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 Washington Supreme Court

MOTION FOR LEAVE TO FILE AND BRIEF OF THE CATO INSTITUTE AND REASON FOUNDATION AS *AMICI CURIAE* SUPPORTING PETITIONER

Manuel S. Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
5538 Red Oak Drive
Los Angeles, CA 90068
(213) 675-1776
mklausner@klausnerlaw.us

Ilya Shapiro
Counsel of Record
Trevor Burrus
Thomas A. Berry
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

November 23, 2021

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Cato Institute and Reason Foundation respectfully move for leave to file the attached brief as *amici curiae* supporting Petitioner. All parties were provided with timely notice of amicus's intent to file as required under Rule 37.2(a). Petitioner's counsel consented to this filing. Respondent's counsel withheld consent.

Amici's interest arises from their respective missions to advance and support the rights that the Constitution guarantees to all citizens.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences, publishes books and studies, and produces the annual *Cato Supreme Court Review*.

The Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and

by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason participates as amicus curiae in cases raising significant constitutional or legal issues.

Amici have extensive experience filing briefs in First Amendment cases in this Court and lower courts across the country. This case concerns *amici* because Washington's law, which treats members of the press differently based upon whether they are citizen-journalists or corporate entities, inverts the purpose of the First Amendment's freedom of the press.

Amici have no direct interest, financial or otherwise, in the outcome of this case, which concerns them only because it implicates constitutional protections for individual liberty. For the foregoing reasons, *amici* respectfully request that they be allowed to file the attached brief as *amici curiae*.

Respectfully submitted,
/s/Ilya Shapiro

Manuel S. Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
5538 Red Oak Drive
Los Angeles, CA 90068
(213) 675-1776
mklausner@klausnerlaw.us

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

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QUESTION PRESENTED

Washington's Public Records Act (PRA) generally requires state agencies to produce government records at the request of the public. Certain records of public employees and volunteers—such as photographs and dates of birth—are exempt from these public requests. However, members of the "news media" may obtain even these exempt records. Brian Green, who operates the "Libertys Champion" YouTube channel, was denied access to such information from the Pierce County Sheriff's Office because he does not meet the statutory definition of "news media." The Washington Supreme Court held that "news media" under the PRA must have an independent corporate structure, and thus dismissed Mr. Green's First Amendment contentions in a footnote.

The question presented is whether a state denying some but not all members of the public access to information in its possession based solely on the identity of the requesting party should be subject to heightened scrutiny under the First Amendment.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute, founded in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

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This case concerns *amici* because Washington's law, which treats members of the press differently based upon whether they are citizen-journalists or corporate entities, inverts the purpose of the First Amendment's freedom of the press.

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. Petitioner consented to its filing of this brief. Respondent withheld consent, which necessitated the filing of a motion for leave to file, which is enclosed with this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

This case raises two important and unanswered questions. First, when does speaker-based discrimination trigger heightened scrutiny? Second, to what extent does the freedom of the press establish a right of access to government information?

This Court has held that speaker-based discrimination is subject to strict scrutiny in at least some instances where political speech is at issue, but that principle has not yet been fleshed where other speech is at issue. As for the latter question, the Court has indicated that the First Amendment provides some right of access to government information but has delineated few, if any, specifics.

This case is a prime opportunity to provide clarity on these questions. The Washington Supreme Court's terse treatment of Brian Green's First Amendment rights failed to adequately grapple with the questions. Laws that privilege some members of the press over others by granting exclusive access to information should raise serious concerns. Such laws elevate institutionalized media above citizen-journalists—an outcome at odds with the Press Clause.

This case provides an ideal opportunity for the Court to establish a baseline rule that will rein in such discrimination. To protect the rights of citizen-journalists, the Court need not decide whether *all* speaker-based discrimination is subject to heightened scrutiny. Instead, the Court should take this case and establish a simple rule: If the government wishes to selectively provide information to some members of the news media based solely on their identity, that scheme must satisfy heightened scrutiny.

ARGUMENT

I. THIS CASE IS AN OPPORTUNITY TO CLARIFY WHEN SPEAKER-BASED DISCRIMINATION TRIGGERS HEIGHTENED SCRUTINY

A. This Court Has Often Expressed Skepticism of Speaker-Based Discrimination But Has Not Fully Established When It Triggers Heightened Scrutiny

A decade ago, this Court held that the government "commit[s] a constitutional wrong when by law it identifies certain preferred speakers." *Citizens United v. FEC*, 558 U.S. 310, 340–41 (2010). After all, "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.* at 340. Thus, when a law "reflects a content preference" by privileging one speaker over another, that law is unquestionably subject to heightened scrutiny. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994) (*Turner I*).

But even when a law does not clearly reflect a preference for certain *content*, a preference for certain *speakers* may still violate the First Amendment in and of itself. At least when "political speech" is at issue, this Court has acknowledged that such discrimination raises concerns "[q]uite apart from the purpose or effect of regulating content." *Citizens United*, 558 U.S. at 340–41.

When the government discriminates among speakers, it distorts the marketplace of ideas. This is dangerous particularly for the political process, where access to a diversity of speakers and sources of information is critical for creating informed voters.

Citizens United, 558 U.S. at 341; *see also Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."). More broadly, the government simply has no business determining "for itself what speech *and speakers* are worthy of consideration." *Citizens United*, 558 U.S. at 340–41 (emphasis added); *accord* Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 Fla. St. U. L. Rev. 765, 793–802 (2015) ("Being open to more speech means that more speakers have an outlet through which to express themselves, and more people can find the kind of speech they want to hear.").

Since *Citizens United*, this Court has reiterated its "deep[] skeptic[ism]" of speaker-based discrimination. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377–79 (2018) (explaining how a California speech regulation that applied to certain unlicensed crisis pregnancy centers but not other similar facilities was unrelated to the state's "informational interest" and therefore constitutionally suspect). *See also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557, 563–79 (2011) (setting aside "content- and speaker-based restrictions" that prevented certain pharmacy records from being "used for marketing by pharmaceutical manufacturers").

But skepticism of speaker-based discrimination has a lengthier pedigree. Nearly 40 years ago, this Court invalidated a tax scheme that "target[ed] a small group of newspapers." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S.

575, 577, 581–92 (1983). The structure of that scheme meant the tax was paid by just "13 publishers, producing 16 out of 374 paid circulation papers." *Id.* at 579. Although there was no evidence of a content-based motivation, singling out a few large companies violated the First Amendment. *Id.* at 581–92; *see also Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 224–28, 234 (1987) (invalidating a statute exempting some publications from a sales tax but denying others that same exemption); *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 635, 638–39 (5th Cir. 2012) (holding that "[l]aws singling out a small number of speakers for onerous treatment are inherently suspect" and "must endure strict scrutiny"); *Vt. Soc'y of Ass'n Execs. v. Milne*, 172 Vt. 375, 376, 382–85, 391 (2001) (invalidating a "five-percent tax" applying only to high-spending lobbyists).

This Court has also noted that because speech injunctions necessarily apply only to a select group, they "carry greater risks of censorship and discriminatory application[.]" *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 764 (1994). For that reason, injunctions "require a somewhat more stringent application of general First Amendment principles" than do "generally applicable statutes." *Id.* at 765.

Nonetheless, this Court has hedged as to whether speaker-based distinctions are problematic *in themselves* or because of their likely effect on the content of speech. For example, the Court described *Minneapolis Star & Tribune* as standing for the narrow proposition that, although "evidence of impermissible legislative motive" isn't needed to raise First Amendment concerns, "differential taxation of First Amendment speakers is constitutionally suspect

when it threatens to suppress the expression of particular ideas or viewpoints." *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

Similarly, *Turner I* suggested a more limited view of when speaker-based discrimination triggers First Amendment scrutiny. 512 U.S. at 645. In that case, federal law required cable television systems to devote a portion of their channels to the transmission of local broadcast television stations. *Id.* at 630. That rule applied only to a certain category of speakers. But the Court reasoned that, so long as such speaker distinctions were "not a subtle means of exercising a content preference," the otherwise content-neutral provisions were not subject to heightened scrutiny. *Id.* at 645. Although generally in *dicta*, the Court has invoked this more limited view of speaker-based discrimination in the decade since *Citizens United*. *See, e.g.*, *Reed v. Town of Gilbert,* 576 U.S. 155, 170 (2015); *Barr v. Am. Ass'n of Political Consultants,* 140 S. Ct. 2335, 2347 (2020).

This case provides an ideal opportunity for the Court to clarify that it meant what it said in *Citizens United*. A speaker-based distinction can trigger heightened First Amendment scrutiny even without a content-based discriminatory intent or effect. To the extent some of the language in other decisions has suggested a contrary rule, that only makes added clarity all the more urgent.

B. Lower Courts Have Often Cabined *Citizens United*'s Speaker-Based Discrimination Rule to "Political Speech"

When "political speech" is at issue, lower courts have duly applied the Court's holding in *Citizens*

United that speaker-based discrimination triggers heightened scrutiny. *See, e.g.*, *Fusaro v. Cogan*, 930 F.3d 241, 245–47, 253 (4th Cir. 2019) (holding that Maryland cannot limit access to its list of registered voters to only Maryland residents); *Brinkman v. Budish*, 692 F. Supp. 2d 855, 858–59, 863–64 (S.D. Ohio 2010) (holding that Ohio cannot prohibit "former members of the General Assembly from representing another person or organization before the Ohio General Assembly for a period of one year subsequent to their departure from office"); *SD Voice v. Noem*, 380 F. Supp. 3d 939, 944, 946–50, 954 (D.S.D. 2019) (enjoining South Dakota's ban on out-of-state contributions to ballot question committees).

However, lower courts have largely resisted applying the same heightened scrutiny to speaker-based discrimination outside of the "political speech" context. *See, e.g.*, *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 159 (2d Cir. 2013) (contending that *Turner I*'s reasoning, not *Citizens United*, should apply to speaker-based discrimination outside the context of "political speech"); *Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014) (applying *Turner I* to a law that required registered sex offenders to report identifying information to law enforcement); *Ex parte Odom*, 570 S.W.3d 900 (Tex. App. Hous. 1st Dist. 2018) (same); *Asgeirsson v. Abbott*, 696 F.3d 454, 462 (5th Cir. 2012) *abrogated on other grounds by Reagan Nat'l Adver. of Austin v. City of Austin*, 972 F.3d 696 (5th Cir. 2020) (finding that *Citizens United* is "inapplicable to statutes that restrict only private speech").

Through a different line of reasoning, other lower courts have limited *Citizens United* by holding that "speaker-based discrimination is permissible when

the state subsidizes speech." *Int'l Union of Operating Eng'rs, Local 139 v. Daley*, 983 F.3d 287, 299 (7th Cir. 2020) (quoting *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 646 (7th Cir. 2013)). And at least one court has implausibly suggested that *Citizens United* should be interpreted as simply rephrasing *Turner I*'s permissive approach to speaker-based discrimination. *Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Castille*, 799 F.3d 216, 222–23 (3d Cir. 2015) (holding that only speaker-based preferences that reflect the "[g]overnment's preference for the substance of what the favored speakers have to say" is constitutionally suspect).

By contrast, at least one lower federal court has expressly extended *Citizens United*'s holding beyond the "political speech" context. *Dumiak v. Vill. of Downers Grove*, 475 F. Supp. 3d 851, 853, 856 (N.D. Ill. 2020) (addressing a statute that allowed some charitable organizations to solicit money without a permit but denied that possibility to individuals).

In sum, courts remain uncertain when heightened scrutiny is appropriate for speaker-based rules. For the most part, they decline to impose such scrutiny unless the speech at issue can be characterized as "political." This case presents an opportunity for the Court to clarify that speaker-based discrimination raises concerns in other contexts.

II. THE COURT SHOULD CLARIFY THAT ACCESS TO GOVERNMENT INFORMATION IS A FIRST AMENDMENT CONCERN

Although the Constitution may not be "a Freedom of Information Act," *McBurney v. Young*, 569 U.S.

221, 232 (2013), several justices have urged that the First Amendment secures some degree of protection for access to government information. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring in the judgement) (arguing that the Constitution "assure[s] the public and the press equal access once government has opened its doors."); *id.* at 30 (Stevens, J., dissenting) ("The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution. It is for this reason that the First Amendment protects not only the dissemination but also the receipt of information and ideas.") (citations omitted); *see also Gannett Co. v. DePasquale*, 443 U.S. 368, 392–93 (1979) (suggesting that the First Amendment right of the press to attend a pretrial hearing should be based "on an assessment of the competing societal interests involved" and not simply a categorical "determination that First Amendment freedoms [are] not implicated"); *accord Fusaro*, 930 F.3d at 253 ("[T]he Supreme Court has strongly signaled that certain types of conditions on access to government information may be subject to First Amendment scrutiny.").

These arguments are persuasive, and it is time for the Court to adopt them. To have vitality, the First Amendment must limit the power of government to selectively withhold the means of creating valuable speech—of which access to state-controlled information is part. *See* Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 Stan. L. Rev. 1, 4 (2016) (citing *Citizens United*, 558 U.S. at 336).

This Court's precedents have left unanswered whether and to what extent the First Amendment

guarantees a right of equal access to government information. In the companion cases of *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974) the Court implied that the First Amendment may require the government to make such information available in some circumstances. *See Houchins*, 438 U.S. at 28 (Stevens, J., dissenting) (citing *Pell*, 417 U.S. at 830). In those cases, prison regulations prevented certain media interviews with inmates. *Pell*, 417 U.S. at 820–22; *Saxbe*, 417 U.S. at 844–47. In both, the Court ultimately held that the media have "no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Pell*, 417 U.S. at 834; *Saxbe*, 417 U.S. at 850.

As Justice Stevens later noted, however, the Court first "canvassed the opportunities already available for both the public and the press to acquire information regarding the prison and its inmates." *Houchins*, 438 U.S. at 28 (Stevens, J., dissenting) (citing *Pell*, 417 U.S. at 830). If there were simply no right to access government information, "there would have been no need to emphasize the substantial press and public access reflected in the record of that case." *Houchins*, 438 U.S. at 28–29 (Stevens, J., dissenting); *see also* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 Ohio St. L.J. 249, 281–82 (2004) ("[A]s the majority saw it, the issue was whether 'press access to specifically designated prison inmates' was 'such an effective and superior method of newsgathering that its curtailment amount[ed] to unconstitutional state interference with a free press.'"). *Pell* and *Saxbe* thus

suggest that restrictions on access to information in the government's possession can sometimes implicate the First Amendment. *Houchins*, 438 U.S. at 28 (Stevens, J., dissenting).

The Court similarly left the door open for some First Amendment right to information in *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999). To be sure, the Court did uphold two conditions that California placed on public access to arrestees' addresses. *Id.* at 34, 40–41. The Court held that these conditions were permissible because "California could decide not to give out arrestee information at all without violating the First Amendment." *Id.* at 40.

But *United Reporting* nonetheless left the door open for *some* First Amendment limitations on the government's ability to restrict access to information within its control. First, *United Reporting* "addressed only a facial challenge, and it left open the possibility that the plaintiff could assert a viable as-applied challenge on remand." *Fusaro*, 930 F.3d at 254. Second, the collective opinions joined by eight justices in *United Reporting* "recognized that restrictions on the disclosure of government-held information can facilitate or burden the expression of potential recipients and so transgress the First Amendment." *Sorrell*, 564 U.S. at 569 (citing *United Reporting*, 528 U.S. at 42 (Scalia, J., concurring); *id.* at 43 (Ginsburg, J., concurring); *id.* at 46 (Stevens, J., dissenting)).

The First Amendment, of course, does not give the public unlimited access to government information. But the Washington Supreme Court presumed that the inquiry should *end* there. *See* App. 15a n.5. This

case is an opportunity to correct that misguided view. The Court should clarify that, at the very least, identity-based discrimination when doling out government information is constitutionally suspect.

III. THIS CASE IS AN IDEAL VEHICLE TO ESTABLISH A BASELINE RIGHT OF EQUAL ACCESS TO GOVERNMENT INFORMATION

Forty-three years ago, Justice Stewart persuasively argued that the First Amendment at least "assure[s] the public and the press equal access once government has opened its doors" to information under its control. *Houchins*, 438 U.S. at 16 (Stewart, J., concurring in the judgement). This case is an ideal vehicle to finally make that commonsense rule the law. Doing so would be both important and correct.

First, the function and special importance of the Press Clause are incompatible with the government's giving information to only some members of the media based purely on their identity. As noted by the petitioner, the Press Clause is not designed for a select group of institutional corporations known as "The Press." Pet. Br. at 14–16. Instead, as the Court has repeatedly emphasized, the Press Clause protects the ability of all people to disseminate opinions and ideas to the public. *See, e.g.*, *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring). Indeed, interpreting the Press Clause as protecting a specific institution is a fairly modern invention. Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology—From the Framing to Today*, 160 U. Pa. L. Rev. 459, 522 (2012).

Moreover, this function of the Press Clause is peculiarly important to the legitimacy of our representative democracy. One scholar describes the Framers' view of the Press Clause thus:

> James Madison referred to liberty of the press as one of the "choicest privileges of the people" and proposed language to make press freedom "inviolable." Thomas Jefferson described it as one of the "fences which experience has proved peculiarly efficacious against wrong." John Adams praised the ways "[a] free press maintains the majesty of the people." The Virginia Declaration of Rights, written by George Mason, declared that "the freedom of the Press is one of the great bulwarks of liberty, and can never be restrained but by despotic Governments."

Sonja R. West, *The Majoritarian Press Clause*, 2020 U. Chi. Legal F. 311, 315–16 (2020).

Washington's law is incompatible with that fundamental principle. By requiring "news media" to have an independent corporate structure in order to receive certain information, the law favors the speech products of corporations. *See* App. 8a, 16a–19a; Wash. Rev. Code § 42.56.250(8); Wash. Rev. Code § 5.68.010(5). This dynamic elevates an institutionalized press over the citizen-journalist's right to distribute news to the public. Considering that a core concern underlying the First Amendment was the right of *everyone* to publish ideas, it is implausible that Washington may favor one class of speakers over another based on nothing more than identity. *See* Ashutosh Bhagwat, *Producing Speech*,

56 Wm. & Mary L. Rev. 1029, 1079–80 (2015) ("If the government generally provides the public with access to information, but then tries to block access to those who would use the information to create speech . . . that action seems more like a restriction on speech creation than a restriction on information."); Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 Yale L.J. 412, 449 (2013) ("The heart of the Press Clause is its prohibition on licensing; another way to express the prohibition on licensing is that the government may not pick and choose who can publish.").

Further, this case is an appropriate vehicle to establish that heightened scrutiny applies to such discrimination, because the lack of heightened scrutiny below was likely determinative of the outcome of this case. If heightened scrutiny were applied, Washington's law would not survive it.

To be sure, the concern that motivated the Washington legislature to limit access to certain personal information of "employees or volunteers of a public agency" is understandable. *See* Wash. H. Bill Rep. E2SHB 1317, 61st Legis. (2010) ("This bill is part of the recommendations coming from the Governor's task force on the Lakewood Police murders."). But there were at least two options for restricting this information available to the legislature that did *not* require speaker-based discrimination. The availability of these alternatives demonstrates that Washington's choice to limit the information to corporate news media was not necessary to achieve its state interest and for that reason cannot withstand heightened scrutiny.

First, Washington could have simply withheld this information from everyone. Such an option would have put citizen-journalists like Green on an equal footing with corporate media. It would also have forced Washington to more carefully consider the need to limit the public's access to this information.

Second, Washington also could have enacted a scheme that released sensitive information on a case-by-case basis, looking to whether a particular requester had demonstrated that they planned on using the information for legitimate media purposes. This would have had the benefit of basing access to the information on the conduct of those requesting the information, not mere identity. Indeed, as described above, that is essentially the statutory regime that the Court upheld against a facial challenge in *United Reporting*. 528 U.S. at 34.

Put simply, the Washington Supreme Court erred in so casually dismissing Green's First Amendment contentions. Washington's law is incompatible with the purposes of the Press Clause. And the fact that Washington had other means at its disposal to limit access to the information at issue illustrates the need for a more critical evaluation of its choice.

Moreover, this Court does not need to establish either a blanket prohibition against speaker-based discrimination or a blanket right to access all government information. Instead, First Amendment values and doctrines militate in favor of finding that favoring one member of the news media attempting to publish information over another, based solely on identity, should be subject to heightened scrutiny.

CONCLUSION

This Court should grant the petition for certiorari to resolve the uncertainty in this area of First Amendment doctrine, and to affirm that a state cannot elevate the corporate media over citizen-journalists like Brian Green.

Respectfully submitted,

Manuel S. Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
5538 Red Oak Drive
Los Angeles, CA 90068
(213) 675-1776
mklausner@klausnerlaw.us

Ilya Shapiro
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Trevor Burrus
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1000 Mass. Ave., NW
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(202) 842-0200
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