); *id.* at 26 (invoking Fourteenth Amendment). Moreover, *Sherrill* is relevant here: it concludes that a journalist has a First Amendment freedom of the press liberty interest in his press pass before proceeding to determine whether due process had been denied in revoking the credentials. *Sherrill v. Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977). *Contra* Def.s' Resp. Br. at 33 n.4.

2nd Circuit has said: "[O]nce 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." *Am. Broadcasting Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977). That proposition has subsequently been cited and adopted many times. *See, e.g., Anderson v. Cryovac, Inc.,* 805 F.2d 1, 9 (1st Cir. 1986); *Huminski v. Corsones*, 396 F.3d 53, 84 (2d Cir. 2004); *Nicholas v. Bratton*, 376 F. Supp. 3d 232, 277 (S.D.N.Y. 2019); *Baldeo v. City of Paterson*, No. 18-5359 (KM) (SCM), 2019 U.S. Dist. LEXIS 9636, at *33 (D.N.J. Jan. 18, 2019); *Telemundo of L.A. v. City of L.A.*, 283 F. Supp. 2d 1095, 1102 (C.D. Cal. 2003) (quoting or citing this line from *ABC v. Cuomo*). Far from being "new" or "novel," *contra* Def.'s Resp. Br. at 1, 13, 33, 41, this right of equal access amongst journalists is well recognized by many courts. Pls.' Principal Br. at 7-8 (listing cases).[2]

And this right to equal access is protected by strict scrutiny. *See* Pls.' Principal Br. at 9 (citing *Sherrill v. Knight*, 569 F.2d 125 (D.C. Cir. 1977) and nine district and

[2] Plaintiffs laid out the breadth of the "press" concept in their opening brief (and sought to address it at greater length before the District Court) because the District Court's opinion differentiated the individual journalist (Osmulski) from his employer (MacIver) in a way that was foreign to prior precedent. S.A. at 17. *See Brown v. Damiani*, 154 F. Supp. 2d 317, 320 n.4 (D. Conn. 2001) ("the cases do not distinguish between the First Amendment rights of reporters and the media for whom they report."). The District Court's focus on the MacIver Institute's status as a "think tank" also drove the Plaintiffs' decision to describe the "press" concept and to show why think tank-based news services are both "press" and legitimate news outlets.

And the District Court's opinion relies heavily on the fact of MacIver's work as a "think tank." S.A. at 16-17. So Plaintiffs' opening brief includes an extended discussion of think tank journalism because "[a]n appellant who does not address the rulings and reasoning of the district court forfeits any arguments he might have that those rulings were wrong." *See* Def.s' Resp. Br. at 26 (quoting *Hackett v. City of S. Bend*, 956 F.3d 504, 510 (7th Cir. 2020)).

state court decisions[3]); *id*. at 10 (explaining why strict scrutiny is appropriate doctrinally). Defendant's attempt to distinguish *Sherrill* as a due-process case fails. Though it's true that the D.C. Circuit ultimately resolved it as a due-process case, it first established that the fundamental right at issue was press freedom. 569 F.2d at 129-30. And the D.C. Circuit says that once a resource (in this case, access to press facilities inside the White House) has been opened to bona fide journalists, equal "access [can] not be denied arbitrarily or for less than compelling reasons." *Id*. at 129. "[I]ndividual newsmen [can] not be arbitrarily excluded from sources of information." *Id*. at 130. This is precisely what has happened here — individual newsmen, the MacIver journalists, have been arbitrarily excluded from access that is generally available to all their colleagues in the Capitol press corps.[4]

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[3] Defendant tries to distinguish most of these cases by saying they pre-date the forum doctrine, as set forth in *Perry*, but the Defendant never explains why *Perry* preempts a well-recognized doctrine of equal access established under an entirely different clause of the First Amendment. The two more recent cases he dismisses by saying, "MacIver makes no showing why *United Teachers* or *Times-Picayune* mandates strict scrutiny here." *Id*. Of course, two court decisions from Florida and Louisiana mandate nothing on this Court. But these two decisions, like all the others cited, show that the majority of published decisions invoke strict scrutiny to analyze equal access claims. Pls.' Principal Br. at 10, & n.4.

[4] Defendant asserts that *Sherrill's* application reduces to his fundamental contention that the MacIver journalists are not "bona fide journalists." Def.'s Resp. Br. at 37. This Court should not miss two facts from Sherrill's case: (1) the courts vindicated the rights of the White House correspondent for an avowedly liberal news magazine, *The Nation*, after he was kicked out of the press room on a suspiciously convenient rationale by the administration of Republican President Gerald Ford, *Forcade v. Knight*, 416 F. Supp. 1025, 1028 (D.D.C. 1976) (Forcade was Sherrill's predecessor as director of the Secret Service), and (2) Knight's uncontested "bona fides" as a Washington journalist were established by the fact that he was credentialed to cover Congress, just as MacIver's journalists are credentialed to cover the Wisconsin Legislature. *Sherrill*, 569 F.2d at 129 n.19.

Defendant attempts to distinguish Plaintiffs' doctrinal argument by saying that this is a case of individual-targeting, rather than one targeting the news media as a class. Defs.' Resp. Br. at 40. That is true, but it's a distinction without a difference: if government policies targeting news media broadly are subject to strict scrutiny, then it makes sense to say that government policies targeting a news media outlet individually should also be subject to strict scrutiny.

Of course, government may have compelling interests that justify limiting press access, such as presidential security or limited space. *See* Pls.' Principal Br. at 14 (acknowledging security and space constraints). At one point, the Defendant asserts, "since it is not possible or practical to allow every media outlet to attend every press event, the criteria are one method by which the Governor can limit attendance based on space constraints, security concerns, and expectations of journalistic integrity." Def.'s Resp. Br. at 31. *See id*. at 29. Yet Defendant never makes a concerted argument that his criteria meet the requirements of compelling interest and least-restrictive means. But more importantly, the assertion is belied by the fact that nearly 800 reporters and media outlets are on his media advisory list, Dkt. 15, Ex. 2, including many with smaller circulations or fewer dedicated news journalists than MacIver. Just as important as the legal term of art "strict scrutiny" is the usual meaning of the words – these facts should cause the Court to apply a strict, skeptical scrutiny to the Defendant's actions.

III. The government speech doctrine does not apply to this case.

Defendant suggests that because the Governor's press events are government

speech, that the First Amendment has not application to this case at all. Def.'s Resp. Br. 27. The only circuit court decision Defendant cites for this extreme proposition actually supports the conclusion that the government speech doctrine has no application here. Defendant asserts: "'At least one Circuit has applied the government speech doctrine to governmental press conferences.' *Brandborg v. Bull*, 276 F. App'x 618, 620 (9th Cir. 2008)." Def.'s Resp. Br. at 25-26. In *Brandborg*, a private, non-governmental activist association demanded a right to speak at a governmental press conference. *Id.* at 619. The Court correctly concluded that a private, non-governmental speaker may not force his way into a government press conference. *Id.* When the government is speaking, it may regulate its own speech based on viewpoint, even where its message is conveyed by private individuals. *Id.*

But then the Court goes on to distinguish another claim made by the plaintiff in *Brandborg*: that he was excluded from *attending* the press conference altogether based on viewpoint. *Id.* at 620. If the complaint alleged that plaintiff was excluded from attending the press conference because of his viewpoint, while other members of the public who also lived in the subject area were permitted to attend the press conference, then plaintiff would have alleged a proper claim under the First Amendment. *Id.* So the Court remanded the case to the district court to determine whether the complaint alleged a proper First Amendment violation. *Id.* The distinction made by the Ninth Circuit in *Brandborg* is the exact reason Defendant's reliance on it is misplaced: here, Plaintiffs are not seeking to speak at the governor's press conferences, they are only seeking to attend. And they are being excluded from doing so

based on their viewpoint. Contrary to Defendant's suggestion, he has no support in applying the government speech doctrine to cases regarding access to attendance of press conferences.

The Court should consider the breathtaking sweep of the Defendant's suggestion invoking *Brandborg*. Defendant attempts to apply the government speech doctrine to citizens' ability to access that speech. In other words, Defendant argues that because the government can control its own speech, including by making viewpoint-based distinctions among who may speak on behalf of the government, then the government can also control who has *access* to that speech, even by making viewpoint-based distinctions. The consequences of this logic are staggering in the breadth of the rights that they would negate. In the context of free press, such a rule would allow government officials to freely discriminate based on a journalist's viewpoint with no court review. *But see McBride v. Vill. of Michiana*, 100 F.3d 457 (6th Cir. 1996); *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 v. Stierheim*, 213 F. Supp. 2d 1368 (S.D. Fla. 2002); *Times-Picayune Pub. Corp. v. Lee*, Civil Action No. 88-1325, 1988 U.S. Dist. LEXIS 3506 (E.D. La. Apr. 15, 1988); *Borreca v. Fasi*, 369 F. Supp. 906 (D. Haw. 1974); *Quad-City Cmty. News Serv. v. Jebens*, 334 F. Supp. 8 (S.D. Iowa 1971) (prohibiting governmental retaliation based on a journalist's viewpoint). Following this logic to its extreme would allow the governor to exclude citizens access to any government information that could be considered government speech based on viewpoint. For example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court held that

under the government speech doctrine, the government could prohibit doctors who receive federal funds for federal health family planning services from discussing abortion with their patients. But under Defendant's logic, if the government can control *access* to its speech based on viewpoint, then not only could the government prohibit doctors who receive federal health family planning services from discussing abortion with their patients, it could prohibit patients with pro-choice views on abortion from accessing the health family planning services provided by doctors who receive federal funds. Thus, Defendant's position that the government speech doctrine applies to *access* to government speech finds no support in the law.

IV. The forum doctrine does not apply to this case.

The forum doctrine is a free speech doctrine Defendant is trying to shoehorn into a free press claim. But the square peg does not fit the round hole. First, the Court should not borrow a doctrine from one clause (free speech) when there is already available a much more natural doctrine (equal access) from a clause that is directly applicable (free press). Second, attendance at a press conference does not mean one "speaks" in a forum — MacIver journalists could attend a press conference and not speak at all. They could attend and not be called upon by the Governor to ask a question. They could attend and only get b-roll for use in their television segments. They could attend the budget briefing and only listen and take the embargoed documents. In other words, they could attend and achieve a journalistic purpose without every speaking. A speech doctrine is a poor fit for potentially silent observers.[5]

[5] Also, looking through the lens of equal access fits well for both the press clause and

This Court should also bear in mind its own admonitions that forum doctrine should be used cautiously. *Wis. Interscholastic Ath. Ass'n*, 658 F.3d at 624 (citing *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 75 (1st Cir. 2004) ("forum analysis itself has been criticized as unhelpful in many contexts,"); *Ill. Dunesland Pres. Soc'y v. Ill. Dep't of Nat. Res.*, 584 F.3d 719, 724 (7th Cir. 2009) (given the multiplicity of gradations of fora, "it is rather difficult to see what work 'forum analysis' in general does.")). *See Wis. Interscholastic Ath. Ass'n v. Gannett Co.*, 716 F. Supp. 2d 773, 794 (W.D. Wis. 2010) ("In *Illinois Dunesland*, Judge Posner even suggests that the entire forum analysis could be chucked in favor of a context-sensitive inquiry regarding the purpose and effect of a regulation on speech. . ."). This is one of those "many contexts" where forum analysis is simply "unhelpful," because the type of property on which (or the type of event at which) the governor is speaking to media is constantly shifting, and often includes private property.

Defendant acknowledges this difficulty, and so conveniently proposes that a uniform rule be established at the lowest level of protection for other participants. Def.'s Resp. Br. at 29-30. A better option is what courts have consistently done in these cases: ignore forum analysis entirely in favor of an on-point doctrine of equal access founded in the free press clause. Pls.' Principal Br. at 7. To adopt forum analysis is to say the 1st and 2nd Circuits used the wrong principle to decide similar equal-access

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for the equal protection clause. *See, e.g., Quad-City Cmty. News Serv., Inc. v. Jebens*, 334 F. Supp. 8 (S.D. Iowa 1971) (looking at exclusion through both lenses as complementary). Defendant makes no effort to show how the forum doctrine is useful for resolving the Plaintiffs' equal protection claim.

cases that also post-date *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), the case which Defendant believes invalidates *ABC v. Cuomo* and numerous other pre-1983 equal-access decisions. *Anderson v. Cryovac, Inc.,* 805 F.2d 1, 9 (1st Cir. 1986); *Huminski v. Corsones*, 396 F.3d 53, 84 (2d Cir. 2004). This Court should not be the first circuit court to expand the use of forum analysis outside of the speech context into the free press clause.

For these reasons, forum analysis does not apply to a free press equal access case. Rather, the proper analysis is the analysis other circuit courts have applied in similar cases, as Plaintiffs describe in their principal brief. Pls.' Principal Br. at 7-9. In those cases, the fact of the denial of equal access was sufficient to prove plaintiffs' case; no inquiry into the Defendant's motive was necessary. Therefore, the Court should reverse the district court and grant Plaintiffs' motion for summary judgment and order the Defendant to extend fair treatment to them.

V. In the alternative, if forum analysis applies, the totality of the record makes clear that MacIver has been targeted for selective exclusion because of its viewpoint.

However, if the Court decides to analyze attendance at the Defendant's press conferences under the speech clause rather than press clause, which it should not — and create a split with the First, Second, and D.C. Circuits — and if the Court agrees with the District Court that these press conferences are a nonpublic forum, Plaintiffs should still win because the Governor here clearly engaged in viewpoint discrimination against a disfavored news outlet.

Admittedly, there is no smoking gun email in which the Governor's communications director writes, "Those conservative hacks at MacIver are the worst; don't let

them in the press room." Because of this, Defendant concludes "the record evidence . . . shows absolutely no discrimination." Def.s' Resp. Br. at 43. But viewpoint discrimination may be inferred from the facts as much as proven by a single explicit statement. *See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 538 (1993) (government officials' discriminatory motives may be deduced from facts). And if the Court concludes that MacIver has been the victim of viewpoint discrimination, then Plaintiffs win even if the Court finds that press conferences are a nonpublic forum, because access to nonpublic fora must be viewpoint neutral.

Here's what the record shows: The MacIver News Service is an award-winning team of professional reporters credentialed by the Wisconsin Capitol Correspondents Board. Dkt. 9, ¶ 6. Its news director and investigative reporter, the two barred from the February 2019 press conference, are each individually award-winning professional journalists. *See* Dkt. 8, ¶ 3; Missouri Press Ass'n.[6] Plaintiff Osmulski is a member of the Society of Professional Journalists. Dkt. 8, ¶ 1. As part of his work for the MacIver News Service, Osmulski produces a weekly state news bulletin that runs on WVCY-30 television in Milwaukee. Dkt. 8, ¶ 4. The record also shows that the News Service's parent organization, the MacIver Institute, is a center-right think tank that "that promotes free markets, individual freedom, personal responsibility and limited government," policy views often at odds with those of the Defendant. *See* Dkt. 9, ¶ 3.

[6] Missouri Press Ass'n, AP Media Editor Awards (2012), available online at https://mopress.com/ap-media-editor-awards/.

Given all this, the Governor's communications director, herself a career political operative, based on her personal experience in Wisconsin politics and media, made a subjective judgment to exclude these MacIver journalists from access to the Governor's press conferences, briefings, and media advisories. *See* Dkt. 15, ¶ 24. This despite the fact that the media advisory list at the time included legislative staffers and political operatives. Dkt. 7, Ex. 1. When MacIver wrote a demand letter after it was blocked from the February briefing, the Governor's lawyer responded with a short paragraph of neutral criteria that conveniently justified MacIver's exclusion. Dkt. 7, Ex. 5. When MacIver filed its suit, it pointed out the obvious discrimination in permitting these non-journalists access to the list, but not MacIver. Dkt. 1, ¶ 5. Ah, the Defendant responded: unbeknownst to MacIver he had set up a new set of criteria and cleaned up the media list, but alas MacIver did not meet these new criteria either. Dkt. 15. Even now, Defendant continues to insist that he "expect[s] that those journalists and organizations will provide an objective account of the Governor's statements." Def.'s Resp. Br. at 32-33. This even though Plaintiffs pointed out in their opening brief that the editorial page editors of Wisconsin's two largest daily papers, among other non-objective opinion writers, were on the "updated" media list. Pls.' Principal Br. at 21-22.

And now we learn that a series of press conferences headlined by the Governor, announced by the Governor on his Twitter account, were in fact sponsored by the Department of Health Services (run by the Governor's appointee). Def.s' Resp. Br. at 44, n.9. And the media access criteria used by DHS for these press conferences are

apparently different from the Governor's own criteria, because, *mirabile dictu,* two self-proclaimed progressive news outlets that flunk the Governor's criteria are permitted in to these COVID-19 press conferences by DHS, but MacIver is still excluded. *See* Dkt. 15, ¶ 28 (the Governor's communications director says the *Wisconsin Examiner* has been excluded from his press list for failure to meet one criterion, namely that a publication must be in existence for at least 18 months). This is just further evidence of how the Governor's office is constantly shifting the goalposts, allowing in yet more journalists who flunk his "neutral criteria" while yet again banning MacIver.

In spite of all this, the District Court concluded that MacIver was not the victim of viewpoint discrimination because the research director from the Wisconsin Policy Forum was also refused admittance to the February briefing. S.A. at 16-17. MacIver's opening brief confronts this comparison directly, both by differentiating MacIver's news service from its policy shop and by showing that MacIver's model of having both a news service and a policy shop is not unique from other think tanks, though it *is* different from the Policy Forum, which has only a policy shop.

The District Court ignores or excuses all other evidence that other outlets were treated differently. And Defendant here waves away his hypocrisy and selective enforcement of the criteria by saying, "MacIver does not suggest that any of these other entities actually has a different viewpoint from MacIver. Without making that showing, it is meaningless to suggest that MacIver's viewpoint was the distinguishing factor." Def.'s Resp. Br. at 47. Of course, throughout this case MacIver has pointed out

the difference between its viewpoint and those of other outlets and the Governor. Dkt 7, at 12 ("Journalists who are affiliated with institutions that have a liberal or progressive viewpoint are included in the Governor's press events and listserv (see Exhibit 1, listing outlets on the listserv including *The Progressive* magazine, Madison *Capital Times* newspaper, and Devil's Advocate radio show). Meanwhile, journalists affiliated with an institution with a conservative or free-market viewpoint, namely the MacIver journalists, are excluded."). But even if the Governor permitted one free-market outlet (say, the *Wall Street Journal*) while barring another (MacIver), it could be that the "viewpoint" basis for the discrimination was less than an objection to a comprehensive ideology and more motivated by a dislike for a particular story, or editorial, or report from MacIver's policy shop. Such retaliation is no less viewpoint discrimination because the motivation is more granular than a comprehensive worldview. What's more, government engages in illicit viewpoint discrimination by retaliating against someone who holds a particular viewpoint even if it chooses for some reason not to retaliate against others who hold the same viewpoint. Otherwise government could automatically avoid judicial scrutiny by exempting a single speaker with a particular viewpoint from a ban on all others who hold that viewpoint.

The Defendant acts as though his decision to rigorously and expansively interpret his criteria to ban MacIver while permitting in others who would fail such a test might be based on some other, non-viewpoint distinction, like the color of the reporter's hair or their shared love of dogs. Def.'s Resp. Br. at 47. The Court need not abandon its common sense to look at the facts and see the game that's afoot here.

Defendant ends with an argument from the U.S. Supreme Court's decision in *Forbes*. The Defendant claims that he is entitled to some "built-in discretion" when making access determinations (Def.'s Resp. Br. at 47); that ties about whether a government official has engaged in viewpoint discrimination go to the government. This seems exactly backwards: "where the government itself is being criticized . . . it has a special incentive to suppress opposition," *Black Panther Party v. Smith,* 661 F.2d 1243, 1265 (D.C. Cir. 1981), *vacated on other grounds*, 458 U.S. 1118 (1982), and so courts should be especially skeptical of its motives. This Court treads dangerous ground if it adopts a test that says, "we trust the government officials who are subject to media coverage to choose for themselves which media get to cover them." Rather, courts must see it for what it is: "an effort to manage the news by manipulating who comes to hear what's to be said and therefore who reports it," *Citicasters Co.*, 2007 U.S. Dist. LEXIS 113246, at *7, and approach it with appropriate skepticism. Running throughout the Supreme Court's cases from the past century is a consistent theme: courts must be "intensely skeptical" of any government efforts to influence, manipulate, regulate, censor, or pick-and-choose among the media. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976) (quoting *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring)).

In fact, this passage from *Forbes* supports MacIver's claims, not the Defendant's. Read in full, the Court is highlighting the importance of allowing news media outlets to adopt strong editorial stances, and the need for courts to respect journalist judgments about what's newsworthy or worthwhile programming. *Ark. Educ. Tv Comm'n*

v. Forbes, 523 U.S. 666, 674 (1998).

Regardless, this paragraph from *Forbes* simply reaffirms a longstanding principle: when the government is speaking (in this case, as a public broadcaster), it may discriminate based on viewpoint. But Plaintiffs have already shown why government speech doctrine is inapplicable too this case (for the reasons discussed *supra* in Section III). In the passage quoted by Defendant, the Court is stating the obvious fact that the Court is not as well equipped as career journalists to determine what content belongs on public television. But it hardly is a warrant for a government official, whose job relies on his election and reelection by the people, to receive deference when orchestrating which news media get to cover his official activities. That is what the Defendant has done here: attempted to manipulate the media coverage of his official activities by selectively targeting one disfavored outlet for exclusion based on its perceived attitude towards his policies. That kind of censorship, intimidation, and retaliation based on viewpoint is not allowed in a nonpublic forum, nor is it narrowly tailored to any compelling government interest.

CONCLUSION

"In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy." *Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations*, 413 U.S. 376, 381-82 (1973) (quoting *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring)). That protection includes a promise of neutral treatment by the government, so the politicians being covered by the news media can't retaliate against journalists based on their coverage or editorial stances by selectively excluding them from the press corps.

This free press, in all its diversity of opinion and reporting, serves its "essential role" by informing public opinion, such that "the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). The Court should view Governor Evers' decision to exclude the award-winning journalists from the MacIver News Service from his press corps with grave concern, and not forget Justice Black's precept that "[t]he press [is] to serve the governed, not the governors." *N.Y. Times Co.,* 403 U.S. at 717.

The District Court's decision should be reversed.

Dated: August 14, 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 and contains 4,534 words in 12-point proportionately spaced Century Schoolbook font.

/s/ Daniel R. Suhr
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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2020, I electronically filed the foregoing Reply 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
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