No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Brian Green operates "Libertys Champion," a YouTube channel dedicated to exposing corruption and covering local court cases in Pierce County, Washington. The county denied Green's request for public records that are restricted to "news media" under Wash. Rev. Code §§ 5.68.010(5) and 42.56.250(8), reasoning that Green is a citizen-journalist, not a corporate media entity. The Superior Court ordered the county to give Green the records.

The Washington Supreme Court reversed. Turning aside Green's First Amendment arguments, it held that certain public records could only be provided to members of the "news media" who have corporate personhood. The question presented is:

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.

PARTIES TO THE PROCEEDING

Petitioner is Brian Green. Respondent is Pierce County, Washington.

STATEMENT OF RELATED PROCEEDINGS

Brian Green v. Pierce County, No. 98768-8, Supreme Court of the State of Washington, judgment entered May 27, 2021, amended July 29, 2021.

Brian Green v. Pierce County, a municipal corporation, No. 53289-1-II, Court of Appeals of the State of Washington, order granting review entered July 3, 2019; order certifying appeal for transfer entered July 10, 2020.

Brian Green v. Pierce County, a municipal corporation, No. 18-2-06266-34, Superior Court of Washington in and for Thurston County, order entered April 5, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Brian Green petitions for a writ of certiorari to review the judgment of the Supreme Court of Washington.

INTRODUCTION

As the dissent below surmised, "This case concerns a question central to our democracy: what counts as news media in the shifting landscape of the 21st century?" App.20a. The First Amendment ultimately answers that question. And in supplying that answer, the Amendment's fundamental guarantees of free speech and press cannot be narrowed by a state law's cramped and technocratic definition of "news media." Washington's Supreme Court may be free to interpret state law, but it cannot apply that law, as it did here, in contravention of the First Amendment. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2262-63 (2020).

The internet's democratization of news-gathering and publication hinges on two established First Amendment doctrines. First, the Press Clause belongs to everyone. Our country does not know of an official or semi-official state-endorsed press, possessing special privileges to control the flow of information and opinion. Anyone is free to gather information, and use it to publish news and commentary. Second, speaker discrimination is often acknowledged as content-based discrimination. Courts understand that state favoritism of some speakers invariably reflects state

favoritism of those speakers' messages, viewpoints, and priorities. As Americans have taken to the online public square, the First Amendment has assured that they enjoy equal unimpeded rights to gather the news and report it to their fellow citizens.

Until now. The decision below violates this guarantee, and threatens the increasingly vital role that citizen-journalism plays in our nation's public discourse. Effectively inverting the arguments this Court rejected in *Citizens United v. FEC*, 558 U.S. 310 (2010), Washington's Supreme Court held that Brian Green, who publishes news and commentary through his YouTube channel, cannot access public records reserved to the "news media" for lack of separate corporate personhood.

In so doing, the court effectively tiered access to First Amendment rights: one level of access for officially sanctioned "press," and another level, of limited or no access, for everyone else.

But if individuals may not be denied First Amendment rights when acting in the corporate form, they may not be denied First Amendment rights because they speak as natural persons. And what may be of interest to Green and his audience is not necessarily of interest to the established corporate media entities privileged by the decision below. More to the point, the First Amendment forbids the government from narrowly defining "news media" to exclude disfavored outlets from receiving public information.

The decision to treat all individuals as second-class citizens—behind corporations, limited liability companies and the like—with respect to engaging in the fundamental freedoms of speech and the press, contradicts this Court's well-established First Amendment precedent. Not surprisingly, it conflicts with the accepted understanding of the First Amendment throughout the lower courts. But if the government may act on its mistrust of people to perform media functions, there may be no telling where this ends.

The opinion below also implicates a growing split among the circuit courts of appeal as to whether the First Amendment requires that the government justify the exclusion of particular press actors from accessing public information. The D.C., First, Second, and Seventh Circuits require the government to provide at least some justification for such exclusion. The Fourth Circuit, now joined by Washington's Supreme Court, is untroubled by the practice.

The judgment below merits this Court's review.

OPINIONS BELOW

The opinion of the Supreme Court of Washington, App.1a-32a, is reported at 487 P.3d 499 and 197 Wn.2d 841. The orders of the Washington Court of Appeals granting review, App.33a-41a, and certifying the appeal for transfer to the Washington Supreme Court, App.42a-43a, are not reported. The order of the

Thurston County, Washington Superior Court, App.44a-62a, is not reported.

JURISDICTION

The Washington Supreme Court entered its decision below on May 27, 2021. This Court, through its COVID-19 order of March 19, 2020, extended the deadline to file a petition for a writ of certiorari to 150 days from the date of the judgment. Green timely files this petition and invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

RULE 29.4(C) STATEMENT

Because this petition draws into question the constitutionality of Wash. Rev. Code §§ 5.68.010(5) and 42.56.250(8), and neither the State of Washington nor any agency, officer, or employee thereof is a party, 28 U.S.C. § 2403(b) may be applicable.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

Pertinent portions of the First Amendment and Fourteenth Amendments to the United States Constitution, and of the Revised Code of Washington, appear at App.87a-89a.

STATEMENT OF THE CASE

A. Washington's Public Records Act

Washington makes certain information about law enforcement personnel available for inspection and copying by the "news media." But the state denies this material to ordinary citizens who are not deemed to be "news media," even when those citizens plainly function as press.

In Washington, "[e]ach agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within [some] specific exemptions . . . which exempts or prohibits disclosure of specific information or records." Wash. Rev. Code § 42.56.070(1).

One such exemption excludes from "public inspection and copying . . . Photographs and month and year of birth in the personnel files of employees or volunteers of a public agency, including employees and workers of criminal justice agencies as defined in RCW 10.97.030. . . ." Wash. Rev. Code § 42.56.250(8).

But this exemption contains an exemption: "The news media, as defined in RCW 5.68.010(5), shall have access to the photographs and full date of birth."

In turn, Wash. Rev. Code § 5.68.010(5) defines "news media," in pertinent part, to mean:

> (a) Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or

> network, or audio or audiovisual production company, or any entity that is in the regular business of news gathering and disseminating news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution;
>
> (b) Any person who is or has been an employee, agent, or independent contractor of any entity listed in (a) of this subsection, who is or has been engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity. . . .

B. Brian Green's investigative news and opinion channel

Brian Green has operated a YouTube channel named "Libertys Champion" (sometimes spelled "Liberty's Champion") continuously since 2013. App.47a, 1a & n.2. The channel "does not have a legal identity separate from Green." App.16a.

"Liberty's Champion describes itself as 'Exposing Corruption, Educating the People.'" App.47a. Green uses the channel to "gather[] information of potential public interest by researching current events, contacting public officials and government offices for information, and making Public Records Act requests for

documents." *Id*. Through the channel, Green disseminates this information "to a broad segment of the public," in addition to related editorial commentary. *Id.* The channel has over 12,000 subscribers. App.48a; YouTube, "Libertys Champion," https://www.youtube.com/channel/UCTjBAvhF0o9561-i7XKo6rA/ ("18.3k subscribers" as of October 11, 2021).

C. Green's arrest and public records dispute

In 2014, Green accompanied a friend on a visit to the Pierce County-City Building in Tacoma. App.2a, 45a. Green's friend refused a security guard's request to have his bag searched, leading to a verbal dispute with a Pierce County Sheriff's Deputy. *Id.* Eventually, the Deputy pushed Green, causing him to fall back onto the floor, at which time the Deputy arrested Green and charged him with misdemeanor criminal obstruction. App.2a, 45a-46a. Green was released approximately 24 hours later, and the charges against him were dismissed. *Id.*

On December 14, 2017, Green made a public records request of the Pierce County Sheriff's Office, seeking records concerning "all detention center and/or jail personnel and/or deputies on duty November 26 & 27 2014," including official photos and dates of birth. App.3a, 46a. "He signed the request as an 'Investigative Journalist.'" App.46a.

The Sheriff's Public Disclosure Unit provided Green some material, but declined to provide him the requested photographs and birth dates, claiming that

these were exempt from disclosure per Wash. Rev. Code § 42.56.250(8). Green, however, pointed to the exemption's exemption for "news media" and insisted that he was therefore entitled to the records. "Green said he was 'working on a story concerning the Pierce County Jail' and again signed his e-mail with the title, 'Investigative Journalist.'" App.3a-4a. Green further explained that he was "a journalist that primarily covers local court cases" on his YouTube channel, which "is a news agency that is in the regular business of gathering and disseminating news via the internet." App.4a. But the Sheriff's Office would not relent.

D. Procedural History

1. Green sued Pierce County to compel the disputed records' production. He argued, in relevant part, that the media exemption could not be construed "in a way that would infringe upon the First Amendment's protections of the freedom of the press." App.63a. Green noted that courts, including this Court, "have repeatedly stated there is no difference between traditional press and any new and emerging press" for First Amendment purposes. App.64a (citations omitted).

The county "posited that to be 'news media,' Libertys Champion must have corporate structure, generate revenue, have employees, and pay compensation." App.5a. "To that end," the county sought and eventually moved to compel discovery "about Libertys Champion's organizational structure and Green's legal relationship with it." App.6a.

The Superior Court held that Green, acting through his channel, qualified as "news media." Focusing on the statutory definition of "news media" as including "any entity that is in the regular business of news gathering and disseminating news or information to the public by any means, including, but not limited to . . . internet, or electronic distribution," the court rejected the county's contention media entities must have a corporate form. App.55a. The court further found that Green's channel was in "the regular business of newsgathering and disseminating news or information" because it regularly engaged in such activities, regardless of whether it was profitable. App.56a-57a. And in the alternative, it found that Green is "news media" because he acts as an agent of Libertys Champion, a media entity. App.59a. The court also denied the county's discovery motion, finding that the discovery was irrelevant. App.44a-45a, 48a. Having found that Green acted as "news media" and was thus entitled to the records, the court nonetheless stayed its judgment to permit the county to attempt an appeal. App.62a.

2. Green opposed the county's motion for discretionary review, in part by arguing that the First Amendment required the Superior Court's conclusion. App.66a-69a. However, the Court of Appeals granted review. In briefing the matter, Green persisted in arguing that the First Amendment forbids the state from denying him the rights of "news media." App.70a-82a.

Upon the completion of briefing, rather than decide the case the Court of Appeals transferred the

matter to the Washington Supreme Court for direct review. App.42a-43a. When corporate media associations appeared as amici before the Washington Supreme Court to oppose Green, Green responded, relying in large part on his First Amendment claims. App.83a-86a.

3. The Washington Supreme Court split 7-2 in reversing the Superior Court's order. Turning to the definition of "news media," the majority found that "[t]he Libertys Champion YouTube channel does not fit into any of the categories of traditional news outlets listed in the statute, nor is it an 'entity.'" App.12a. "[T]he word 'entity' must be interpreted to embrace something that is similar in nature to the specific types of traditional news outlets listed in the statute. The list includes only organizations. It does not include individuals. Indeed, the statute differentiates between organizations and the individuals who represent them." App.13a (citation omitted).

Accordingly, "the word 'entity' cannot be construed to include an individual. An 'entity' must be something with a legal identity separate from the individual." *Id.* And because Libertys Champion was not "news media," neither could Green qualify for that privilege as the channel's employee, agent, or contractor. App.17a-18a. The majority acknowledged that "[m]odern conceptions of 'news media' continue to evolve and expand beyond the limits of the statutory definition. . . ." App.13a. "[I]t was unlikely the legislature could foresee how social media would advance to become an instrumental part of our daily lives. As social media

developed, so has a 'new news cycle.'" *Id.* (internal quotation marks omitted).

But the majority also suggested that news and information shared on social media may be categorically less reliable than established news outlets. "The evermore constant use of social media to access news demonstrates our increased reliance on and trust in social media, and it requires careful vetting to ensure that the news and stories we find are accurate." App.14a.

Green had pointed out that many corporate media entities operate YouTube channels as well, but the majority answered, "owning and operating a YouTube channel alone does not create a news media entity . . . Unlike Libertys Champion, the other YouTube channels Green points to are owned and operated by valid legal entities. A YouTube channel run by an individual does not meet the statutory definition of 'news media.'" App.15a (footnote omitted).

The majority dismissed Green's and his amici's First Amendment argument in a footnote. "[T]here are no freedom of the press implications if there is no news media." App.15 n.5. Moreover, the majority noted that there is no free-standing First Amendment right to receive government-generated information. *Id.*

4. The dissent relied upon Green's First Amendment arguments to support its conclusion that Green qualified for "news media" privileges. "The concerns animating the First Amendment's protection of the free press also favor including Libertys Champion in

the definition of 'entity' in this statute." App.25a. While the dissent offered that "this case does not directly concern the First Amendment," it also acknowledged that "[f]rom the perspective of the First Amendment, distinguishing different news media based on size or organizational structure or status as a legal entity is disfavored, if not outright impermissible. To hold that RCW 5.68.010(5)(a) provides otherwise, as the majority does, risks construing the statute in an unconstitutional manner, a result we must avoid." App.26a (citation omitted).

REASONS FOR GRANTING THE PETITION

The lower court's hand-waving rejection of the First Amendment—"there are no freedom of the press implications if there is no news media," App.15a n.5—is perfectly circular and outcome-based. "The statute abolishing entitlement to constitutional rights means no rights are implicated. Q.E.D."

This backwards logic misses the point. The question here is whether a determination that "there is no news media" when individuals gather and report the news has "freedom of the press implications." It does. The centrality of independent citizen journalism in American public discourse cannot be overstated. And as trust in legacy media plummets, Megan Brenan, *Americans' Trust in Media Dips to Second Lowest on Record*, Gallup (Oct. 7, 2021), https://bit.ly/3aPDQeA, the implications of holding that natural persons can be

written out of the First Amendment's freedom of the press are profound. This Court should not wait to see where the limits of this logic end.

Indeed, the decision below contradicts two long, unbroken lines of this Court's precedent. *First*, the freedom of the press belongs to the people, not to officially sanctioned organizations. As the dissent noted, "today's solitary YouTuber" is the "lonely pamphleteer" whose press rights the First Amendment secures in the exact full measure as is extended to the New York Times. App.26a (quoting *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972)). The First Amendment may not require the state to make records public. But it bars the state from making records "public" for only a select subset of the press. *Second*, by discriminating in favor of one class of speakers (corporate entities) and against another (everyone else), the government discriminates in favor of the speech expected from the former, and against that which might be published by the latter. The county did not attempt to bear its burden of justifying this form of content-based discrimination.

The decision below also implicates Washington's Supreme Court in a circuit split as to whether the First Amendment regulates the government's discrimination among the press when doling out access to public information. Four circuits believe the practice warrants a close look, though they disagree as to which First Amendment doctrine applies. One circuit, like the court below, believes that the government can pick and

choose who among the press may access and, if they see fit, publish or comment on "public" information.

Securing the First Amendment rights of citizen journalists, re-enforcing this Court's basic First Amendment doctrines, and resolving an important split regarding access to public information, all merit this Court's review.

I. The decision below directly conflicts with this Court's First Amendment precedent.

A. Freedom of the press belongs to everyone, not just official corporate media.

"With the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred." *Citizens United*, 558 U.S. at 352.

But for purposes of the Press Clause, that line simply cannot be drawn. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); *Branzburg*, 408 U.S. at 705 ("informative function" of the "organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists"). The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than

through any kind of authoritative selection." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.), *aff'd*, 326 U.S. 1 (1945).

Accordingly, "the First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms." *Bellotti*, 435 U.S. at 802 (Burger, C.J., concurring); *see also* 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 (2012). "[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it." *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring). "When the Framers thought of the press, they did not envision the large, corporate newspaper and television establishments of our modern world. Instead, they employed the term 'the press' to refer to the many independent printers who circulated small newspapers or published writers' pamphlets for a fee." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring).

Just as "[t]here is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not," *Citizens United*, 558 U.S. at 352, nothing supports the First Amendment distinction drawn below, between media corporations and *individuals*—a radically more dramatic form of the same impermissible discrimination. To the contrary: "We have consistently rejected the proposition that the

institutional press has any constitutional privilege beyond that of other speakers." *Citizens United*, 558 U.S. at 352 (internal quotation marks and citations omitted).

> The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher. . . .

Branzburg, 408 U.S. at 703-04. "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. Griffin*, 303 U.S. 444, 452 (1938).

Courts typically understand this concept. *See, e.g.*, *Obsidian Fin. Group, LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014) ("The 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."); *Snyder v. Phelps*, 580 F.3d 206, 219 n.13 (4th Cir. 2009), *aff'd*, 562 U.S. 443 (2011) ("Any effort to justify a media/nonmedia distinction rests on unstable ground, given the difficulty of defining with precision who belongs to the 'media.' "); *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 149

(2d Cir. 2000) ("a distinction drawn according to whether the defendant is a member of the media or not is untenable"); *In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986) ("To recognize the existence of a first amendment right and yet distinguish the level of protection accorded that right based on the type of entity involved would be incompatible with the fundamental first amendment principle that [the value of speech is not speaker-dependent]") (citation omitted); *Garcia v. Bd. of Educ.*, 777 F.2d 1403, 1410 (10th Cir. 1985) ("First amendment protection should not depend on whether the criticism is in the form of speech by a private individual or publication by the institutional press.").

The Washington Supreme Court's holding that the First Amendment is not implicated when the state defines the press to include only corporate entities is seriously out-of-step with established First Amendment doctrine.

B. Discrimination against categories of speakers is content-based speech discrimination.

"[R]estrictions distinguishing among different speakers, allowing speech by some but not others," are "interrelated" to content-based discrimination. *Citizens United*, 558 U.S. at 340 (citation omitted). "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.*

"'[T]he fact that a distinction is speaker based' does not 'automatically render the distinction content neutral.'" *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2347 (2020) (plurality) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015)); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563-64 (2011). "Indeed, the Court has held that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.'" *Id.* (quoting *Reed*, 576 U.S. at 170); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994).

> [M]oreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government 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. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

Citizens United, 558 U.S. at 340-41.

Depriving one class of speakers—here, individuals—of public information, plainly alters the content of speech that the public may receive. Green's thousands of subscribers have been denied the story that only he would publish if he could access the "public"

information available only to corporate entities. The decision below cannot be reconciled with this Court's understanding of speaker prohibition under the First Amendment.

II. The decision below implicates a growing circuit split as to whether the First Amendment bars government from discriminating among the press in providing public information.

It is irrelevant that the First and Fourteenth Amendments do not guarantee "a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally." App.15a n.5 (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring)). The lower court should have read the very next sentence of the opinion it quoted: "The Constitution does no more than assure the public and the press equal access once government has opened its doors." *Houchins*, 438 U.S. at 16 (Stewart, J., concurring).

The circuits are split as to whether Justice Stewart was right in observing that the Constitution guarantees equal access to government records. Some courts understand that "[f]avoring one media organization over another would 'present serious First Amendment concerns.'" *Courthouse News Serv. v. Planet*, 947 F.3d 581, 595 n.8 (9th Cir. 2020) (quoting *Turner*, 512 U.S. at 659). The D.C., First, Second, and

Seventh Circuits hold that the First Amendment requires the government to justify any discrimination in providing press access to information. Washington's Supreme Court has now joined the Fourth Circuit on the short end of that split.

The First Amendment does not require the White House to host reporters or build them facilities. But "White House press facilities having been made publicly available as a source of information for newsmen," the D.C. Circuit held that "the protection afforded newsgathering under the first amendment guarantee of freedom of the press requires that this access not be denied arbitrarily or for less than compelling reasons." *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977). After all, "[n]ot only newsmen and the publications for which they write, but also the public at large have an interest protected by the first amendment in assuring that restrictions on newsgathering be no more arduous than necessary, and that individual newsmen not be arbitrarily excluded from sources of information." *Id.* at 129-30. Last year, the D.C. Circuit applied *Sherrill* in affirming that the White House could not suspend a reporter's access for a month absent due process. *Karem v. Trump*, 960 F.3d 656 (D.C. Cir. 2020).

Applying this concept, the First Circuit condemned a protective order that allowed a single television station access to sealed material.

> By the grace of the court, WGBH became a privileged media entity that could, over a four-month period, review otherwise confidential

> information and shape the form and content of the initial presentation of the material to the public. It is of no consequence that others could then republish the information WGBH had chosen to release. A court may not selectively exclude news media from access to information otherwise made available for public dissemination.

Anderson v. Cryovac, Inc., 805 F.2d 1, 9 (1st Cir. 1986) (citations omitted). The First Circuit presaged *Citizens United*'s concern that a governmental speaker preference would alter the public's perception of the news:

> The danger in granting favorable treatment to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive. Such a practice is unquestionably at odds with the first amendment. Neither the courts nor any other branch of the government can be allowed to affect the content or tenor of the news by choreographing which news organizations have access to relevant information.

Id.

Anderson relied on the Second Circuit's holding that the First Amendment prohibited the exclusion of one of the three major networks from a political debate. "[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 or the rights of the First Amendment would no longer be

tenable." *Am. Broad. Cos., Inc. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977); *cf. Huminski v. Corsones*, 396 F.3d 53, 84 (2d Cir. 2004).

More recently, the Seventh Circuit turned aside a First Amendment challenge by two reporters to a governor's access policy that excludes them from certain press events. *John K. Maciver Inst. for Pub. Pol'y, Inc. v. Evers*, 994 F.3d 602 (7th Cir. 2021), *cert. petition pending*, No. 21-388 (filed Sep. 7, 2021). The Seventh Circuit's approach differed from those of the D.C., First, and Second Circuits in that it applied forum analysis because, at least on the facts of that case, "at the end of the day . . . location matters." *Id.* at 613. The *Maciver* plaintiffs' petition for certiorari focuses on the Seventh Circuit's use of forum analysis as a departure from the more traditional scrutiny employed by the other circuits that question discrimination against members of the press; but one would imagine that faced with a case like this one, which involves only the provision of documents and not some event occurring at a particular location, the Seventh Circuit would have found a forum analysis to be incongruent.

In any event, like the aforementioned circuits and unlike the court below, the Seventh Circuit at least recognized that the governor's access policy implicated meaningful First Amendment concerns. "We . . . look carefully at any claim that a government entity is disallowing access to the media or a particular subset thereof." *Id.* at 615.

The Fourth Circuit takes a different approach. In *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006), it upheld a governor's edict to the state's executive branch forbidding employees from returning calls or complying with requests made by two disfavored reporters. The extent of the plaintiffs' exclusion was unclear. Apart from having their calls unreturned, one plaintiff was excluded from some press briefings while being allowed to attend others; he was also advised that the state would keep answering his requests made under the Public Information Act. *Id.* at 413-14. But the court broadly held that the First Amendment is not offended when "government officials disadvantage some reporters because of their reporting and simultaneously advantage others by granting them unequal access to nonpublic information." *Id.* at 418.

The decision below plainly implicates this split. Further lower court percolation is unnecessary. Awaiting it would needlessly jeopardize First Amendment rights.

III. The decision below seriously threatens citizen-journalism, and with it, Americans' access to news and commentary.

The First Amendment's protections are predicated on the assumption "that valuable public debate—as well as other civic behavior—must be informed." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (citation omitted). More than ever, that information comes not from

corporate behemoths, but from individual news-gatherers and publishers. Long after technology rendered Thomas Paine's printing press obsolete, the "lonely pamphleteer's" press function continues as a critical source of news and opinion that might otherwise not see the light of day. Examples abound:

Earlier this year, the Pulitzer Prize Board awarded Darnella Frazier a Special Citation "[f]or courageously recording the murder of George Floyd, a video that spurred protests against police brutality around the world, highlighting the crucial role of citizens in journalists' quest for truth and justice." The Pulitzer Prizes, *Darnella Frazier*, https://bit.ly/3aPzi85 (last visited Oct. 18, 2021). Frazier was not a credentialed journalist, let alone an "entity." She was simply a 17-year-old girl walking her nine-year-old cousin to the corner store, who had the presence of mind to record an historically news-worthy incident. Joe Hernandez, *Read This Powerful Statement From Darnella Frazier, Who Filmed George Floyd's Murder*, National Public Radio (May 26, 2021), https://n.pr/2Z0wTEW. Perhaps a corporate news reporter on the scene would have recorded Floyd's killing as well, but it fell to Frazier to do so. And if the corporate media were not interested in her video, the logic of the decision below—"there are no freedom of the press implications if there is no news media," App.15a n.5—might have enabled her story's suppression.

Of course Frazier was not the first ordinary citizen to play such a journalistic role. Twenty-nine years earlier and some 1,500 miles away, police activity outside

his apartment woke up plumber George Holliday in the dead of night. Holliday reached for his videotape recorder and documented four police officers beating motorist Rodney King. "Holliday's simple act of hoisting a video camera to his shoulder was probably one of the first flickers of the citizen journalist movement to come, in which everyday people would record and disseminate video snippets of unfolding events, from Eric Garner to George Floyd, both of whom died at the hands of police officers." Steve Marble, *George Holliday, man who filmed Rodney King video that forever changed L.A., dies*, Los Angeles Times (Sept. 20, 2021), https://lat.ms/3AS0opJ. No official press were on the scene that night on the outskirts of Los Angeles. And again, if a local news station hadn't found Holliday's tape newsworthy, his publication of the videotape might have required the Press Clause's protection.

While Frazier and Holliday found established outlets for their news, the internet enables citizen journalists to break through with stories that the institutional press, for its own reasons, would rather suppress. And so it fell to Matt Drudge, not a well-heeled corporate media entity, to reveal "that reporter Michael Isikoff developed the story of his career, only to have it spiked by top NEWSWEEK suits hours before publication." Drudge Report, *Newsweek Kills Story on White House Intern* (Jan. 17, 1998), https://bit.ly/3lQrsBA. That story led to the second presidential impeachment trial in American history, among other significant consequences.

As Drudge reported, before Newsweek spiked the story "[w]ord of the story's impeding [sic] release caused blind chaos in media circles; TIME magazine spent Saturday scrambling for its own version of the story [and] [t]he NEW YORK POST on Sunday was set to front the young intern's affair, but was forced to fall back on [another] dated [story]." *Id.* What Newsweek put in the trash became Matt Drudge's treasure. And what Newsweek and the New York Post would not report, and what Time could not report, became one of history's biggest news stories.

Only a year later, Drudge, sued as an individual by one of the President's advisors regarding another matter, successfully asserted the First Amendment reporter's privilege in federal court, *Blumenthal v. Drudge*, 186 F.R.D. 236, 244 (D.D.C. 1999)—something he could not have done under the opinion below. But there is no doubt that Drudge's groundbreaking reporting of why the President might have committed perjury fulfilled the Framers' vision of the press—and that in many countries lacking anything similar to the First Amendment's Press Clause, Drudge would not have dared to publish such information about the chief executive.

More than just an instrument to hold fellow journalists and the government accountable, citizen journalists have also proven they can provide invaluable data to the public while their institutional counterparts fail. At the COVID-19 pandemic's outset, little was known about how devastating the death toll might be. All eyes were fixed on two models: one created by

Imperial College London (ICL) and the other by the Institute for Health Metrics and Evaluation (IHME). While the ICL model predicted upwards of two million deaths in the United States, the IHME model predicted a mere 60,000 deaths. Neither turned out to be particularly accurate, but in the debate over how dangerous COVID-19 was, the models provided favorable, inaccurate data to support each opposing side's preferred narrative. *Compare* Jake Johnson, '*Terrifying' New Research Warns 2.2 Million Could Die From Coronavirus in US Without Drastic Action*, Common Dreams (Mar. 17, 2020), https://bit.ly/3DOgKBC, *with* Noah Higgins-Dunn, *Trump says US will have 'substantially under' 100,000 deaths from coronavirus, lower than initial estimates*, CNBC (Apr. 10, 2020), https://cnb.cx/3DXki4N.

As it turned out, the most accurate model was built not by a multi-million dollar research facility but by Youyang Gu, an MIT graduate in his twenties who had previous experience working with machine learning algorithms for high-frequency trading systems. Ashlee Vance, *The 27-Year-Old Who Became a Covid-19 Data Superstar*, Bloomberg (Feb. 19, 2021), https://bloom.bg/3BS4Cil. Gu attracted attention to his model via the power of social media; as a result, the CDC included Gu's model on its COVID-19 forecasting website and invited him to meetings with other modelers to try and collectively improve forecasts. Gu fulfilled a press role when, as a citizen journalist, he educated the public (and the government) about a serious public health crisis. Had Gu been denied the First Amendment's

protection for lack of corporate personhood, we might know much less about the course of this pandemic.

Indeed, under the lower court's logic, the legislature as gatekeeper to First Amendment freedoms may imperil entire mediums of publication. One such form, used by various Seattle communities, is the zine. Zapp Zine Collection, Seattle Public Library, https://bit.ly/2Z3cFuO (last visited Oct. 19, 2021). "A zine is most commonly a small circulation publication of original or appropriated texts and images. More broadly, the term encompasses any self-published unique work of minority interest, usually reproduced via photocopier," typically "produced in editions of 1,000 or less" without much profit motive. *What is a Zine?*, University of Texas Libraries, https://bit.ly/3pij7sf (last visited Oct. 19, 2021). While "magazines" appear in the Washington law's list of specifically-approved media entities, the court below held that "[t]he list includes only organizations." App.13a. Zines are thus also not "media" raising Press Clause implications.

The videos that Brian Green might publish if he knew the identities of the officers who assaulted and jailed him would doubtless annoy Pierce County. But the Minneapolis and Los Angeles police departments probably did not care for Darnella Frazier and George Holliday's videos, either. The feelings that many powerful people, not least the President, might have harbored toward Matt Drudge over his landmark exposé were probably quite negative. And various parties to the COVID-19 debate might not appreciate competition in the epidemiological modeling space, or alleged

"disinformation" by a scientist who may lack the resources to fend off cancellation. A robust First Amendment may ward off opportunistic legislative and litigation attacks on all manner of critical citizen journalism. But this Court should not take for granted its baseline assumption that individuals who gather and publish news and commentary enjoy the First Amendment's protection. That concept must be defended against challenges such as that presented here by the Washington Supreme Court.

IV. This case is an optimal vehicle for clarifying the law, resolving the split of authority, and securing fundamental rights.

The First Amendment issue here is as focused as it is important. The case does not turn on any disputed factual record—there is no question that Green is a natural person and was denied the First Amendment's protection on that account. The case thus raises only straightforward legal questions. The Washington Supreme Court's refusal to consider the First Amendment's application is either consistent with established doctrine, or it is not. The government may either enforce a statute that places individuals outside the Press Clause's protection for lack of corporate personhood, or it may not. The government is either required to justify discrimination against members of the media, or it is not. And because the case arises in the context of public records disclosure, not in any particular location, this Court need not consider whether forum analysis applies. Deciding these matters will bring

clarity to the law, resolve a split of authority, and secure Americans' access to citizen-journalism.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 22, 2021