

No. 12-17

---

IN THE  
**Supreme Court of the United States**

---

MARK J. MCBURNEY, AND ROGER W. HURLBERT,  
*Petitioners,*

v.

NATHANIEL L. YOUNG, DEPUTY COMMISSIONER  
AND DIRECTOR, VIRGINIA DIVISION OF CHILD  
SUPPORT ENFORCEMENT, *ET AL.*,  
*Respondents.*

---

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

---

**BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR  
FREEDOM OF THE PRESS AND 53 MEDIA ORGANIZATIONS,  
INCLUDING PROMINENT PRINT, BROADCAST, AND ONLINE  
MEDIA OUTLETS, AS WELL AS LEADING JOURNALISM  
ADVOCACY ORGANIZATIONS, IN SUPPORT OF PETITIONERS**

---

Bruce D. Brown  
*Counsel of Record*  
Mark R. Caramanica  
Aaron Mackey  
The Reporters Committee  
for Freedom of the Press  
1101 Wilson Blvd., Suite 1100  
Arlington, VA 22209  
bbrown@rcfp.org  
(703) 807-2100

*(Additional counsel for amici listed in Appendix B)*

---

**TABLE OF CONTENTS**

Table of Contents ..... i

Table of Authorities ..... iii

Statement of Interest..... 1

Summary of Argument ..... 3

Argument..... 6

I. Virginia’s citizenship requirement for access to public records dramatically harms the ability of journalists around the nation to report on matters of public importance..... 6

    A. Affirming the Fourth Circuit would limit reporting on issues in Virginia and throughout the country..... 8

        i. VFOIA’s citizenship requirement jeopardizes state-by-state comparisons of national news.. 9

        ii. News in one state is generally of interest to non-citizens. .... 13

        iii. News originating in Virginia is regularly of national significance ..... 17

    B. Media, particularly online platforms, cannot rely on the limited media exception in VFOIA because other state open records laws do not include similar exceptions and affirming the Fourth Circuit could push other states to similarly restrict access to their public records ..... 21

II. VFOIA’s citizens-only requirement violates the Privileges and Immunities Clause because it burdens the fundamental right to access records of the government and prevents out-of-state companies and individuals from engaging in the common calling of journalism.....	25
A. The right to access government records is a fundamental right established by common law that predates statutory grants such as VFOIA.....	26
B. The common calling of journalism has long been recognized as a fundamental institution. ....	29
C. Virginia does not have a substantial reason for discriminating against non-citizens under VFOIA.....	30
D. Virginia's VFOIA citizenship restriction bears no nexus to its stated objective of opening government to the people .....	32
III. Affirming the Fourth Circuit’s decision would thwart the goal of the Privileges and Immunities Clause to forge a national identity and undercut the media’s historic role as a government watchdog.....	33
Conclusion .....	39
Appendix A: Description of <i>amici</i> .....	A-1
Appendix B: Additional <i>amici</i> counsel .....	A-17

## TABLE OF AUTHORITIES

### CASES

<i>Associated Tax Service, Inc. v. Fitzpatrick</i> , 372 S.E.2d 625 (Va. 1988) .....	24, 38
<i>Biddle v. Walton</i> , 6 Pa. D. 287 (Pa. Ct. Comm. Pl. 1897) .....	28
<i>Burton v. Tuite</i> , 44 N.W. 282 (Mich. 1889) .....	27
<i>Casey v. MacPhail</i> , 65 A.2d 657 (N.J. Super. Ct. Law Div. 1949) .....	29
<i>City of Lakewood v. Plain Dealer Pub. Co.</i> , 486 U.S. 750 (1988).....	24
<i>Clay v. Ballard</i> , 13 S.E. 262 (Va. 1891) .....	27
<i>Ferry v. Williams</i> , 41 N.J.L. 332 (N.J. 1879) .....	29
<i>Forsyth County, Ga. v. Nationalist Movement</i> , 505 U.S. 123 (1992).....	24
<i>Grosjean v. American Press Co.</i> , 297 U.S. 233 (1936).....	23
<i>Herbert v. Ashburner</i> , 95 Eng. Rep. 628 (1750) ....	27

<i>King v. G. Babb</i> , 100 Eng. Rep. 743 (1790).....	27
<i>Matte v. Winooski</i> , 271 A.2d 830 (Vt. 1970) .....	28
<i>McBurney v. Young</i> , 667 F.3d 454 (2012) .....	4, 37
<i>N.Y. Times v. Sullivan</i> , 376 U.S. 254 (1964)...	35, 36
<i>N.Y. Times v. United States</i> , 403 U.S. 713 (1971).....	35
<i>Newspapers, Inc. v. Breier</i> , 279 N.W.2d 179 (Wis. 1979) .....	28
<i>Nixon v. Warner Commc'ns, Inc.</i> , 435 U.S. 589 (1978).....	26
<i>Nowack v. Fuller</i> , 219 N.W. 749 (Mich. 1928).....	27, 28
<i>Rex v. Guardians</i> , 109 Eng. Rep. 202 (1829) .....	27
<i>S. Jersey Publ'g. Co. v. N.J. Expressway Auth.</i> , 591 A.2d 921 (N.J. 1991) .....	29
<i>State ex rel. Colescott v. King</i> , 57 N.E. 535 (Ind. 1900) .....	27
<i>Supreme Court of N.H. v. Piper</i> , 470 U.S. 274 (1985).....	26, 30

<i>Supreme Court of Va. v. Friedman</i> , 487 U.S. 59 (1988).....	30
<i>Toomer v. Witsell</i> , 334 U.S. 385 (1948) .....	34
<i>Wellford v. Williams</i> , 75 S.W. 948 (Tenn. 1903) ...	27
<b>STATUTES AND LEGISLATIVE MATERIALS</b>	
78 Del. Laws Ch. 382 (2012).....	7
Ala. Code § 36-12-40 (2012) .....	7
Ark. Code § 25-19-105 (2012) .....	7
Cal. Gov't Code § 9070, <i>et seq.</i> (2012).....	24
Conn. Gen. Stat. §1-200(1) (2012) .....	24
Del. Code tit. 29, § 10003 (2012).....	7
Mo. Stat. § 109.180 (2012) .....	7
N.H. Rev. Stat. § 91-A:4 (2012) .....	7
N.J. Stat. § 47:1A-1 (2012).....	7
Tenn. Code § 10-7-503 (2012) .....	7
Va. Code § 2.2-3704(F) (2012).....	31

Va. Code. § 2.2.-3704(A) (2012) ..... 3, 6, 22

## **OTHER AUTHORITIES**

2012 Fortune 500 company listing for Virginia.... 19

ANTHONY LEWIS, *MAKE NO LAW* (1991) ..... 35, 36

Ashley Halsey III, *More Flights, More Fliers  
Strain National Airport*, WASH. POST,  
Sept. 23, 2012,..... 16

Brooke Barnett, Note, *Use of Public Records  
Databases in Newspaper and Television  
Newsrooms*, 53 FED. COMM. L.J. 557 (2001) ..... 8

Bruce Baron, Editorial, *Campus Safety is  
Everyone's Responsibility and Concern*, THE (San  
Bernardino County) SUN, Mar. 8, 2011 ..... 18

Bruce Shipkowski, *Legislators Tout Campus Safety*,  
THE (Trenton) TIMES, Aug. 30, 2010 ..... 18

Dan Chapman, *Georgia Town Hopes to Benefit from  
VW*, ATLANTA JOURNAL-CONSTITUTION ..... 20

Dana Priest and William M. Arkin, *Monitoring  
America*, WASH. POST, Dec. 20, 2010,..... 9, 10

David G. Savage, <i>Appeals Court Rejects Challenges to Obama's Health Care Overhaul</i> , CHICAGO TRIBUNE, Sept. 9, 2011 .....	17
Editorial, <i>Ken Cuccinelli: National Profile</i> , RICHMOND TIMES-DISPATCH, Jan. 5, 2011.....	18
Jill Reipenhoff & Todd Jones, <i>Secrecy 101: College Athletic Departments Use Vague Law to Keep Public Records from Being Seen</i> , THE COLUMBUS DISPATCH, May 31, 2009 .....	12
Jodi Upton, Denise Atmos & Anne Ryman, <i>For Teachers, Many Ways and Reasons to Cheat on Tests</i> , USA Today, Mar. 10, 2011, at A1 .....	11
Kevin Dilanian, <i>'Fusion Centers' Sharing Even Nonterrorism Data</i> , CHI. TRIB., Nov. 15, 2010...	10
Kevin Sack, <i>Battle Over Health Care Law Shifts to Federal Appellate Courts</i> , N.Y. TIMES, May 9, 2011 .....	17
Mali R. Schantz-Feld, <i>Virginia</i> , AREA DEV. SITE & FACILITY PLANNING, Apr. 1, 2006 .....	20
Marissa Taylor, <i>As Terrorism Tips Spike, Collection of Data Raises Privacy Concerns</i> , MCCLATCHY NEWSPAPERS, May 8, 2011.....	10



- Marjorie Censer & Jonathan O’Connell, *Boeing Ramping up D.C. Presence*, WASH. POST, Mar. 7, 2011, at A9 ..... 20
- Matt Apuzzo and Eileen Sullivan, *Senate Report Blasts Intelligence Program: Homeland Security Had Info on Citizens Instead of Terrorists*, THE ASSOCIATED PRESS, Oct. 3, 2012 ..... 10
- Memos Reveal Political Favors*, ST. LOUIS POST-DISPATCH, Nov. 16, 2003 ..... 14
- Michael Peltier, *‘Turn in Your Neighbor’ Program in Florida Worries ACLU Official*, ORLANDO SENTINEL, Sept. 4, 2011 ..... 10
- Mike Hendricks, *Crackdown Looms for Illegal Slots, Poker Machines*, KANSAS CITY STAR, Dec. 25, 2011 ..... 13, 14
- Olympia Meola, *Democrats File Request for Cuccinelli Expenses*, RICHMOND TIMES-DISPATCH, March 24, 2010 ..... 18
- PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *INTERNET GAINS ON TELEVISION AS PUBLIC’S MAIN NEWS SOURCE (2011)* ..... 34
- Robin Fields, *In Dialysis, Life-Saving Care at Great Risk and Cost*, PROPUBLICA, Nov. 9, 2010. .... 11

Ronald Reagan Washington National (DCA) Air Traffic Statistics.....	16
Sandy Bauers, <i>Environmentalists Oppose N.J. Bid to Put Off Limits on Sewers</i> , PHILADELPHIA INQUIRER, Jan. 9, 2012 .....	15
Stephanie Ebbert, <i>Colleges Reviewing Security Policies; Shootings Prompt Questions from Student Prospects</i> , THE BOSTON GLOBE, Feb. 16, 2008 .....	18
Stephen Labaton & Edmund L. Andrews, <i>Mortgage Giants Taken over by U.S.</i> , N.Y. TIMES, Sept. 8, 2008, at A1 .....	19
Steven Rock, <i>System Puts Players at Risk: NCAA Doesn't Require Medical Supervision</i> , THE KANSAS CITY STAR, Oct. 8, 1997 .....	12
Steven Thomma and David Lighthman, <i>Obama Signs Historic Health Care Overhaul into Law</i> , MCCLATCHEY NEWSPAPERS, Mar. 23, 2010 .....	17
STEVEN WALDMAN, WORKING GROUP ON INFORMATION NEEDS OF COMMUNITIES, FED. COMM. COMM'N., THE INFORMATION NEEDS OF COMMUNITIES 30 (2011) .....	22

*Taking the Shock out of Charges: A guide to allowable charges for record production under the Freedom of Information Act*..... 32

VA. ECON. DEV. P'SHIP, INTERNATIONALLY OWNED COMPANIES IN VIRGINIA (2009–2010)..... 19

Washington Dulles International Airport (IAD) Air Traffic Statistics..... 16

**RULES**

Cal. Rules of Court 10.500 *et seq*..... 24

**STATEMENT OF INTEREST<sup>1</sup>**

*Amici curiae*, described fully in Appendix A, are The Reporters Committee for Freedom of the Press and 53 media organizations — Advance Publications, Inc., A. H. Belo Corporation, Allbritton Communications Company, ALM Media, LLC, American Society of News Editors, Ars Technica, The Associated Press, Association for Alternative Newsmedia, The Association of American Publishers, Inc., Atlantic Media, Inc., Automattic, Bay Area News Group, Belo Corp., Bloomberg News, Cable News Network, Inc., The Center for Investigative Reporting, Courthouse News Service, The Daily Caller, Daily Kos, Daily News, LP, The Digital Media Law Project, Dow Jones & Company, Inc., The E.W. Scripps Company, First Amendment Coalition, Gannett Co., Inc., Grist, Hearst Corporation, MapLight, The Maryland-Delaware-District of Columbia Press Association, Matthew Lee, MPA – The Association of Magazine Media, MuckRock, The National Press Club, National Press Photographers Association, Newspaper Association of America, The Newspaper Guild – CWA, The New Yorker, The New York Times Company, North Jersey Media Group Inc., NPR, Inc., Online News Association, POLITICO LLC, Radio Television Digital

---

<sup>1</sup> Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amici curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and written consent of all parties to the filing of the brief has been filed with the Clerk of the Court.

News Association, The Slate Group, The Society of Professional Journalists, Stephens Media LLC, The Student Press Law Center, Techdirt, Time Inc., Tribune Company, Tumblr, The Washington Post, and WNET.

This case concerns an issue critical to the public and the media: whether a state can enact discriminatory citizenship requirements for individuals to access public records. As advocates for the rights of the news media who gather and disseminate information to the public, *amici* maintain a strong and ongoing interest in ensuring that journalists—as well as members of the public—have a robust right to access public records across the country, regardless of whether the individual requester is a citizen of a particular state.

Moreover, by allowing states to enact open records laws that discriminate against non-residents, the Court will be sanctioning a practice that directly harms the media's ability to gather and disseminate news that provides a full and accurate account of regional and national events. Although the individual states comprising our union are in many ways diverse, they at the same time make up a unified and interdependent body where events in one state impact and are newsworthy to citizens in other states. The outcome of this case directly bears upon the public's ability to stay informed of affairs nationwide that are of concern to all citizens and permeate the national discourse and policy debates. Thus, *amici* respectfully request that this Court reverse the decision below.

## SUMMARY OF ARGUMENT

The citizenship requirement of the Virginia Freedom of Information Act (“VFOIA”) and similar statutory provisions found in Alabama, Arkansas, New Hampshire, New Jersey, and Tennessee can harm the media’s ability to report on regionally and nationally significant stories and provide the public with complete and comprehensive information about the country as a whole. By largely limiting public record access in Virginia to commonwealth citizens, VFOIA inhibits the media from acquiring newsworthy records and stymies efforts to provide state-by-state comparisons on important topics such as public education, healthcare, and law enforcement activities.

By its very terms, VFOIA’s media exception<sup>2</sup> forecloses access by media from most of the nation. Additionally its outdated language invites officials to discriminate against certain members of the media. Notably, the statute excepts foreign newspapers and radio and television stations that serve Virginia, yet it fails to account for burgeoning online media entities that are accessible to Virginia residents. The statute therefore discriminates against members of the media in two distinct ways: first based on their residency and second based on the form in which they disseminate news.

---

<sup>2</sup> Va. Code § 2.2.-3704(A) (2012) creates a limited exception to the citizenship requirement for “representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth.”

Additionally, laws in other states with citizens-only provisions similar to VFOIA's do not contain media exceptions. If this Court fails to void VFOIA's citizenship provision, it would be in effect allowing states to continue practices of preventing all out-of-state media from obtaining public records, effectively shutting out companies and persons who cannot be considered citizens of those states. Affirmance could also embolden other states to adopt similarly restrictive legislation, further inhibiting the national press corps' ability to report on matters of public importance at the local and regional level. Hence, the outcome of this case has implications beyond VFOIA and could potentially impact the public's right to access records in numerous jurisdictions.<sup>3</sup>

*Amici* are not just concerned about the vagaries of VFOIA's media exception, however. The law more broadly violates the media's rights under the Privileges and Immunities Clause of the U.S. Constitution. Our constitutional system of federalism recognizes that there are times when individuals are citizens of their respective home states and when they are citizens of one nation. The Privileges and Immunities Clause of the U.S. Constitution reinforces this structural scheme by preventing states from enacting

---

<sup>3</sup> The Fourth Circuit dismissed *amici*'s concerns about the harm VFOIA posed to journalists because it noted that certain *amici* can obtain records in Virginia under the law's media exception. See *McBurney v. Young*, 667 F.3d 454, 461 n.1 (2012). Yet the Fourth Circuit misunderstood that even *amici* that might take advantage of VFOIA's media exception recognize the acute harm that the citizens-only provision poses to the ability of *all* members of the media to access public records.

laws that discriminate against individuals who live outside a state's borders.

Having access to information is fundamental to helping Americans stay informed about their government, a critical component in our nation's ability to self-govern. Indeed, as will be discussed more fully, *infra*, issues often originate in a single state before being elevated to the national stage. By allowing states to prohibit access to their records based on whether individuals are citizens of the state, coverage of important national stories could be stymied by virtue of a discriminatory citizenship requirement in a state's public records law.

Americans' historic, common law right of access to government records demonstrates that it is a fundamental right recognized under the Privileges and Immunities Clause of the U.S. Constitution. Moreover, journalism has a historic social and economic role in this country, making it a common calling protected by the Constitution. The advent of the Internet and the proliferation of online journalism outlets only further supports the conclusion that although we are a nation of states, we are more interconnected than ever. Information barriers no longer exist, and artificial ones based on arbitrary geographic lines only serve to retard the national progress that comes from a well-educated, well-informed citizenry.

Finally, Virginia cannot show that it has a substantial reason for discriminating against non-citizens, as the commonwealth has several alternative means of easing the purported administrative burdens VFOIA allegedly presents. Further, VFOIA's



discriminatory provision is antithetical to the law's purpose, which is to increase access to government records.

For these reasons, *amici* respectfully ask this Court to strike down VFOIA's citizenship provision as a violation of the Privileges and Immunities Clause.

## ARGUMENT

### **I. Virginia's citizenship requirement for access to public records dramatically harms the ability of journalists around the nation to report on matters of public importance.**

In an effort to erect a wall around government activities within the commonwealth, Virginia has enacted a citizenship requirement<sup>4</sup> that unconstitutionally discriminates against out-of-commonwealth residents seeking access to Virginia's public records. But as the Third Circuit observed, "[n]o state is an island . . . and some events which take place in an individual state may be relevant to and have an impact upon policies of not only the national government but also of the states." *Lee v. Minner*, 458 F.3d 194, 199-200 (3d Cir. 2006).

Virginia's limitation on access to its public records is an unconstitutional attempt to create such an island to the detriment of non-residents who have an

---

<sup>4</sup> Va. Code. § 2.2.-3704(A) (2012).

interest in the commonwealth's activities, such as the Petitioners in the present case and *amici*.<sup>5</sup>

Although some *amici* may qualify for VFOIA's media exception, they are just as concerned as are other *amici* about the law because its precise contours have not been defined<sup>6</sup> and at least five other states' statutory records laws reference citizenship requirements that lack media exceptions.<sup>7</sup> Further, if this Court were to sanction VFOIA's discrimination against non-citizens, it could invite other states to add similar prohibitions in their laws, severely limiting the amount of information made available to regional and national media.

---

<sup>5</sup> Virginia residents themselves also lose under such a restriction because they do not obtain the benefit of macro-level, comparison reporting that incorporates Virginia issues or legal and policy perspectives.

<sup>6</sup> *Amici* are unaware of any Virginia court interpretation of what "circulation in the Commonwealth" means for purposes of online media.

<sup>7</sup> Those states include Alabama – Ala. Code § 36-12-40 (2012); Arkansas – Ark. Code § 25-19-105 (2012); New Hampshire – N.H. Rev. Stat. § 91-A:4 (2012); New Jersey – N.J. Stat. § 47:1A-1 (2012); Tennessee – Tenn. Code § 10-7-503 (2012). Delaware's statute, Del. Code tit. 29, § 10003 (2012), was declared unconstitutional by the Third Circuit, *see Lee*, 458 F.3d 194, and the state legislature subsequently amended the law to remove the citizenship requirement. 78 Del. Laws Ch. 382 (2012).

**A. Affirming the Fourth Circuit would limit reporting on issues in Virginia and throughout the country.**

Limiting access to state records in Virginia and elsewhere to only those citizens located within a particular state would diminish the amount of quality reporting<sup>8</sup> disseminated to the public and ultimately harm the ability of individuals to make informed decisions about their government.

As the examples discussed *infra* show, a great deal of important regional and national news is derived from public records, including 50-state surveys on topics such as homeland security spending and education. Additionally news commonly defies state borders, creating situations in which non-citizens feel the impact of events occurring just across state lines. This undercuts Virginia's justification that only its citizens care about Virginia government records. And as other examples show, Virginia's importance in terms of national news cannot be understated, as its businesses, political figures, and government regularly make headlines across the country.

---

<sup>8</sup> See Brooke Barnett, Note, *Use of Public Records Databases in Newspaper and Television Newsrooms*, 53 FED. COMM. L.J. 557, 558 (2001) ("If legislatures restrict that access, not only would some stories prove more difficult or expensive to report, or be reported less completely, accurately, or quickly, but reporters would miss altogether those stories that result from routine searching of public records—so-called 'enterprise stories.'").

**i. VFOIA’s citizenship requirement jeopardizes state-by-state comparisons of national news.**

Reporters often use public records compiled from a number of states to create important stories about regional or national issues or to put local events into a broader context. By placing barriers on non-resident journalists’ ability to access public records, VFOIA and similar laws create gaps in such comparisons, leading to incomplete reporting that fails to provide the public with a full picture of events.

For example, using public records from federal and state governments, *The Washington Post* in 2010 presented a comprehensive picture of a national domestic intelligence program where local, state, and federal law enforcement agencies work together in cities throughout the country to collect information about Americans through “fusion centers.” See Dana Priest and William M. Arkin, *Monitoring America*, WASH. POST, Dec. 20, 2010, *available at* 2010 WLNR 25809847.<sup>9</sup>

The story revealed that local law enforcement agencies across the country were using equipment and technology created for battlefields in their domestic surveillance efforts. *Id.* It also reported that some state intelligence reports generated for the fusion centers came from investigating citizens engaged

---

<sup>9</sup> To facilitate access to secondary sources, “WLNR,” or Westlaw NewsRoom, citations are provided whenever possible.

in lawful, constitutionally protected activities, such as attending meetings. *Id.*

The *Washington Post* and other media<sup>10</sup> accounts on fusion centers increased awareness about the link between local and federal domestic surveillance efforts and its financial and social costs. The heightened scrutiny led to a critical Senate report that found that the fusion centers improperly collected information about Americans and produced little valuable intelligence about terrorism. See Matt Apuzzo and Eileen Sullivan, *Senate Report Blasts Intelligence Program: Homeland Security Had Info on Citizens Instead of Terrorists*, THE ASSOCIATED PRESS, Oct. 3, 2012, available at 2012 WLNR 21048221.

Reporters have also compiled public records from multiple states to explore the impact of the “No Child Left Behind” initiative on the behavior of teachers. Reviewing hundreds of “misadministration” and “irregularity” reports filed with the state Departments of Education in Florida, California, and Arizona, *USA Today* detailed incidents of missing standardized test booklets and teachers whispering answers to students during testing. See Jodi Upton, Denise Atmos & Anne Ryman, *For Teachers, Many Ways and Rea-*

---

<sup>10</sup> See, e.g., Kevin Dilanian, *Fusion Centers’ Sharing Even Nonterrorism Data*, CHI. TRIB., Nov. 15, 2010, available at 2010 WLNR 22769712; Michael Peltier, *‘Turn in Your Neighbor’ Program in Florida Worries ACLU Official*, ORLANDO SENTINEL, Sept. 4, 2011, available at 2011 WLNR 17536998; Marissa Taylor, *As Terrorism Tips Spike, Collection of Data Raises Privacy Concerns*, MCCLATCHY NEWSPAPERS, May 8, 2011, available at 2011 WLNR 9201880.

*sons to Cheat on Tests*, USA Today, Mar. 10, 2011, at A1, available at 2011 WLNR 4717508.

The story further revealed that events occurring within each state were not isolated but instead were part of a national trend as educators attempted to deal with the high-stakes testing in which poor results were seen as a reflection of a teacher's competence, a school's credibility, and a state's commitment to education. *See id.*

Similarly, *ProPublica*, a Pulitzer Prize-winning nonprofit news organization that produces investigative journalism in the public interest, used state health records from California, New York, North Carolina, Ohio, Pennsylvania, and Texas to reveal wide disparities in the conditions in which dialysis patients received medical care. *See* Robin Fields, *In Dialysis, Life-Saving Care at Great Risk and Cost*, PROPUBLICA, Nov. 9, 2010.<sup>11</sup>

*ProPublica* then used the records to create a database that tracked and quantified a variety of problems at more than 1,500 dialysis centers across the country, including unsanitary and unsafe conditions, prescription errors, infection control breaches, and serious patient safety lapses.

Additional examples of the type of high-impact, bird's-eye view reporting published when reporters have access to public records in multiple states include a 2009 investigation by the *Columbus Dispatch*

---

<sup>11</sup> The story and others in the series are available at <http://www.propublica.org/series/dialysis>.

that revealed uneven and inappropriate application of the Family Education Rights and Privacy Act to shield access to college athletic records discussing student-athletes' criminal behavior, academic cheating incidents, and recruiting violations.<sup>12</sup> And in 1997, the *Kansas City Star* filed public records requests in several states for an investigation into the NCAA's lax safety measures for college athletes and how the hands-off approach may have contributed to the death of athletes at major universities.<sup>13</sup>

Without access to records from any one of the states above, reporters would not have been able to gain important context about newsworthy events, and the magnitude of the problems discovered may never have come to light. By comparing records from several states, reporters were able to understand whether certain activities were isolated within a state or part of a larger regional or national trend. And by being able to draw upon records from many different states, the stories were able to underscore the importance of the issue and elevate it to a national audience.

The presence of a citizenship requirement in any of the public records laws used by these reporters to gain access to records would have substantially

---

<sup>12</sup> See Jill Reipenhoff & Todd Jones, *Secrecy 101: College Athletic Departments Use Vague Law to Keep Public Records from Being Seen*, THE COLUMBUS DISPATCH, May 31, 2009, available at 2009 WLNR 10328545.

<sup>13</sup> See Steven Rock, *System Puts Players at Risk: NCAA Doesn't Require Medical Supervision*, THE KANSAS CITY STAR, Oct. 8, 1997, available at 1997 WLNR 6454162.

weakened their journalism or prevented them from getting a handle on the scope of the problem. Effectively, one state could frustrate the media's role to find compelling, important stories that affect people across state lines by undercutting reporters' abilities to access public records.

**ii. News in one state is generally of interest to non-citizens.**

Although Virginia officials argue that only Virginians are concerned about the actions of the commonwealth's government, the practical reality is that events occurring within a state often do not cease being news at its borders. Today, metropolitan regions frequently cross state lines (along with the commuters who work in one state yet live in another), blurring geographic boundaries. The examples discussed below show that, often, individuals living near state borders or in metropolitan areas have an interest in events occurring across state lines.

A 2011 story by the *Kansas City Star* detailed how conflicting state gambling laws and lax enforcement on the Kansas side of Kansas City created competition between "gray machines" and gambling operations on the Missouri side of the city. See Mike Hendricks, *Crackdown looms for illegal slots, poker machines*, KANSAS CITY STAR, Dec. 25, 2011, available at 2011 WLNR 26673774.

The story recounts how, although Kansas has a state law prohibiting slot machines, many bars and clubs operate machines that allow players to win credits and later redeem them for money. These ma-



chines are directly across the river from Missouri, where riverboat casinos operate and are a central part of the state's economy. *Id.* The story also notes that officials in both Kansas and Missouri have no idea how much money changes hands when people play the gray machines. *Id.*

The story impacts citizens of both Kansas and Missouri because it demonstrates how lax enforcement of Kansas law has created an industry that competes with legitimate, taxed gambling in Missouri. As a result, citizens from both states may be using the gray machines to the detriment of Missouri's tax base, reducing the level of government services the state can provide.

The Mississippi River may separate St. Louis from Illinois, but the boundary did not appear to stop then-Illinois governor George Ryan from trying to draw Major League Baseball's St. Louis Cardinals across the river in 2003. Relying on records received from the Illinois governor's administration, the *St. Louis Post-Dispatch* recounted how Illinois state officials tried to persuade the team to move as talks between the team and Missouri and St. Louis officials about a new stadium broke down, despite Illinois officials publicly stating that they were not getting involved. *See Memos Reveal Political Favors*, ST. LOUIS POST-DISPATCH, Nov. 16, 2003, *available at* 2003 WLNR 1764676.

The story was of interest to more than die-hard Cardinals fans, as the team's move to Illinois would have shifted jobs, services, and millions of dollars in tax revenue to an entirely different state.

In another example, the densely packed urban corridor around Philadelphia has seen increased residential development in New Jersey. The interconnected nature of the region prompted the *Philadelphia Inquirer* to cover the New Jersey legislature as it grappled with whether to create limits on sewer service, which would slow growth in the state. See Sandy Bauers, *Environmentalists Oppose N.J. Bid to Put Off Limits on Sewers*, PHILADELPHIA INQUIRER, Jan. 9, 2012, available at 2012 WLNR 558446.

The news was likely of interest to *Inquirer* readers who live just across the Delaware River because many of the future New Jersey residents who would live in the developments would work in Philadelphia. It is also likely that many of the businesses based in Philadelphia would benefit from the influx of additional workers and customers.

Northern Virginia is yet another example of how geographic boundaries blur in a metropolitan area. In 2011, more than 42 million people flew through the Washington, D.C region's two major airports in Vir-

ginia,<sup>14</sup> with many of those passengers living in the District or Maryland.

The growth of Reagan National Airport in recent years has created regional interest among those who live just across the Potomac as the airport transitions into a mini-hub, resulting in extremely long security lines and the inability of the airport to increase its physical footprint amid cramped conditions. *See Ashley Halsey III, More Flights, More Fliers Strain National Airport, WASH. POST, Sept. 23, 2012, available at 2012 WLNR 20238501.*

The stories above show that interest in a state government's activities often spills across the border, affecting individuals who live nearby but commute to the state daily for work. VFOIA and similar laws contemplate a world in which the acts of state governments are of no interest to those living outside its borders. But as shown here, non-citizens have a substantial interest in such activities, and VFOIA creates an impediment for non-residents to learn about news that concerns them.

---

<sup>14</sup> Dulles International Airport had more than 23 million people fly through it in 2011 while Reagan National Airport had nearly 19 million. *See* Washington Dulles International Airport (IAD) Air Traffic Statistics, *available at* <http://www.metwashairports.com/dulles/653.htm> (last visited Dec. 4, 2012); Ronald Reagan Washington National (DCA) Air Traffic Statistics, *available at* <http://www.metwashairports.com/reagan/1279.htm> (last visited Dec. 4, 2012).

**iii. News originating in Virginia is regularly of national significance.**

Just as news about a state is often of interest to non-citizens living nearby, Virginia in particular routinely makes national news. Whether it is the Attorney General's lawsuit challenging the Affordable Care Act, a college campus shooting tragedy, or the finance, defense, and high technology businesses that call the commonwealth home, events occurring within Virginia frequently interest the rest of the country. VFOIA's citizens-only requirement hinders efforts by national news reporters to cover these events.

Virginia Attorney General Ken Cuccinelli made national headlines when, minutes after President Barack Obama signed the Affordable Care Act into law in March 2010, he filed a lawsuit challenging its constitutionality. *See* Steven Thomma and David Lightman, *Obama Signs Historic Health Care Overhaul into Law*, MCCLATCHEY NEWSPAPERS, Mar. 23, 2010, *available at* 2010 WLNR 6054040.

Media across the country followed the case as it worked its way through the courts. *See* Kevin Sack, *Battle Over Health Care Law Shifts to Federal Appellate Courts*, N.Y. TIMES, May 9, 2011, *available at* 2011 WLNR 9176187; David G. Savage, *Appeals Court Rejects Challenges to Obama's Health Care Overhaul*, CHI. TRIB., Sept. 9, 2011, *available at* 2011 WLNR 17864110.

The suit raised Cuccinelli's profile nationally, including speculation that he may run for the U.S. Senate. *See* Editorial, *Ken Cuccinelli: National Pro-*

*file*, RICHMOND TIMES-DISPATCH, Jan. 5, 2011, *available at* 2011 WLNR 243436 (“Cuccinelli may be the GOP’s most compelling figure – at least for the time being.”). It also led to the filing of a VFOIA request to discover the litigation’s costs. *See* Olympia Meola, *Democrats File Request for Cuccinelli Expenses*, RICHMOND TIMES-DISPATCH, March 24, 2010, *available at* 2010 WLNR 6138263. A non-citizen would not have been able to request those records because of VFOIA’s citizens-only provision.

The 2007 shootings at Virginia Polytechnic Institute and State University prompted national headlines as media from across the country descended on the campus to learn how the tragedy occurred and what steps were being taken to prevent similar acts in the future.

In the aftermath of the shootings, colleges across the country re-examined their safety procedures and the shootings are often discussed in national stories about gun use and campus safety. *See* Stephanie Ebbert, *Colleges Reviewing Security Policies; Shootings Prompt Questions from Student Prospects*, THE BOSTON GLOBE, Feb. 16, 2008, *available at* 2008 WLNR 3165951; Bruce Baron, Editorial, *Campus Safety is Everyone’s Responsibility and Concern*, THE (San Bernardino County) SUN, Mar. 8, 2011, *available at* 2011 WLNR 4538489; Bruce Shipkowski, *Legislators Tout Campus Safety*, THE (Trenton) TIMES, Aug. 30, 2010, *available at* 2010 WLNR 17259247.

The records detailing the shootings and their aftermath—which provide the public with a full account of what occurred—are subject to VFOIA, as

Virginia Tech is a public school. But despite the overwhelming national interest in the events that occurred at Virginia Tech, a reporter who is not a citizen of the commonwealth or cannot take advantage of the limited media exception, would not be legally entitled to such records.

Non-citizens also have a great deal of interest in news about businesses that are based in or have a substantial presence in Virginia, which is home to 24 Fortune 500 companies<sup>15</sup> and several divisions of major multinational corporations such as Airbus, Volkswagen, Rolls-Royce, and Siemens.<sup>16</sup> One notable Fortune 500 company based in Virginia is mortgage finance giant Freddie Mac, the federal bailout of which generated national headlines and became symbolic of the recent recession. *See* Stephen Labaton & Edmund L. Andrews, *Mortgage Giants Taken over by U.S.*, N.Y. TIMES, Sept. 8, 2008, at A1, *available at* 2008 WLNR 17004719.

With its proximity to the nation's capital, Virginia is also home to roughly 4,000 registered defense contractors and ranks second nationwide in the number of U.S. Department of Defense prime defense contractors. *See* Mali R. Schantz-Feld, *Virginia*, AREA DEV.

---

<sup>15</sup> *See* 2012 Fortune 500 company listing for Virginia, *available at* <http://money.cnn.com/magazines/fortune/fortune500/2012/states/VA.html>.

<sup>16</sup> *See generally* VA. ECON. DEV. P'SHIP, INTERNATIONALLY OWNED COMPANIES IN VIRGINIA (2009–2010), *available at* [http://www.yesvirginia.com/pdf/Internationally\\_Owned\\_Companies.pdf](http://www.yesvirginia.com/pdf/Internationally_Owned_Companies.pdf).

SITE & FACILITY PLANNING, Apr. 1, 2006, *available at* 2006 WLNR 7417919.<sup>17</sup>

These Fortune 500 companies and defense contractors regularly interact with local governments, generating records subject to VFOIA that are of immense interest to the public generally as well as to shareholders of the companies. For example, Boeing's recent plans to build a corporate office complex in the Crystal City section of Arlington, VA<sup>18</sup> likely generated many records, including architectural plans, possible zoning changes, and building permits, that may be newsworthy to many people living outside of Virginia because they could affect many other local job markets where Boeing has offices.<sup>19</sup>

---

<sup>17</sup> The report notes that every major federal defense contractor has a presence in Virginia and that since Sept. 11, 2001, several homeland security and defense companies, including SAIC, General Dynamics, Northrop Grumman, Lockheed Martin and Boeing, have invested more than \$1 billion in new or expanding business in the commonwealth, particularly in its northern region.

<sup>18</sup> See Marjorie Censer & Jonathan O'Connell, *Boeing Ramping up D.C. Presence*, WASH. POST, Mar. 7, 2011, at A9, *available at* 2011 WLNR 4418885.

<sup>19</sup> Regional and national interest in state public records generated by large-scale corporate developments is easy to see, given that records detailing the size, complexity, and number of employees expected for a particular location could impact jobs at competing sites throughout the country. This is particularly true in the mid-Atlantic and Southern regions of the country, where major automotive manufacturers have increasingly relocated their plants or built new ones. See Dan Chapman, *Georgia town hopes to benefit from VW*, ATLANTA JOURNAL-CONSTITUTION, May 17, 2009, *available at* 2009 WLNR 9389042.

The above examples demonstrate not only that events in Virginia are often relevant nationally, but also that complete reporting on those events requires access to records through use of VFOIA. Yet the law's citizenship requirement prevents a large majority of the media from accessing these records and, by extension, delivering a full report to interested members of the public.

**B. Media, particularly online platforms, cannot rely on the limited media exception in VFOIA because other state open records laws do not include similar exceptions and affirming the Fourth Circuit could push other states to similarly restrict access to their public records.**

The media exception to VFOIA does not save the law's discriminatory impact. Rather, it exacerbates the problem because it invites officials to make *ad hoc* applications of the rule to out-of-state press under a statute that fails to account for new forms of media. Contrary to the Fourth Circuit's appraisal that VFOIA's media exception alleviates any harm to potential media members, the law fails to account for a shifting media landscape in which traditional media are joined by ever-growing and diverse online media.

The statute's exception to VFOIA's citizenship requirement is limited to "representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth."



Va. Code § 2.2-3704(A). Applying the statute to media outside of Virginia raises distinct legal problems that, if VFOIA is upheld, would directly harm the media's ability to fulfill its watchdog role.

When interpreting the statute there is a threshold question of whether online media would qualify for the exception as do certain newspapers, magazines, and broadcasters.<sup>20</sup> *Amici* could find no cases applying the exception to online media. A straightforward reading of VFOIA's media exception would leave out online media, as they do not circulate in a tangible print form similar to magazines or broadcast over the air similar to television news. Such an interpretation would discriminate against certain media purely on the basis of the form in which they deliver news.

Even if Virginia officials interpreted the media exception broadly by reading "circulation" to include online media outlets that are read by the commonwealth's residents, officials would still need to determine whether particular online media qualify for the exception. The Internet allows anyone to gather and disseminate news and the FCC has recognized that these independent journalists are as necessary as the professional media in today's communications landscape.<sup>21</sup>

---

<sup>20</sup> Book authors also are unlikely to qualify for the exception, as VFOIA does not mention them.

<sup>21</sup> STEVEN WALDMAN, WORKING GROUP ON INFORMATION NEEDS OF COMMUNITIES, FED. COMM. COMM'N., THE INFORMATION NEEDS OF COMMUNITIES 30 (2011).

But would an individual blogger with a website be entitled to the media exception in the same way as a contributor to the *Huffington Post*, an online news site that has won a Pulitzer Prize? If Virginia officials determine that any non-resident who seeks to gather news would qualify for the exception, it would swallow VFOIA's citizens-only requirement, an unlikely outcome given Respondent's actions in the present case.

On the other hand, if officials begin granting exceptions to particular online media but not others, the officials would be privileging certain members of the media without any clear standards, creating a *de facto* media licensing scheme for access to Virginia records. This would raise serious First Amendment problems by granting overly broad discretion to public officials to determine which members of the media have the right to access Virginia public records.<sup>22</sup> See *Grosjean v. American Press Co.*, 297 U.S. 233, 249-50 (1936) (quoting 2 T. Cooley, *Constitutional Limitations* 886 (8th ed. 1927)):

The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

---

<sup>22</sup> See Charles Bonner, Jean Paul Jones, and Henry M. Kohnlein, *Annual Survey of Virginia Law*, 33 U. RICH. L. REV. 727, 731 (1999) (noting that VFOIA's media exception could raise prior restraint concerns under the First Amendment).

*See Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (licensing schemes “may not delegate overly broad licensing discretion to a public official.”); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (danger from censorship “is at its zenith with the determination of who may speak and who may not is left to the unbridled discretion of a government official”).

Allowing officials to inquire into the type of media seeking records under VFOIA would also conflict with the statute itself, as officials cannot scrutinize a requestor’s purpose. *See Associated Tax Service, Inc. v. Fitzpatrick*, 372 S.E.2d 625, 236 Va. 181 (1988).

Finally, because other states with laws similar to VFOIA do not have a media exception, a finding that such laws do not offend the Privileges and Immunities Clause could embolden officials across the country to pass similarly restrictive laws.<sup>23</sup> This would undoubtedly decrease the number of records media could access and thus report on, harming the public’s ability to learn about government.

---

<sup>23</sup> Officials could also pass laws that restrict access to records from all three branches of state governments, as state open records laws vary in their application. For example, Connecticut’s FOI law applies to executive branch agencies, the state legislature, and the administrative functions of state courts. Conn. Gen. Stat. §1-200(1) (2012). In contrast, California has a separate law governing access to legislative records, Cal. Gov’t Code § 9070, *et seq.* (2012), and administrative court records are governed by Cal. Rules of Court 10.500 *et seq.* An adverse decision could therefore lead state officials to restrict access to an entire series of state records, not just from state administrative branch agencies that are traditionally thought of as being subject to public records laws.

VFOIA’s media exception intensifies the harm to media because it allows officials to determine, *ad hoc*, whether certain requesters gain the benefit of the exception. This would dramatically undercut the media’s ability to gather and disseminate news about Virginia and would allow officials to determine which members of the media can access records in a scheme that conflicts with the principles behind the Free Press Clause of the First Amendment.<sup>24</sup>

**II. VFOIA’s citizens-only requirement violates the Privileges and Immunities Clause because it burdens the fundamental right to access records of the government and prevents out-of-state companies and individuals from engaging in the common calling of journalism.**

VFOIA and similar laws burden two separate fundamental rights—the provision discriminates against U.S. citizens’ fundamental right to access information about government and prevents non-citizens from engaging in the common calling of journalism. A law violates the Privileges and Immunities Clause of the U.S. Constitution if it burdens a fundamental right, the state has no substantial reason for the law, and there is no substantial relationship between the discrimination and the law’s objectives. *See Toomer v. Witsell*, 334 U.S. 385, 396 (1948); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985).

---

<sup>24</sup> *See Near v. Minnesota*, 283 U.S. 697, 716-20 (1931) (discussing the historic understanding that the Press Clause prevents prior restraints).

Virginia and states with laws similar to VFOIA have no substantial reason for discriminating against non-citizens because they can lawfully charge fees to address concerns about the administrative burdens created by non-citizen requests. Finally, the discriminatory practice bears no substantial relationship to the purpose of VFOIA, which is to open up Virginia government to public scrutiny.

**A. The right to access government records is a fundamental right established by common law that predates statutory grants such as VFOIA.**

The right of individuals to access public records has long been part of the common law and is fundamental to ensuring that the nation's citizens have the ability to make informed decisions about their government. For purposes of the Privileges and Immunities Clause, fundamental rights are those rights recognized as "sufficiently basic to the livelihood of the Nation." *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 388 (1978). Common law access rights to public records have been recognized for centuries<sup>25</sup> and were viewed as essential to ensuring that the sovereignty of the people continued to flourish as citizens made informed decisions about the future of their government.

---

<sup>25</sup> The longstanding common law access right to court records was recognized by this Court in *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978).

With roots in English common law,<sup>26</sup> American courts have long recognized the right to inspect government records. As Michigan Supreme Court Justice Allen Morse wrote in 1889, “I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to and public inspection of public records.” *Burton v. Tuite*, 44 N.W. 282, 285 (Mich. 1889). Virginia itself recognizes the common law right to access records, as an 1891 decision held that such rights were “well defined and understood.” *Clay v. Ballard*, 13 S.E. 262, 263 (Va. 1891). An Indiana court recognized in 1900 that a common law right of access was essential for an individual “to ascertain if the affairs of his country have been honestly and faithfully administered by the public officials charged with that duty.” *State ex rel. Colescott v. King*, 57 N.E. 535, 537 (Ind. 1900).<sup>27</sup>

---

<sup>26</sup> See, e.g., *Herbert v. Ashburner*, 95 Eng. Rep. 628, 628 (1750) (“These are public books which every body has a right to see...”); *King v. G. Babb*, 100 Eng. Rep. 743 (1790); *Rex v. Guardians*, 109 Eng. Rep. 202, 202 (1829) (“Every inhabitant rated, or liable to be rated, has an interest in seeing whether the expenditure of the parish money has been proper. Consequently he has a right to inspect the books in which the account of such expenditure is contained.”). For further discussion of reported English cases discussing common law rights of access to public records, see *Nowack v. Fuller*, 219 N.W. 749, 750–51 (Mich. 1928); *Wellford v. Williams*, 75 S.W. 948, 954–56 (Tenn. 1903).

<sup>27</sup> Michigan’s Supreme Court understood that the right to access records served as an expedient to government accountability when it held that a newspaper editor had the common law right “to inspect the public records in the auditor general’s office, to determine if the public money is being properly expended.” *Nowack*, 219 N.W. at 751.

To be sure, most states and the federal government have codified access rights that serve as the primary means by which individuals can obtain public records today. But it would be a mistake to read recently created statutory rights as an indication that the founders did not believe that free and open government information played a fundamental role in the nation's self-governance.<sup>28</sup> Instead, the statutory grants are better viewed as a codification of the common law right to access government information.<sup>29</sup> Even in states where access rights exist by statute, some courts still recognize a distinct common law right as well.<sup>30</sup>

---

<sup>28</sup> See *Biddle v. Walton*, 6 Pa. D. 287 (Pa. Ct. Comm. Pl. 1897) (holding that the right to access municipal documents in the U.S. was already “regarded as settled law in this country” and citing cases upholding similar common law rights in New York, New Jersey and Missouri).

<sup>29</sup> This principle is illustrated by two state court decisions. The Vermont Supreme Court has held that “[t]he common law has established the right in all citizens to inspect the public records and documents made and preserved by their government when not detrimental to the public interest.” *Matte v. City of Winooski*, 271 A.2d 830, 831 (Vt. 1970) (citing *Clement v. Graham*, 63 A. 146 (Vt. 1906)). Such common law rights are now simply “confirmed by statute with limited exceptions where considerations of public policy and necessity require some restraint.” *Id.* Similarly, the Wisconsin Supreme Court has held there to be a right of access to arrest records grounded in statutory law that the court found as implementing rights previously established at common law. See *Newspapers, Inc. v. Breier*, 279 N.W.2d 179, 183 (Wis. 1979).

<sup>30</sup> See *S. Jersey Publ'g. Co. v. N.J. Expressway Auth.*, 591 A.2d 921, 927 (N.J. 1991) (citing *Ferry v. Williams*, 41 N.J.L. 332

Citizens have long held a common law right to view public records that predate statutory grants through VFOIA and similar laws. Moreover, such access rights were seen as fundamental to self-governance.

**B. The common calling of journalism has long been recognized as a fundamental institution.**

Journalism is a common calling under the Privileges and Immunities Clause because it plays an essential role in the nation’s economy by providing a robust national media industry and also furthers the social good of the nation by providing citizens with important news.<sup>31</sup>

To determine whether a pursuit is classified as a common calling, this Court has measured the role of the activity in the economy by looking at whether it is “important to the national economy,” *Piper*, 470 U.S. at 281, or “sufficiently basic to the national economy.” *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 66 (1988); *see Piper*, 470 U.S. at 288 (holding the prac-

---

(N.J. 1879) (holding that the long-recognized common law right to access public records and the state’s public records law are not mutually exclusive and complement each other); *Casey v. MacPhail*, 65 A.2d 657 (N.J. Super. Ct. Law Div. 1949)).

<sup>31</sup> Congress recognized the benefits of the press when it passed the Newspaper Preservation Act of 1970. Pub. L. 91-353, § 2, 15 U.S.C. § 1801 (2012) (declaring that there is a public interest in “maintaining a newspaper press editorially and reportorially independent and competitive in the United States”).



tice of law to be a protected pursuit); *United Bldg.*, 465 U.S. at 222–23 (constitutionally protecting construction contracting); *Toomer*, 334 U.S. at 403 (finding commercial shrimping to be a common calling).

Journalism’s importance to the national economy and commercial intercourse is evident through the sheer number of news outlets and organizations and their circulation, viewership, and online visitor figures. Further, the media is a major source of information on economic and financial issues.

This “Court has never held that the Privileges and Immunities Clause protects only economic interests.” *Piper*, 470 U.S. at 282 n.11. The “noncommercial role and duty” of an activity is equally relevant to whether a pursuit falls “within the ambit” of the Privileges and Immunities Clause. *Id.* at 281. Journalists do more than sell a product—they provide the public news and information to serve as a basis for discourse and debate. The combined historic, economic, and social role that the media have established since the nation’s founding demonstrates that journalism is a common calling protected by the Privileges and Immunities Clause.

**C. Virginia does not have a substantial reason for discriminating against non-citizens under VFOIA.**

To withstand scrutiny under the Privileges and Immunities Clause, Virginia must show that it has a substantial reason for the discriminatory practice. *Toomer*, 334 U.S. at 396. Virginia’s reasons for limiting access to public records to its citizens under

VFOIA are not substantial enough to justify its discrimination against non-citizens.

Virginia has summarily claimed that it must prevent non-citizens from accessing its records under VFOIA because otherwise it would be overburdened by a flood of record requests and that commonwealth taxpayers would be stuck with the costs of processing those requests.<sup>32</sup>

Yet Virginia has other, much less restrictive means available to it to prevent this alleged, yet unsubstantiated, harm. They include collecting fees from non-citizen requesters as permitted under Va. Code § 2.2-3704(F), which allows commonwealth officials to charge requesters for the actual costs associated with the time expended to search, access, duplicate, or supply the records. The fee collection provision applies to all requests under VFOIA, including those made by the media. No realistic fear exists that Virginia governments will be inundated with unchecked out-of-state requests.

Additionally, Virginia officials could also ensure that personnel are properly trained and that requesters are better informed of how to file proper, clear requests so they can be processed more efficiently. Virginia's own Freedom of Information Coun-

---

<sup>32</sup> Virginia has argued that non-citizen requests use up the time and effort of public officials when processing such requests, but does not provide any evidence about the costs of responding to non-citizen requests or how many requests the state receives from parties outside the commonwealth. See *Joint Resp. Br. of Defs.-Appellees*, at 41-42, *McBurney*, No. 11-1099 (4th Cir. 2011).

cil, a commonwealth agency, recommends that agencies put routinely requested records online and employ good records management practices for efficient FOIA processing. *See Taking the Shock out of Charges: A guide to allowable charges for record production under the Freedom of Information Act.*<sup>33</sup> Such best practices not only facilitate increased access to records but also help agencies make better use of their resources. These practices, if implemented, would undoubtedly decrease Virginia's administrative burden without discriminating against non-citizens.

More broadly, the alleged increased burden Virginia would suffer as a result of processing non-citizen VFOIA requests fails to acknowledge that open government is a policy goal with ends unto itself, promoting transparency and confidence in the activities of elected officials. VFOIA should therefore not be viewed as a burden on public officials, as it is an essential part of the government's mission.

**D. Virginia's VFOIA citizenship restriction bears no nexus to its stated objective of opening government to the people.**

VFOIA's discrimination against non-citizens seeking information about Virginia's government does not have a substantial relationship to the statute's stated government transparency objectives.

VFOIA plainly states that its policy objective is "to promote an increased awareness by all persons of

---

<sup>33</sup> The document is available at <http://foiacouncil.dls.virginia.gov/ref/FOIACCharges.pdf>.

governmental activities,” giving individuals “every opportunity . . . to witness the operations of government.” Va. Code § 2.2-3700(B) (2011).

Yet, VFOIA clearly fails to advance this objective with its citizens-only provision, as it stands in complete contrast to the policy of “ready access” embodied within. *Id.* Journalists, no matter where they reside and where their works are published or broadcast, publicize government actions of interest to the public by acting on behalf of all persons. The citizens of Virginia and of the United States are clearly better served if more sources of news about government are available to the public, which is the precise purpose of VFOIA.

Because there is no nexus between Virginia’s discriminatory practice under VFOIA and the law’s stated purpose, it violates the Privileges and Immunities Clause and must be held unconstitutional.

### **III. Affirming the Fourth Circuit’s decision would thwart the goal of the Privileges and Immunities Clause to forge a national identity and undercut the media’s historic role as a government watchdog.**

VFOIA’s citizenship requirement also violates the Privileges and Immunities Clause of the U.S. Constitution because it allows the commonwealth to withdraw itself from national scrutiny while discriminating against non-citizens. Additionally, VFOIA and similar laws burden the media by prohibiting them from serving as surrogates for the public and as a check on the power of government.

The Privileges and Immunities Clause as a whole was intended to “fuse into one Nation a collection of independent, sovereign States.” *Toomer*, 334 U.S. at 395. The press plays an essential role in furthering the goal of the Privileges and Immunities Clause by weaving together stories from across the country to inform Americans and enable them to self-govern.

The Privileges and Immunities Clause’s purpose has been furthered by the increased presence of new forms of content published on the Internet, both by traditional and new media, which allow people across the country to consume news, connect, and share their views. As more Americans acquire their news through the Internet rather than through print or broadcast radio,<sup>34</sup> traditional geographic barriers are breaking down and national online communities are taking their place.

This Court has long recognized that one of the fundamental roles of the press, established by the First Amendment, was to serve as a watchdog for the people over their government. Justice Black in his concurrence in *N.Y. Times v. United States*, 403 U.S. 713, 717 (1971) wrote that:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. [ . . .

---

<sup>34</sup> See PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, INTERNET GAINS ON TELEVISION AS PUBLIC’S MAIN NEWS SOURCE (2011) (noting that since 2007 the percentage of Americans who report getting their news from online sources increased from 24 percent to 41 percent).

. ] The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

VFOIA and similar citizenship provisions found in open records statutes impose direct restraints on the press because they prevent out-of-state media from obtaining records about state government. Undoubtedly, less effective government oversight results from these laws.

VFOIA and similar laws also give state officials greater control over who can access public records to the detriment of the media and the general public. This means that a state may be able to prevent disclosure of important events concerning state government that impact the nation as a whole. An illustrative example of this potential harm is *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964), in which a series of large libel judgments against the newspaper could have bankrupted it and deterred national reporting on race relations in the southern states.<sup>35</sup>

In his concurrence in *Sullivan*, Justice Black recognized this potential harm, noting that “[t]he half-million dollar verdict does give dramatic, proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials.” *Id.* at 294. Black

---

<sup>35</sup> The practical implications of the judgment pending in the case, as well as other suits brought against the newspaper, are detailed in ANTHONY LEWIS, *MAKE NO LAW* (1991).

went on to describe how there were eleven libel suits pending against the *Times* and another five pending against *CBS*, who were seen as “outside agitators.” *Id.* at 294-95.

Allowing the libel judgments against the *Times* and *CBS* to stand would have meant that a state could prevent outside media, and by extension the rest of the nation, from learning about events occurring within its borders. Coverage of the civil rights movement by the national press was influential in educating all Americans about the struggles to desegregate.<sup>36</sup> VFOIA and similar laws can create a like situation in that they allow state governments to control the information they release to outside media working to inform the entire nation.

The Third Circuit in *Lee v. Minner*, 458 F.3d 194 (2006) understood the fundamental role access to information plays in civic engagement and the danger citizens-only provisions in state public records laws represent to maintaining an informed electorate. The court recognized that “[e]ffective advocacy and participation in the political process [. . .] require access to information.” *Id.* at 199.

In the present case, the Fourth Circuit distinguished *Lee*’s reasoning by scrutinizing the actual VFOIA requests made by Petitioners and determining that their requests concerned “information of *personal* import rather than information to advance the interests of other citizens or the nation as a whole, or that is of political or economic importance.” *McBur-*

---

<sup>36</sup> *See id.*

*ney v. Young*, 667 F.3d 454, 465 (2012) (emphasis in original).

This distinction is problematic for several reasons. First, the Fourth Circuit appears to believe that a VFOIA request by a private citizen concerning personal affairs cannot serve the public interest. Yet even a private request could reveal compromising information about the government that causes it to change its behavior, resulting in a public benefit.

The Fourth Circuit also seems to imply that an individual making a request as part of a business has a singularly private interest in the records. This cannot be the law, as members of the for-profit media have commercial interests in the requests they file, but also provide an important contribution to the public by informing it about the affairs of government. Put simply, the motives animating a particular public records request can be complex and are not as easily categorized as the Fourth Circuit indicates.

Assuming *arguendo* that Petitioner's requests are of a purely private import, the Fourth Circuit's holding is still problematic because it is not limited to requests under VFOIA made by non-citizens who seek information solely for private purposes. Because the Fourth Circuit did not limit its decision to the particular facts of the case, the rule it established applies to all cases going forward. If an out-of-state newspaper or broadcaster subsequently requests the exact same records as Petitioners in this case as part of a larger VFOIA request to investigate how child support enforcement occurs within the state, Virginia



could deny the request even though it advances the interests of other citizens.

Finally, the Fourth Circuit's reasoning is problematic because its inquiry into the motivation of the request exceeded that permitted by VFOIA. *See Associated Tax Service, Inc.*, 372 S.E.2d 625 (Va. 1988) (holding that Virginia officials cannot inquire into the purpose or motives of a particular VFOIA request). Thus, the Fourth Circuit weighed the value of the request in determining that the Petitioners sought information of a personal import, which is a factor Virginia officials cannot consider when responding to VFOIA requests.

Because VFOIA's discriminatory provision imposes direct restraints on the ability of non-citizens to access information, media outside of the commonwealth are impeded in their reporting on Virginia news that matters to the entire country. This unsupported law interferes with the press' historic, constitutionally protected role of government watchdog and undercuts the historic and fundamental role access to information plays in informing citizens in our democracy.

**CONCLUSION**

For the foregoing reasons, *amici* respectfully requests that this Court reverse the decision below.

Respectfully submitted,

Bruce D. Brown

*Counsel of Record*

Mark R. Caramanica

Aaron Mackey

The Reporters Committee for  
Freedom of the Press

1101 Wilson Blvd., Suite 1100

Arlington, VA 22209

bbrown@rcfp.org

(703) 807-2100

January 2, 2013

## APPENDIX A

### Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. It also owns many Internet sites and has interests in cable systems serving over 2.3 million subscribers. Advance Publications, Inc. publishes *The New Yorker*, which appears as a separate *amicus* within this brief.

A. H. Belo Corporation, along with its subsidiaries, publishes several daily newspapers, including *The Dallas Morning News*, Texas' leading newspaper and winner of nine Pulitzer Prizes since 1986. A. H. Belo also operates a diverse group of websites.

Allbritton Communications Company is the parent company of entities operating ABC-affiliated television stations in the following markets: Washington, D.C.; Harrisburg, Pa.; Birmingham, Ala.; Little Rock, Ark., Tulsa, Okla.; and Lynchburg, Va. In Washington, it operates broadcast station WJLA-TV,

the 24-hour local news service, NewsChannel 8 and the news web sites, WJLA.com and TBD.com. An affiliated company operates the ABC affiliate in Charleston, S.C.

ALM Media, LLC publishes over thirty national and regional magazines and newspapers, including The American Lawyer, the New York Law Journal, Corporate Counsel, and the National Law Journal as well as the website Law.com. Many of ALM's publications have long histories reporting on legal issues and serving their local legal communities. ALM's The Recorder, for example, has been published in Northern California since 1877; the New York Law Journal was begun a few years later, in 1888. ALM's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later picked up by other national media. ALM Media, LLC is privately owned, and no publicly held corporation owns 10 percent or more of its stock.

With some 500 members, the American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

Ars Technica is a Condé Nast technology publication with offices in New York and millions of readers nationwide and internationally. Ars provides readers with in-depth technology news, hardware reviews, and policy analysis.

The Associated Press (“AP”) is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP’s members include approximately 1,500 daily newspapers and 25,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and has staff in 321 locations worldwide. AP news reports in print and electronic formats of every kind, reaching a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 116 countries.

Association of Alternative Newsmedia (“AAN”) is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their web sites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The Association of American Publishers, Inc. (“AAP”) is the national trade association of the U.S. book publishing industry. AAP’s members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback

books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Atlantic Media, Inc. is a privately held integrated media company that publishes *The Atlantic*, *National Journal* and *Government Executive*. These award-winning titles address topics in national and international affairs, business, culture, technology and related areas, as well as cover political and public policy issues at federal, state and local levels. *The Atlantic* was founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others.

Automattic is a privately held for-profit technology company based in San Francisco. Founded in 2005, Automattic develops and maintains numerous Internet products, including WordPress.com, an online hosting and publishing platform that powers nearly 40 million individual blogs in addition to several major news websites and some of the Web's most highly trafficked sites.

Bay Area News Group is operated by MediaNews Group, one of the largest newspaper companies in the United States with newspapers throughout California and the nation. The Bay Area News Group includes the San Jose Mercury News, Oakland Tribune, Contra Costa Times, Marin Independent Journal, West County Times, Valley Times, East County

Times, Tri-Valley Herald, The Daily Review, The Argus, Santa Cruz Sentinel, San Mateo County Times, Vallejo Times Herald and Vacaville Reporter. These newspapers rely on constitutional, statutory and common law protections for journalists' confidential sources and unpublished information in order to obtain and provide vital information to the public about government and corporate activities that affect their lives.

Belo Corp. owns or operates 20 television stations reaching 14% of U.S. television households, two regional cable news channels reaching more than three million households, four local cable news channels and more than 30 associated websites.

Bloomberg News is a 24-hour global news service with more than 1800 journalists in 146 bureaus around the world. Bloomberg News supplies real time business, financial and legal news to more than 300,000 desktop subscribers world-wide. As a wire service, Bloomberg provides news to more than 400 newspapers in 72 countries with a combined circulation of 76.2 million readers. Bloomberg also provides daily radio and television programming throughout the world through its 750 radio affiliates. Bloomberg News also operates a 24-hour global cable news channel, publishes two Monthly Magazines, Markets and Bloomberg BusinessWeek. Its internet website [www.bloomberg.com](http://www.bloomberg.com) receives 3.5 million individual user visits each month.

Cable News Network, Inc. ("CNN"), a division of Turner Broadcasting System, Inc., a Time Warner Company, is the most trusted source for news and in-

formation. Its reach extends to nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news web sites in the United States; CNN Newsource, the world's most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

The Center for Investigative Reporting is the country's oldest non-profit investigative news organization. Founded in 1977, the Center produces multimedia reporting that enables the public to demand accountability from government, corporations and others in power. The Center, and its California Watch and The Bay Citizen divisions, provide widely distributed in-depth investigative reporting focusing on local, state, national and international issues.

Courthouse News Service is a California-based legal news service for lawyers and the news media that focuses on new civil litigation, appellate rulings and controversies involving the law and the courts.

Founded in 2010 by Tucker Carlson and Neil Patel, The Daily Caller is a 24-hour news publication that provides its audience with original reporting, in-depth investigations, thought-provoking commentary and breaking news. In only its second full year of operations, The Daily Caller draws more than 8 million readers per month.

Daily Kos is an online, progressive political community and news organization with over 300,000 registered users. The users can post their own stories



and comments, which are a source of news and political analysis for millions of Americans.

Daily News, LP publishes the New York *Daily News*, a daily newspaper that serves primarily the New York City metropolitan area and is the sixth-largest paper in the country by circulation. The *Daily News*' website, NYDailyNews.com, receives approximately 22 million unique visitors each month.

The Digital Media Law Project ("DMLP") provides legal assistance, education, and resources for individuals and organizations involved in online media and independent journalism. The DMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study, and help pioneer its development. The DMLP is an unincorporated association hosted at Harvard University, a non-profit educational institution.

Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million, WSJ.com, a news website with more than one million paid subscribers, *Barron's*, a weekly business and finance magazine and, through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires, as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information web sites, and licensing and syndication. The company's portfolio of locally focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 13 markets; and the Washington, D.C.-based Scripps Media Center, home of the Scripps Howard News Service.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

Gannett Co., Inc. is an international news and information company that publishes 82 daily newspapers in the United States, including USA TODAY, as well as hundreds of non-daily publications. In broadcasting, the company operates 23 television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

Grist is a nonprofit, online publication that serves 1.5 million readers each month with news, investigative reporting, and commentary about the environment and sustainability issues. Founded, in 1999, Grist is based in Seattle and has a staff of 25, with journalists in Washington, California, New York, and Washington, D.C.

Hearst Corporation is one of the nation's largest diversified media companies. Its major interests include ownership of 15 daily and 38 weekly newspapers, including the *Houston Chronicle*, *San Francisco Chronicle* and *Albany Times*; interests in an additional 43 daily and 74 non-daily newspapers owned by MediaNews Group, which include the *Denver Post* and *Salt Lake Tribune*; nearly 200 magazines around the world, including *Good Housekeeping*, *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations, which reach a combined 18 percent of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E and ESPN; business publishing, including a minority joint venture interest in Fitch Ratings; and Internet businesses, television production, newspaper features distribution and real estate.

MapLight is a nonprofit, nonpartisan research organization that tracks money's influence on politics. MapLight provides journalists and the public with transparency tools connecting data on campaign contributions, legislators, and votes to reveal the impact of campaign contributions on public policy.

The Maryland-Delaware-District of Columbia Press Association, founded in 1908, is a nonprofit organization whose members include all of the daily

newspapers and nearly all of the non-dailies in Maryland, Delaware and the District of Columbia. The Association serves to bring together newspapers for the preservation and defense of the principles of the First Amendment and to promote the growth and development of the newspaper industry.

Matthew Lee is a journalist residing in New York who routinely files Freedom of Information requests at the local, state, national, and international/United Nations level for Inner City Press, which he founded. Delaware's denial of his FOIA request regarding a state settlement resulted in *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006).

MPA – The Association of Magazine Media (“MPA”) is a national trade association for multi-platform magazine companies. Representing approximately 225 domestic magazine media companies with more than 1,000 titles, MPA members provide broad coverage of domestic and international news in weekly and biweekly publications and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of intellectual property and the First Amendment.

MuckRock is an online open-government tool that helps members of the public and press file federal and state FOIA requests on issues of importance to those individuals. Created by journalists and entrepreneurs, MuckRock has filed almost 2,000 requests

for public records, over 475 of which have been successfully completed. Both Virginia and Arkansas have denied Freedom of Information requests filed through MuckRock because of their citizens-only provisions.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,500 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events including news conferences, luncheons, and panels, and more than 250,000 guests come through its doors.

National Press Photographers Association ("NPPA") is a nonprofit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 8,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism.

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability

of the media to provide the public with news and information on matters of public concern.

The Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America. CWA is America’s largest communications and media union, representing 700,000 men and women in both public and private sectors.

The New Yorker is an award-winning magazine, published weekly in print, digital, and online. Its writers, including Jane Mayer, David Grann, and Raffi Khatchadourian, regularly use information gained from federal and state freedom of information act laws to report on matters of state, national, and international importance.

The New York Times Company publishes The New York Times, The Boston Globe, and other newspapers. Through its newspapers and affiliated websites, it covers government and public events across the United States and around the world.

North Jersey Media Group Inc. (“NJMG”) is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: The Record (Bergen County), the state’s second-largest newspaper, and The Herald News (Passaic County). NJMG also

publishes more than 40 community newspapers serving towns across five counties, including some of the best weeklies in the state. Its magazine group produces high-quality glossy magazines including “(201) Best of Bergen,” nearly a dozen community-focused titles and special-interest periodicals such as The Parent Paper. The company’s Internet division operates many news and advertising web sites and online services associated with the print publications.

NPR, Inc. is an award winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information. NPR has no parent company and does not issue stock.

Online News Association (“ONA”) is the world’s largest association of online journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. ONA’s more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students, and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests

of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

POLITICO LLC is a nonpartisan, Washington-based political journalism organization that produces a newspaper and web site covering politics and public policy.

Radio Television Digital News Association (“RTDNA”) is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Slate Group publishes *Slate*, a daily online magazine at slate.com, which provides analysis and commentary about politics, news, business, technology, and culture and receives approximately 8-10 million unique visitors per month.

The Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and



protects First Amendment guarantees of freedom of speech and press.

Stephens Media LLC is a nationwide newspaper publisher with operations from North Carolina to Hawaii. Its largest newspaper is the Las Vegas, Nev., Review-Journal.

The Student Press Law Center (“SPLC”) is a non-profit, non-partisan organization which, since 1974, has been the nation’s only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. The SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

Techdirt is a group blog that serves well over a million readers every month. Techdirt provides analysis on government policy and technology, and has received widespread recognition for its coverage of proposed copyright legislation in 2011 and 2012.

Time Inc. is the largest magazine publisher in the United States. It publishes over 90 titles, including *Time*, *Fortune*, *Sports Illustrated*, *People*, *Entertainment Weekly*, *InStyle* and *Real Simple*. Time Inc. publications reach over 100 million adults and its web sites, which attract more visitors each month than any other publisher, serve close to two billion page views each month.

Tribune Company operates broadcasting, publishing and interactive businesses, engaging in the cov-

erage and dissemination of news and entertainment programming. On the broadcasting side, it owns 23 television stations, a radio station, a 24-hour regional cable news network and “Superstation” WGN America. On the publishing side, Tribune publishes eight daily newspapers — Chicago Tribune, Hartford Courant, Los Angeles Times, Orlando Sentinel (Central Florida), The (Baltimore) Sun, The Daily Press (Hampton Roads, Va.), The Morning Call (Allentown, Pa.) and South Florida Sun-Sentinel.

Tumblr is a privately held technology company, founded in 2007 by its CEO David Karp and based in New York. Tumblr provides products, a platform, and a network for original content creators (including many journalists). Tumblr.com hosts over 80 million blogs and reaches an audience of over 175 million people each month.

The Washington Post is a leading newspaper with nationwide daily circulation of over 623,000 and a Sunday circulation of over 845,000.

WNET is the parent company of THIRTEEN, WLIW21, Interactive Engagement Group and Creative News Group and the producer of approximately one-third of all primetime programming seen on PBS nationwide. Locally, WNET serves the entire New York City metropolitan area with unique on-air and online productions and innovative educational and cultural projects. Approximately five million viewers tune in to THIRTEEN and WLIW21 each month.

**APPENDIX B**

Additional *amici* counsel:

Richard Bernstein, Esq.  
Sabin, Bermant & Gould LLP  
Four Times Square  
New York, NY 10036  
212-381-7039  
212-381-7201 fax  
*Counsel for Advance Publications, Inc.*

Russell F. Coleman  
A. H. Belo Corporation  
508 Young Street  
Dallas, TX 75202

Jerald N. Fritz  
Senior Vice President  
Legal and Strategic Affairs  
and General Counsel  
Allbritton Communications Company  
1000 Wilson Blvd., Suite 2700  
Arlington, VA 22209  
*Also counsel for POLITICO LLC*

Allison C. Hoffman  
120 Broadway, 5th Floor  
New York, NY 10271  
*Counsel for ALM Media, LLC*

Kevin M. Goldberg  
Fletcher, Heald & Hildreth, PLC  
1300 N. 17th St., 11th Floor  
Arlington, VA 22209  
*Counsel for American Society of  
News Editors*

Marvin Ammori,  
The Ammori Group  
1899 L St. NW, Suite 400  
Washington, D.C. 20036  
*Counsel for Ars Technica, The Daily Caller, Grist,  
Matthew Lee, MuckRock, and TechDirt*

Karen Kaiser  
Associate General Counsel  
The Associated Press  
450 W. 33rd Street  
New York, NY 10001

Jonathan Bloom  
Weil, Gotshal & Manges LLP  
767 Fifth Avenue  
New York, NY 10153  
*Counsel for The Association  
of American Publishers, Inc.*

Bruce Gottlieb  
General Counsel  
Atlantic Media Company  
The Watergate  
600 New Hampshire Avenue, NW  
Washington, DC 20037

Paul Sieminski  
General Counsel  
Automattic  
60 29th St. #343  
San Francisco, CA 94110

Andrew Huntington (CA Bar  
No. 187687)  
General Counsel/Director  
of Labor Relations  
Bay Area News Group  
750 Ridder Park Drive  
San Jose, CA 95190

James Chadwick (CA Bar  
No. 157114)  
Sheppard Mullin Richter  
& Hampton, LLP  
390 Lytton Avenue  
Palo Alto, CA 94301  
*Additional Counsel for  
Bay Area News Group*

Russell F. Coleman  
Belo Corp.  
400 S. Record Street  
Dallas, TX 75202

Charles J. Glasser, Jr.  
731 Lexington Avenue  
New York, NY 10001  
*Counsel for Bloomberg L.P.*

David C. Vigilante  
Johnita P. Due  
Cable News Network, Inc.  
One CNN Center  
Atlanta, GA 30303

Judy Alexander  
The Law Office of Judy Alexander  
2302 Bobcat Trail  
Soquel, CA 95073  
*Counsel for Center for Investigative Reporting*

Rachel Matteo-Boehm  
Bryan Cave LLP 560  
560 Mission Street, Suite 2500  
San Francisco, CA 94105  
*Counsel for Courthouse News Service & MapLight*

Adam C. Bonin  
The Law Office of Adam C. Bonin  
1900 Market St., 4th Fl.  
Philadelphia, PA 19103  
*Counsel for Daily Kos*

Matthew A. Leish  
Vice President And Assistant General Counsel  
New York Daily News  
4 New York Plaza  
New York, NY 10004

Jeffrey P. Hermes  
Director, Digital Media Law Project  
(formerly the Citizen Media Law Project)  
Berkman Center for Internet & Society  
23 Everett Street, 2nd Floor  
Cambridge, Massachusetts 02138

Mark H. Jackson  
Jason P. Conti  
Dow Jones & Company, Inc.  
1211 Avenue of the Americas  
7th Floor  
New York, NY 10036

David M. Giles  
Vice President/Deputy  
General Counsel  
The E.W. Scripps Company  
312 Walnut St., Suite 2800  
Cincinnati, OH 45202

Peter Scheer  
First Amendment Coalition  
534 Fourth St., Suite B  
San Rafael, CA 94901

Barbara M. Wall  
Vice President/Senior  
Associate General Counsel  
Gannett Co., Inc.  
7950 Jones Branch Drive  
McLean, VA 22107

Jonathan Donnellan  
Hearst Corporation  
Office of General Counsel  
300 W. 57th St., 40th Floor  
New York, NY 10019

Juan Cornejo  
Assistant General Counsel  
The McClatchy Company  
2100 Q Street  
Sacramento, CA 95816-6899

Charles D. Tobin  
Holland & Knight  
2099 Pennsylvania Avenue, N.W.  
Suite 100  
Washington, DC 20006  
*Counsel for the Maryland-Delaware-DC  
Press Association & National Press Club*

Bradley Weltman  
434 Broadway, 6th Floor  
New York, NY 10013  
*Counsel for MPA – The Association  
of Magazine Media*

Mickey H. Osterreicher  
69 Delaware Avenue, Suite 500  
Buffalo, NY 14202  
*Counsel for the National Press Photographers  
Association*



Kurt Wimmer  
Covington & Burling LLP  
1201 Pennsylvania Ave., NW  
Washington, DC 20004  
*Counsel for Newspaper Association of America*

Barbara L Camens  
Barr & Camens  
1025 Connecticut Ave., NW  
Suite 712  
Washington, DC 20036  
*Counsel for the Newspaper Guild – CWA*

Lynn Oberlander  
General Counsel  
The New Yorker  
4 Times Square  
New York, New York 10036

David E. McCraw  
Vice President and Assistant General Counsel  
The New York Times Company  
620 Eighth Ave.  
New York, NY 10018

Jennifer Borg  
General Counsel  
North Jersey Media Group Inc.  
P.O. Box 75  
Hackensack, NJ 07602

Denise Leary  
Ashley Messenger  
NPR, Inc.  
635 Massachusetts Ave., N.W.  
Washington, D.C. 20001

Jonathan D. Hart  
Dow Lohnes PLLC  
1200 New Hampshire Ave., NW  
Washington, DC 20036  
*Counsel for Online News Association*

Kathleen A. Kirby  
Wiley Rein LLP  
1776 K St., NW  
Washington, DC 20006  
*Counsel for Radio Television  
Digital News Association*

Bruce W. Sanford  
Laurie A. Babinski  
Baker & Hostetler LLP  
1050 Connecticut Ave., NW  
Suite 1100  
Washington, DC 20036  
*Counsel for Society of Professional Journalists*

Mark A. Hinueber  
Vice President/General Counsel  
Stephens Media LLC  
1111 West Bonanza Road  
Las Vegas, NV 89106

Frank D. LoMonte  
Student Press Law Center  
1101 Wilson Blvd., Suite 1100  
Arlington, VA 22209-2211

Andrew Lachow  
Vice President and Deputy  
General Counsel – Litigation  
Time Inc.  
1271 Avenue of the Americas  
New York, NY 10020

David S. Bralow  
Assistant General Counsel/ East Coast Media  
Tribune Company  
220 E. 42nd Street  
Suite 400  
New York, NY 10017

Ari Shahdadi  
General Counsel  
Tumblr  
35 E 21st St., 6E  
New York, NY 10010

Eric Lieberman  
James A. McLaughlin  
Kalea Seitz Clark  
1150 15th St., NW  
Washington, DC 20071  
*Counsel for The Washington Post  
& The Slate Group*

Bob Feinberg  
Vice President, General Counsel & Secretary  
WNET  
825 Eighth Avenue  
New York, NY 10019