

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

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

Plaintiffs,

v.

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

Defendant.

No.

COMPLAINT

INTRODUCTION

1. The First Amendment guarantees the freedoms of speech and of the press, and those rights are incorporated against the states by the Due Process Clause of the Fourteenth Amendment. The Fourteenth Amendment also guarantees citizens equal protection of the laws, including equal treatment by their government.

2. The freedoms of speech and of the press and equal protection include a right of equal access among journalists to generally available information and events. A public official may not target particular news media outlets or journalists

for exclusion from access made generally available to other media. *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986). To do so violates several constitutional doctrines, particularly the right to news-gathering and the prohibition against viewpoint discrimination. *See Am. Broad. Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (“[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...”).

3. Plaintiff John K. MacIver Institute for Public Policy is a nonpartisan, nonprofit organization that includes among its activities the MacIver News Service. Plaintiff Bill Osmulski is an experienced reporter and credentialed member of the Wisconsin Capitol press corps who reports on important topics for Wisconsin’s citizens.

4. Defendant Tony Evers is governor of Wisconsin, and is sued in his official capacity. Governor Evers and his staff have targeted plaintiffs for exclusion from generally available media advisories and press events.

5. Plaintiffs therefore bring this suit under 42 U.S.C. § 1983, seeking declaratory and injunctive relief.

PARTIES

6. Plaintiff John K. MacIver Institute is a 501(c)(3) nonprofit organization based in Madison, Dane County, Wisconsin.

7. Plaintiff William (“Bill”) Osmulski is news director for the MacIver News Service. He works in Madison, Dane County, Wisconsin and lives in Rock County, Wisconsin.

8. Defendant Tony Evers is governor of the State of Wisconsin and oversees the Office of the Governor, including its communications department. He lives and works in Dane County, Wisconsin. His address for service of process is Office of the Governor, 115 East State Capitol, Madison, Wisconsin, 53701.

JURISDICTION AND VENUE

9. This case raises claims under the First and Fourteenth Amendments of the United State Constitution and 42 U.S.C. § 1983. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

10. Venue is appropriate under 28 U.S.C. § 1391(b)(1) and (2) because the Defendant is headquartered in and a substantial portion of the events giving rise to the claims occurred in the Western District of Wisconsin.

FACTUAL ALLEGATIONS

11. The John K. MacIver Institute for Public Policy is a nonprofit, nonpartisan organization based in Madison, Wisconsin. It bills itself as “The Free Market Voice for Wisconsin.” Among its programs, it sponsors the MacIver News Service. Writers for the News Service post to its website and social media, and occasionally its stories are run by other news outlets. Its reporters often contribute directly to other outlets as well. The MacIver Institute has gone to court before to defend the rights of journalists and the public to access important information, *see John K. MacIver Inst. For Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49 (access to public records held by legislators), and has won an “Opee” from the Wisconsin Freedom of Information Council for its commitment to openness and transparency in state government.

12. Bill Osmulski is the news director for the MacIver News Service. He previously won several awards working as a television news reporter in the Milwaukee and Eau Claire markets. He produces a regular public-affairs program for WVCY-TV 30.

13. The MacIver News Service is credentialed by the Wisconsin State Legislature to cover its activities as part of the Capitol press corps. Osmulski and other MacIver journalists regularly interview state legislators and other public officials in and around the Capitol. Osmulski is a member of the Madison chapter of the Society of Professional Journalists.

14. When Governor Evers took office, Osmulski and his former MacIver News Service colleague Matt Kittle asked the Governor's Office to add them to the media list. They received no response and have never received a media advisory of an upcoming event by the Governor in the subsequent six months, although numerous media advisories have been sent out to an email list of approximately 1,000 local, state, and national reporters and news outlets. The list includes a number of journalists from outlets with decidedly left-leaning editorial stances, such as *The Progressive Magazine*, Devil's Advocate Radio, and *The Capital Times* newspaper. The list also includes staff from the Democratic Party of Wisconsin, Democratic legislative offices, and left-wing advocacy groups like One Wisconsin Now.

15. Access to media advisories is critical because it provides reporters with information about the Governor's public events, which also are the context in which he is sometimes available to answer questions as part of a media availability (or "gaggle") before or after an event. Media advisories also alert reporters to press conferences with formal opportunities to ask questions of the Governor. *See Borreca v. Fasi*, 369 F. Supp. 906 (D. Haw. 1974) (targeted exclusion of a disfavored journalist from press conferences). As a result of this exclusion, it has been practically impossible for the MacIver journalists to attend the vast majority of the Governor's public events and press conferences.

16. On February 28, 2019, the Governor's Office held a press briefing for members of the Capitol press corps to explain the Governor's forthcoming budget on an embargoed, on-background basis. The Office invited 26 members of the Capitol press corps but did not invite reporters from the MacIver News Service. The invitation email described it as "a budget briefing for media" with "staff from the state budget office and the governor's office" that would "include an overview of key budget initiatives on background, as well as a brief opportunity for questions." The email also promised a printed copy of the Budget in Brief, which was not made available to the general public until the Governor's budget address later that night.

17. Alerted to the briefing by a colleague in the press corps, Kittle and Osmulski emailed the Governor's staff to RSVP. They then went up to the conference room at the designated hour and were denied access. Watching their colleagues in the press corps file by, they were told that they were not on the RSVP list and that the senior staff member in the Governor's Office who could permit their access was not available to talk to them. Numerous messages and requests via email and voicemail asking the Governor's communications staff for a conversation to discuss went unreturned.

18. Briefings like this are important for journalists to thoroughly and accurately report the news in a timely manner, especially in a competitive news business. By targeting the MacIver News Service for intentional and selective

exclusion from this briefing, the Governor's office made it substantially harder for these journalists to report the news in a timely, thorough manner.

COUNT I

By targeting the MacIver News Service and Bill Osmulski for exclusion from generally available press information and events, Governor Evers is violating their First Amendment right to freedom of the press.

19. The allegations contained in all preceding paragraphs are incorporated herein by reference.

20. The right to freedom of the press in the First Amendment has been incorporated to and made enforceable against the states through the Fourteenth Amendment guarantee of Due Process. *Near v. Minnesota*, 283 U.S. 697 (1931).

21. The Governor's targeted exclusion of the MacIver News Service and its journalists from media advisory lists and press conferences otherwise generally available to the news media violates the right of equal access inherent in the freedom of the press. *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977).

22. The Governor's targeted exclusion of the MacIver News Service and its journalists from press briefings such as the February 28, 2019, budget briefing for members of the Capitol press corps violates the right of equal access inherent in the freedom of the press.

23. MacIver and Mr. Osmulski are entitled to an injunction under 42 U.S.C. § 1983 ordering Governor Evers to immediately end his pattern of behavior

barring them from equal access to information and events on the same basis as their colleagues in the press corps.

COUNT II

By targeting the MacIver News Service and Bill Osmulski for exclusion from generally available press information and events, Governor Evers is violating their First Amendment right to free speech.

24. The allegations contained in all preceding paragraphs are incorporated herein by reference.

25. The Governor's media advisory list and press conferences constitute a limited public forum created by a government entity for a particular purpose.

26. The Governor's targeted exclusion of the MacIver News Service and its journalists from media advisory lists and press conferences constitutes viewpoint discrimination based on the MacIver Institute's editorial stances, preventing them from speaking or asking questions in press conferences and gaggles, in violation of the First Amendment's free speech clause. *See United Teachers of Dade v. Stierheim*, 213 F. Supp. 2d 1368 (S.D. Fl. 2002).

COUNT III

By targeting the MacIver News Service and Bill Osmulski for exclusion from generally available press information and events, Governor Evers is violating their Fourteenth Amendment right to equal protection of the laws.

27. The allegations contained in all preceding paragraphs are incorporated herein by reference.

28. The equal protection clause requires that a state government grants equal treatment to its citizens and not discriminate amongst them, especially in respect of their fundamental rights. In this context, it requires that all journalists have equal access to information generally available to the news media. *See Getty Images News Servs. v. Dept. of Defense*, 193 F.Supp.2d 112 (D.D.C. 2002); *Ludtke v. Kuhn*, 461 F.Supp. 86 (S.D.N.Y. 1978).

29. The targeted exclusion from equal access of the MacIver News Service and Bill Osmulski by Governor Evers denies them the equal protection of the laws to which they are entitled.

PRAYER FOR RELIEF

Plaintiffs John K. MacIver Institute for Public Policy and Bill Osmulski respectfully request that this Court:

- a. Declare that excluding the MacIver News Service and Bill Osmulski from the information concerning the time and location of the Governor's public events and press conferences is unconstitutional;

- b. Declare that excluding the MacIver News Service and Bill Osmulski from generally available press events like the February 28, 2019, budget briefing is unconstitutional;
- c. Enjoin Governor Evers from excluding MacIver News Service from generally available press events and lists announcing such events;
- d. Enjoin Governor Evers from excluding Bill Osmulski from generally available press events and lists announcing such events as long as he remains affiliated with the MacIver News Service;
- e. Award Plaintiffs their costs and attorneys' fees under 42 U.S.C. § 1988; and
- f. Award any further relief to which Plaintiffs may be entitled.

Dated: August 5, 2019

Respectfully Submitted,

**JOHN K. MACIVER INSTITUTE
FOR PUBLIC POLICY**

WILLIAM OSMULSKI

By: /s/ Daniel R. Suhr

Daniel R. Suhr (WI State Bar #6321108, WDWI admission April 9, 2019)
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