No. 21-614

IN THE

Supreme Court of the United States

BRIAN GREEN,

PETITIONER,

V.

PIERCE COUNTY, WASHINGTON,

RESPONDENT.

On Petition for Writ of Certiorari to the Supreme Court of Washington

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* LIBERTY JUSTICE CENTER AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* LIBERTY JUSTICE CENTER

This case presents an issue of constitutional importance, and *amicus curiae* Liberty Justice Center is well-suited to discuss the legal basis and practical consequences of the decision below. Liberty Justice Center timely notified counsel of record for both parties that it intended to submit the attached brief more than 10 days prior to filing. Counsel for petitioner consented to the filing of this brief. Counsel for respondent declined to consent. Therefore, pursuant to this Court's Rule 37.2(b), Liberty Justice Center respectfully moves for leave to file the accompanying brief of *amicus curiae* in support of petitioner.

The Liberty Justice Center's interest in this matter stems from its advocacy for freedom of speech and of the press, including for small and upstart journalists. For instance, it represents the petitioners in *John K. MacIver Institute for Public Policy, Inc. v. Evers*, No. 20-1814, which asks this Court to review a Seventh Circuit decision allowing the government to exclude disfavored journalists from media events based on their institutional affiliations, their organization's size and history, and other criteria that discriminate against small and independent media outlets. This case involves similar government discrimination against individual journalists, and Liberty Justice Center's insight and experience would be helpful to the Court's evaluation of the petition for certiorari. Therefore, the motion for leave to file should be granted and the attached *amicus* brief filed.

Respectfully submitted,

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November 22, 2021

QUESTION PRESENTED

Whether barring individual citizen-journalists from accessing public records otherwise made available to news media, for lack of corporate personhood, violates the First Amendment freedoms of speech and press.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF THE *AMICI CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest legal aid firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g.*, *Janus v. AFSCME,* 138 S. Ct. 2448 (2018) (representing petitioner Mark Janus).

The Liberty Justice Center advocates for freedom of speech and of the press, including for small and upstart journalists. For instance, it represents the petitioners in *John K. MacIver Institute for Public Policy, Inc. v. Evers*, No. 20-1814, which asks this Court to review a Seventh Circuit decision allowing the government to exclude disfavored journalists from media events based on their institutional affiliations, their organization's size and history, and other criteria that discriminate against small or independent media outlets.

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[1] Pursuant to Rule 37, no counsel for any party authored any part of this brief, and no person or entity other than the *amicus* funded its preparation or submission. All parties were timely notified of the filing of this brief. Counsel for petitioner consented to the filing of this brief; counsel for responded declined to consent. Therefore, this brief is accompanied by a motion for leave to file, in accordance with Rule 37.2(b).

INTRODUCTION AND SUMMARY OF ARGUMENT

Washington law provides the news media access to certain government records. Brian Green, who runs a YouTube channel focused on state and local politics, sought such records. If he had been a *Seattle Times* or CBS News reporter, he would have gotten them. But because he has not formed a media corporation, he was denied. And the Washington Supreme Court upheld this denial because Green's YouTube channel was not "an entity with a legal identity separate from the individual." App. 1a. The court brushed aside any First Amendment problem with that holding, reasoning in a footnote that the "freedom of the press" can be limited to "news media" and that the government can deny all access to public information anyway. App. 15a n.5.

Such cavalier treatment of the freedom of speech and of the press is not unique. But it is wrong. The First Amendment protects the rights of all Americans to engage in speech and press activities—not just the rights of large corporations. And it is no answer to say that the government could close off all access to public records. Even if that were true, once the government decides to provide certain records, it cannot discriminate against journalists based on their corporate affiliations.

The decision below joins other recent decisions in disregarding the full scope of the First Amendment. Also before this Court is the Seventh Circuit's decision in *John K. MacIver Institute for Public Policy, Inc. v. Evers*, 994 F.3d 602 (7th Cir. 2021), which likewise discriminated based on corporate status—there, that the journalists were employed by the same parent entity as employees doing policy analysis. *See* Petition for

Certiorari, No. 20-1814 (Sept. 7, 2021). Many other government actions have likewise disregarded the First Amendment's core protection for freedom of the press. All too often, the government can use a judicial license to discriminate to exclude those journalists that the government dislikes. The result is most odious to the First Amendment: discrimination against individuals based on the content of their speech. This Court's review is urgently needed.

REASONS FOR GRANTING THE WRIT

I. The decision below contradicts this Court's and other courts' precedents.

In the Washington Supreme Court's view, denying Mr. Green access to government records did not implicate the First Amendment for two reasons. *First*, "there are no freedom of the press implications if there is no news media." App. 15a n.5. So according to the court below, because Mr. Green did not satisfy the State's definition of "news media," he was unprotected by the freedom of the press. *See ibid.*

Second, the court stated that "there is no First Amendment right to public information." *Ibid.* Though the court did not explain the import of this statement, presumably it meant to say that because there is no right to the government information here, the government's discriminatory exclusion of Mr. Green did not violate the First Amendment.

As matters of First Amendment law, both rationales are wrong. And they conflict with many decisions both of this Court and of the federal courts of appeals.

A. The First Amendment requires equal press access.

Taking the Washington Supreme Court's second rationale first, even if no general right to government information exists, the government may not violate First Amendment rights once it chooses to provide information. Even the opinion cited by the decision below says that "once government has opened its doors," the First Amendment "assure[s] the public and the press equal access." *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring in the judgment). And most courts of appeals to consider the question have held that "once there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media." *Am. Broadcasting Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977); *accord Karem v. Trump*, 960 F.3d 656, 660 (D.C. Cir. 2020) ("[T]he protection afforded newsgathering under the first amendment requires that this access not be denied arbitrarily or for less than compelling reasons." (cleaned up)); Pet. 20–22 (collecting cases).

This rule finds support in the Court's precedents about participation in publicly available programs. For at least 75 years, "this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons," the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). If "the government could deny a benefit to a person because of his constitutionally protected speech or associations," for example, "his exercise of those

freedoms would in effect be penalized and inhibited." *Ibid.* Because "[t]his would allow the government to produce a result which it could not command directly," it "is impermissible." *Ibid.* (cleaned up). And this principle holds regardless of the First Amendment right at stake. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring in part) ("Generally the government may not force people to choose between participation in a public program and their right to free exercise of religion.").

If the government may not condition participation in its programs in ways that would violate the Constitution, neither may it condition access to public information in ways that the First Amendment would not tolerate directly. As discussed next, First Amendment rights ordinarily could not hinge on corporate identity. And at a minimum, the government would need to justify its condition. But the decision below breezed past these issues with no discussion. That was error, and it implicates a division among the courts of appeals over whether and how governments may justify unequal press access. *See* Pet. 19–23; *see also* Pet. for Cert. 10–19, *John K. MacIver Institute for Public Policy v. Evers*, No. 21-388 (Sept. 7, 2021).

B. Press rights do not depend on corporate structure.

Turning to the Washington Supreme Court's first rationale—that the government may define solo or nontraditional journalists out of the First Amendment's protection—it also conflicts with decisions of this Court and many other courts. Those decisions

leave no doubt that the First Amendment does not depend on corporate formalities. So clear is this rule that summary reversal here would be warranted.

This Court has held that "[f]reedom of the press is a fundamental personal right which is not confined to newspapers and periodicals, but instead "comprehends every sort of publication which affords a vehicle of information and opinion." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (cleaned up). The same "informative function" performed by the "organized press" can also be "performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Ibid.* Thus, "liberty 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." *Ibid.* "[T]he rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784 (1985) (Brennan, J., dissenting); *id.* at 783–84 (noting that "at least six Members of this Court" agreed with that proposition).

The Court's disapproval of content-based speech restrictions supports this view. "[R]estrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). "By taking the right to speak from some and giving it to others, the [g]overnment deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Id.* at 340–41. Indeed here, as the dissent below pointed out, the government's position evinces "a certain disapprobation, as if Libertys [sic] Champion is

simply *unworthy* of being considered news media or that what it seeks here is not newsworthy." App. 30a.

The lower courts have echoed this Court's view of the freedom of the press. For instance, the Second and Fourth Circuits have held that "a distinction drawn according to whether the defendant is a member of the media or not is untenable." *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000); *see Snyder v. Phelps*, 580 F.3d 206, 219 n.13 (4th Cir. 2009) ("Any effort to justify a media/nonmedia distinction rests on unstable ground"). Yet that is precisely the distinction drawn by the court below, which found no constitutional problem with it.

The Ninth Circuit too has held that "[t]he 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." *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014). The conflict between this holding and the decision below is especially troubling, for it means that the level of First Amendment protection in the State of Washington depends on whether the litigation is in state or federal court.

The circuits' decisions—unlike the decision below—necessarily follow from the First Amendment itself. Start with the text. As Justice Scalia explained, it would be "passing strange to interpret the phrase 'the freedom of speech, or of the press' to mean, not everyone's right to speak or publish, but rather everyone's right to speak or the institutional press's right to publish. No one thought that is what it meant." *Citizens United*, 558 U.S. at 390 n.6 (concurring opinion).

The history confirms what the text suggests. "In the late 18th century, state supreme courts, state constitutions, and commentators uniformly referred to 'every man' or 'every freeman' or 'every citizen's' expressive rights," including freedom of the press. David B. Sentelle, *Freedom of the Press: A Liberty for All or A Privilege for A Few?*, 2014 Cato Sup. Ct. Rev. 15, 23; *see generally* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. Penn. L. Rev. 459, 465–98 (2012). "[P]re-First Amendment commentators who employed the term 'freedom of speech' with great frequency, used it synonymously with freedom of the press." *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 799 (1978) (Burger, C.J., concurring). And the typical "press" people at the Founding were "individual authors" like Thomas Paine, an excise officer by trade. Sentelle, *supra*, at 24. It would be far-fetched to suggest that the First Amendment did not protect Mr. Paine's pamphlets, to say nothing of the anonymously published *Federalist Papers* written by James Madison, Alexander Hamilton, and John Jay. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring) ("When the Framers thought of the press, they did not envision the large, corporate newspaper and television establishments of our modern world.").

This broad understanding of "the press" "was even more clearly established" by the Fourteenth Amendment, which applied the First Amendment to the States. Volokh, *supra*, at 498. A "long line" of contemporaneous cases and treatises explained "that the institutional press had no greater rights than anyone else." *Id.* at 498–500. Thus, the text and history each

refute the decision below's cramped interpretation of the First Amendment.

The practical problems with the decision below also counsel against its interpretation of the First Amendment. "The very task of including some entities within the 'institutional press' while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country." *Bellotti*, 435 U.S. at 801 (Burger, C.J., dissenting). Such "definitional problem[s] pose[] an insurmountable hurdle to the press-as-institution interpretation." Sentelle, *supra*, at 21.

Finally, the Washington Supreme Court's apparent confusion over the scope of its review does not affect this Court's own review. Though the dissenting opinion below thought that "this case does not directly concern the First Amendment," App. 26a, that is incorrect. The majority understood that Green pressed a First Amendment argument; it just found that argument so meritless that it dismissed it with a curt (and incorrect) footnote. *See* App. 15a n.5. But there is no question that throughout this litigation, Green raised his First Amendment claims, and they are properly before this Court now. *See, e.g.*, App. 63a-65a, 70a-73a. A lower court cannot insulate its decision from review by failing to grapple with a presented argument. Review is needed.

II. More and more, governments are infringing on First Amendment press rights.

Unfortunately, the government's conduct below is not unique. Many examples show that governments are increasingly contriving distinctions between members of the press to avoid public disclosure and accountability. Though Mr. Green and similar citizen journalists are sometimes called "nontraditional" journalists, in truth they are much the same as what the Founders would have recognized as press members—like Thomas Paine. Yet the governments have invoked various, arbitrary distinctions to justify violating the First Amendment with regard to such citizen journalists.

Judge Sentelle described one recent example in which "the North Carolina Board of Dietetics/Nutrition threatened to send a blogger to jail for describing his battle against diabetes and encouraging others to use his diet and lifestyle as an example." Sentelle, *supra*, at 21. The Board did not make similar threats against the "professional" "authors of many of the books on the Amazon bestseller list." *Id.* at 22.

Another example comes from the *MacIver* case pending before this Court. There, after a new governor took office in Wisconsin, his press office decided to exclude the MacIver News Service from press events. The News Service is a project of the John K. MacIver Institute for Public Policy, and its professional journalists had long been credentialed to cover Wisconsin government. But the new governor's office decided that the MacIver journalists were not "bona fide," later formulating a list of supposedly neutral criteria for post hoc justification.

These criteria—which were non-exhaustive and merely informed the office's discretion—included: whether the journalist was employed by an organization "whose principal business is news dissemination"; how "established" the parent organization was; the journalist's pay; the organization's "credibility" and "real or perceived conflicts of interest"; any "pressures from advertisers" or "donors"; and, participation in any "advocacy." Pet. for Cert. 7–8, *John K. MacIver Institute for Public Policy v. Evers*, No. 21-388 (Sept. 7, 2021).

Both the district court and the Seventh Circuit thought that this exclusion from press events otherwise open to the press was permissible under public forum analysis. As the certiorari petition there explains, that view conflicts with the decisions of other courts of appeals. *See id.* at 10–19. It is also inconsistent with the First Amendment and this Court's precedents. *See id.* at 19–32. But for present purposes, the important point is that the government sought to discriminate against certain media outlets. No one could argue that First Amendment rights could normally be made to turn on one's participation in other advocacy, how much one is paid, and how many people listen to one's speech—much less a government official's discretionary balancing of these and other unidentified criteria. Yet just like the decision below's focus on corporate identify, the courts in *MacIver* read away First Amendment press rights by treating the Press Clause differently from all other parts of the First Amendment.

Allowing this type of manipulation would have serious consequences. First, as mentioned, these press ex-

clusions are often served with a strong whiff of content-based discrimination. The government here dislikes what it views as the speech of a local gadfly who explores local stories that larger media outlets will not cover. The governor's office in *MacIver* disliked the politics of the journalists' affiliated organization. Such content-based discrimination is inevitable when governments get to pick and choose which journalists are "bona fide." And this Court always applies strict-scrutiny to content-based restrictions on speech. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). That is because, "[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987).

Second, these infringements are especially significant given that, "[s]ince 1964, however, our Nation's media landscape has shifted in ways few could have foreseen." *Berisha v. Lawson*, 141 S. Ct. 2424, 2427 (2021) (Gorsuch, J., dissenting from denial of certiorari). Individual journalists like Mr. Green can easily reach a much larger audience than ever before through the Internet. Citizens have access to a far greater breadth of information. So now, they could follow hyper-local issues of the type Mr. Green covers and hold their leaders accountable. From governments that do not like such accountability, the hostility shown toward Mr. Green, the MacIver journalists, and so many others is perhaps unsurprising. But that does not make it consistent with the First Amendment, which "protects the freedom of the press not as a favor to a particular industry, but because democracy cannot function without the free exchange of ideas. To govern themselves wisely, the framers knew, people must be

able to speak and write, question old assumptions, and offer new insights." *Id.* at 2425–26.

Protecting the First Amendment speech and press rights of journalists like Mr. Green is necessary to allow the type of untrammeled, open debate envisioned by the Founders to flourish. The recent trend of governments trying to silence such voices confirms the need for this Court to address the issue.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted or the decision below summarily reversed. In the alternative, this case could be held for *John K. MacIver Institute for Public Policy, Inc. v. Evers*, No. 20-1814, which squarely presents a conflict between the federal courts of appeal over how to analyze claims of unequal press access.

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