No. 21-388

In The

Supreme Court of the United States

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

Petitioners,

v.

TONY EVERS, GOVERNOR OF WISCONSIN,

Respondent.

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

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BRIEF AMICUS CURIAE OF THE HONORABLE SCOTT WALKER IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICUS[1]

Amicus Scott Walker was the 45th Governor of the State of Wisconsin, and is a strong supporter of transparency in government and a robust free press.

In 2020, he became president of Young America's Foundation ("YAF"), a non-profit organization committed to ensuring that increasing numbers of young Americans understand and are inspired by the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. Amicus' duties at YAF include overseeing the management of YAF's publications, including the New Guard and Libertas, and its National Journalism Center, which since 1977 has trained aspiring journalists in the values of responsible, balanced, and accurate reporting.

Amicus has an interest in advocating for the constitutional protection of journalists from arbitrary, invidious, or otherwise unjustified government discrimination.

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[1] As required by Supreme Court rules 37.2 and 37.6, Amicus states as follows: no counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; no person other than Amicus or his counsel made such a monetary contribution; counsel of record received timely notice of intent to file this brief; and consent has been given by all parties for this brief.

SUMMARY OF ARGUMENT

Writing from Paris in 1787, Thomas Jefferson famously quipped:

> The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.

5 Works of Thomas Jefferson 253 (P. Ford ed. 1904); *see also John K. MacIver Inst. for Pub. Pol'y, Inc. v. Evers*, 994 F.3d 602, 605 (7th Cir. 2021).

Jefferson recognized that our republic depends for its functioning on a free press. In that light especially, the facts of this case are troubling. The executive of a state holds a press briefing on a matter of general public importance to which certain reporters are invited; a pair of credentialed reporters attempt to attend the briefing but are barred at the door; and a post-hoc policy is adopted to justify the decision and future exclusion of the reporters. Yet despite constitutional provisions prohibiting the government from "abridging the freedom . . . of the press," U.S. Const. amend. I, and "deny[ing] to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1, the Seventh

Circuit concluded that the executive's criteria for picking and choosing some reporters over others need meet only the most minimal of standards, namely be "reasonable" and "viewpoint neutral."

The Seventh Circuit found this lenient rule justified based on its conclusion that forum analysis provides the proper lens through which to view this case. But, as Petitioners observe, forum analysis is a free speech construct that does not transfer well to equal access cases. Forum analysis applies where speakers wish to engage in expressive activity on government property, a condition not present here. The doctrine's categories, moreover, make no sense as applied to the press in this context.

The Petitioners have provided a superior means of assessing this case—review under the Free Press Clause itself—and that claim warrants this Court's review. But an additional avenue of relief, asserted below, is also available. If this Court grants review of this case, it should also order the parties to brief whether the Respondent's actions violated the Equal Protection Clause. Under this Court's precedent, governmental classifications burdening fundamental rights such as First Amendment guarantees deserve heightened scrutiny. This approach is also a far better match for this case than forum analysis, as it focuses judicial attention on a meaningful testing of the challenged governmental distinctions—the actual subject of this dispute—rather than on where supposed, but illusory,

"expressive pursuit[s]" are taking place. *John K. MacIver*, 994 F.3d at 611. Given the First Amendment interests at stake here, heightened scrutiny under the Equal Protection Clause is far more appropriate than a bare test of reasonableness and viewpoint neutrality which will virtually always be met.

ARGUMENT

I. Forum analysis is a poor fit for equal press access cases.

The Seventh Circuit resolved this case through application of forum analysis, apparently suggesting that the framework applies to questions involving *any* "First Amendment activities" on government property, including exercise of the freedom of the press. *John K. MacIver*, 994 F.3d at 609.

The Court selected this approach even though modern forum analysis is a tool for assessing free speech, not free press, claims. *See, e.g.*, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215 (2015) ("We have previously used what we have called 'forum analysis' to evaluate government restrictions on purely private speech that occurs on government property."); *Christian Legal Soc. Chapter of the Univ. of California v. Martinez*, 561 U.S. 661, 679 (2010) ("[I]n a progression of cases, this Court has employed forum analysis to determine

when a governmental entity, in regulating property in its charge, may place limitations on speech.").

None of the cases cited by the Seventh Circuit below in support of its decision to apply forum analysis, *see John K. MacIver*, 994 F.3d at 612, are to the contrary. *See Minnesota Voters All. v. Mansky,* ___ U.S. ___, 138 S. Ct. 1876 (2018) (applying forum analysis to free speech claim); *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37 (1983) (same); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (same); *Frisby v. Schultz*, 487 U.S. 474 (1988) (same).[2]

Thus, before deciding that forum analysis should be "imported wholesale" into the field of journalism, *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 749 (1996) (plurality opinion), it was incumbent on the Seventh Circuit to fully consider the relevance of the doctrine and its categories "with an eye toward their

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[2] Even in a case like *U.S. Postal Serv. v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981), which involved forum analysis and *joint* speech and press claims, the speech claim clearly controlled as the facts involved a private party's desire to speak on public property and no press claim was separately analyzed. As discussed below, that is not the case here. *See U.S. Postal Serv.*, 453 U.S. at 131 n.7 (explaining holding, in case where civic groups wished to place unstamped materials in the mailboxes of private homes, that a nonpublic forum "may be subject to a prohibition of speech, leafleting, picketing, *or other forms of communication* without running afoul of the First Amendment" (emphasis added)).

purposes," *Pleasant Grove City v. Summum*, 555 U.S. 460, 484 (2009) (Breyer, J., concurring). This the Court failed to do—a grievous error, as forum analysis is inadequate to meet the distinct questions this case poses for two central reasons.

First, although (as the Seventh Circuit noted) courts have used forum analysis to assess the constitutionality of governmental restrictions on private "expressive activity," broadly defined, *John K. MacIver*, 994 F.3d at 612, the doctrine has no application to governmental speech. *See Summum*, 555 U.S. at 467. But in the context of the type of events at issue in this case—press briefings and limited-access press conferences—the relevant speakers are government actors, not journalists in attendance. Consider the facts of this case: "an invitation-only press briefing . . . during which *the Governor's office* would preview the major initiatives in his budget address scheduled for that same evening." *John K. MacIver*, 994 F.3d at 607 (emphasis added). Journalists do not attend such events to express themselves, but instead to gather information; a journalist might attend such an event and never utter a single word. And although journalists might engage in private speech when asking questions, and the government seek to restrict such speech, that is not this case. This case involves the threshold issue of access by press to a press event for *any* purpose.

The Seventh Circuit, implicitly acknowledging all of this—and seeming to suggest that it was actually treating this case as one under the Free Speech Clause—concluded that forum analysis governed because "gathering information for news dissemination" is an "expressive pursuit." *Id.* at 611-12. That is contradicted by this Court's precedent, which has "rejected 'the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea," and instead holds that conduct must be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (first quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968), then quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam)).

The relevant questions under this line of cases are whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Id.* (quoting *Spence*, 418 U.S. at 410-11) (alterations in original). In *Texas v. Johnson* the Court illustrated this test with several examples from its cases, citing, *inter alia*,

> the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam; . . . a sit-in by blacks in a

> "whites only" area to protest segregation; . . . the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam; and . . . picketing about a wide variety of causes.

Id. at 404 (citations omitted).

What similarly "particularized message" does a journalist "gathering information" on a notepad or computer seek to convey? There is none. If information-gathering is an expressive pursuit, anything is an expressive pursuit.

The second problem with applying forum analysis to this case is that the fora identified by this Court do not make sense when applied to the press. For example, public parks may be "traditional public forums for 'the delivery of speeches and the holding of marches and demonstrations' by private citizens," *Texas Div.*, 576 U.S. at 214 (quoting *Summum*, 555 U.S. at 214), but a park is no more "traditional" a locale for newsgathering than a briefing room, and indeed, much less so.

Conversely, those events which have long been opened for press activity—press conferences, press briefings, and the like—are, by their nature, generally closed to the public and thus, under this Court's precedent, permit maximum governmental censorship at the precise time when one might

express free press rights to be at their zenith. *See, e.g.*, *Minnesota Voters All.*, 138 S. Ct. at 1885 (in spaces "not by tradition or designation a forum for public communication," the government's regulations need only be reasonable and viewpoint neutral (quoting *Perry*, 460 U.S. at 46)). Applying forum analysis to press access cases may make all future cases easy ones, but only at the total expense of the constitutional rights at stake.

This is precisely why this Court has indicated that "the public forum doctrine should not be extended in a mechanical way" to "very different context[s]". *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672-73 (1998) (public television broadcasting). In *Arkansas Educ. Television Comm'n*, for instance, this Court explained that "broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations." *Id.* at 673. This case presents the opposite problem: narrow rights of access for journalists, *merely* because press events are inherently "nonpublic," would be antithetical to the traditional role the Constitution preserves for them. This is not to say that the press need be granted unlimited access, but a haphazard "jurisprudence of labels" cannot answer the question. *Summum*, 555 U.S. at 484 (Breyer, J., concurring).

II. If it grants the petition, this Court should order the parties to additionally brief the application of the Equal Protection Clause.

If forum analysis is not the proper rubric for this case, what is? The Petitioners argue that the First Amendment's Free Press Clause itself imposes an equal access principle, and that claim alone is worthy of this Court's attention. However, a second claim raised by the Petitioners below—one under the Equal Protection Clause—provides an attractive alternative.

The Fourteenth Amendment provides in part that a State may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799 (1997).

Although most state-imposed classifications need only meet rational basis review, "a classification warrants some form of heightened review [if] it jeopardizes exercise of a fundamental right." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Freedom of the press fits this definition. *See Lovell v. Griffin*, 303 U.S. 444, 450 (1938) ("freedom of the press . . . [is] among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action"); *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 33 (1973) ("key" to

determining existence of a fundamental right "lies in assessing whether" the right is "explicitly or implicitly guaranteed by the Constitution"); *cf. also Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) (heightened scrutiny appropriate under Equal Protection Clause where statute "affect[s] First Amendment interests").

Where, as here, public officials adopt a policy explicitly governing media access, and thus "directly and substantially" interfering with attempted press activity by excluded journalists, they "burden a fundamental right," *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978)), and something more than a basic standard of reasonableness and viewpoint neutrality should be required. *See Grosjean v. Am. Press Co.,* 297 U.S. 233, 250 (1936) ("The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." (quoting 2 Cooley's Constitutional Limitations 886 (8th ed.))).

Equal protection analysis is a much better fit for equal access claims than forum analysis. It does not require courts to rely on judge-made categories created for an entirely separate constitutional right with a separate history. The question is not whether speech or expressive conduct should be permitted on

government property in the first place and, if so, how it should be regulated, but instead whether the distinctions the government has applied to groups of journalists already permitted access to government property are sufficiently justified and carefully drawn.

With respect to the latter, it will be easy enough for government actors to adopt "reasonable" or "viewpoint-neutral" categories that box out unwanted media entities based on items like length of or manner of operation; equal protection analysis allows courts to more deeply probe the government's decisions in this sphere by asking whether the categories themselves are necessary.

Some courts have taken this general approach in analogous circumstances. In *McCoy v. Providence Journal Co.*, for example, a newspaper company sued public officials who impeded it from accessing certain public records while allowing a competitor to do so. 190 F.2d 760, 762 (1st Cir. 1951). The Court determined that since the defendants had not "barred the press at large from access," it need only address the "narrower issue" of equal protection and not the broader one of freedom of the press. *Id.* at 763. The case was an easy one, as the defendants' decision had been wholly arbitrary. *Id.* at 763, 766. *Cf. also Cap. Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1176 (3d Cir. 1986) (en banc) (publisher in public records case sufficiently stated equal protection claim that agency was "discriminating between newsseekers, granting

access to those favorably disposed to it while denying access to those whom it considers unfriendly”).

In *Quad-City Cmty. News Serv., Inc. v. Jebens*, similarly, the publisher of an “‘underground’ newspaper” sued city officials who denied them access to records granted to other newspapers. 334 F. Supp. 8, 10-11 (S.D. Iowa 1971). The Court observed that “[n]o showing merely of a rational relationship to some colorable state interest suffices to justify a classification between media permitted access to the reports and others which are not so permitted.” *Id.* at 15. Instead, because the classification “penalize[d] or restrain[ed] the exercise of a First Amendment right,” strict scrutiny was appropriate, a burden the city officials could not meet. *Id.*

Like these courts, this Court should consider application of equal protection analysis to the governmental discrimination challenged in this case.

III. This Court may consider the Petitioners’ equal protection claim.

That the Petitioners have not directly pursued an Equal Protection Clause claim in their certiorari petition is understandable. First, as noted, their Free Press Clause claim already independently warrants this Court’s attention. But additionally, the Seventh Circuit erroneously concluded below that the Petitioners had waived their equal protection

argument as not sufficiently developed. *John K. MacIver*, 994 F.3d at 614.

The facts do not bear the Seventh Circuit's conclusion out. The Petitioners' briefs below sought to prove the existence of a right to equal press access. After arguing that that right had a basis in multiple provisions of the federal constitution, including the Equal Protection Clause, *see* Dkt. 5:1 (statement of the issues), 7-9, the Petitioners then argued for strict scrutiny of that right, *id.* at 9-11. The Petitioners relied for its arguments on equal protection precedents. *See id.* at 8. And, after the Respondent argued for waiver, Dkt. 7:33 n.4, the Petitioners protested vigorously in reply, noting that, in their view, the equal protection claim and press clause claim were "coterminous," Dkt. 14:3 n.1. This point fits with the Petitioners' focus on the right of equal press access itself. The Seventh Circuit might have found the Petitioners' legal arguments wanting, but that does not justify a finding that the arguments were never made at all.

Regardless, "consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals is not beyond [this Court's] power, and in appropriate circumstances [it has] addressed them." *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980); *see, e.g.*, *Teague v. Lane*, 489 U.S. 288, 300 (1989) (considering question "raised only in an *amicus* brief"); *Duignan v. United States*, 274 U.S. 195, 200 (1927) (court may

consider questions "not pressed or passed upon" in the lower courts, though "only in exceptional cases").

Although resolution of the equal protection question is not necessary to disposition of this case, given the close relation of the two claims—both involving the question of whether the right to a free press justifies a rule of equal access via the Fourteenth Amendment—it would be highly appropriate for this Court to order briefing of this additional question, should it grant the petition. *Cf. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 37 (1991) (Stevens, J., dissenting) (collecting cases for the proposition that "[o]n a number of occasions, this Court has considered issues waived by the parties below and in the petition for certiorari because the issues were so integral to decision of the case that they could be considered 'fairly subsumed' by the actual questions presented").

CONCLUSION

Consequently, Amicus respectfully requests this Court grant the Petitioners' petition for writ of certiorari and order the briefing of the additional Equal Protection Clause claim the Petitioners raised below.

Respectfully submitted,

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