

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 05-3329

MATTHEW LEE,

Plaintiff-Appellee,

v.

GOVERNOR OF THE STATE OF DELAWARE, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Delaware

**BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS IN SUPPORT OF APPELLEE**

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TABLE OF CONTENTS

TABLE OF CITATIONS i

STATEMENTS

 I. Statement of Interest 1

 II. Statement of the Issue 1

 III. Statement of the Case 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

 I. Access to Information is Necessary to the Pursuit
 of Journalism, Which Serves the Public Interest 5

 II. Delaware’s “Citizens Only” Provision Prohibits
 Noncitizens From Engaging in the Common
 Calling of Journalism 8

 A. A Common Calling is a Fundamental Right
 Under the Privileges and Immunities Clause
 of the U.S. Constitution 8

 B. Journalism’s Importance to the National Economy
 as well as its Noncommercial Role Classifies it
 as a Common Calling Under Supreme Court
 Jurisprudence 9

 C. Delaware Does Not Have a Substantial Reason for
 its Discrimination Against Nonresident Journalists
 Engaged in their Common Calling and this Law
 Unduly Burdens Them 10

CONCLUSION 12

CERTIFICATIONS 14

TABLE OF CITATIONS

CASES

<i>Baldwin v. Fish & Game Comm'n of Montana</i> , 436 U.S. 371 (1978)	12
<i>Belth v. Bennett</i> , 740 P.2d 638, 641 (1987)	7
<i>Cox v. Cohn</i> , 420 U.S. 469 (1975)	5, 6
<i>Lee v. Minner</i> , 369 F. Supp. 2d 527 (Del. 2005)	3
<i>Paul v. Virginia</i> , 75 U.S. 168 (1868)	8
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555 (1980)	6
<i>Supreme Court of New Hampshire v. Piper</i> , 470 U.S. 274 (1985)	<i>passim</i>
<i>Supreme Court of Virginia v. Friedman</i> , 487 U.S. 59 (1988)	9, 11
<i>Toomer v. Witsell</i> , 334 U.S. 385 (1948)	4, 8, 9
<i>United Bldg. & Constr. Trades Council v. Mayor & Council of Camden</i> , 465 U.S. 208 (1984)	4, 8, 9

STATE STATUTES

Colorado Public Records Law, COLO. REV. STAT.
§ 24-72-203(1)(a) (2005) 7

Delaware Freedom of Information Act, 29 DEL. CODE ANN.
§ 10001 (2003) 1, 10, 11

Delaware Freedom of Information Act, 29 DEL. CODE ANN.
§§ 10001-10005 (2003) 2

Florida Public Records Law, FLA. STAT. ANN.
§ 119.01(1) (2005) 7

Massachusetts Public Records Law, MASS. GEN. LAWS ANN.
ch. 66 § 10(a) (2005) 7

Montana Public Records Act, MONT. CODE ANN.
§ 2-6-102 (2005) 7

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. IV, § 2, cl. 1 4

MONT. CONST. art. II, § 9 7

OTHER

Fed. R. App. P. 29(a) 1

Opening Brief for Appellants 11

STATEMENT OF INTEREST

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.

The Privileges and Immunities Clause of the U.S. Constitution must be interpreted to define journalism as a common calling; constitutionally protecting journalists, no matter where they reside, to have equal rights to gather news in any state to serve the public interest. The Reporters Committee urges this Court to affirm the U.S. District Court for the District of Delaware and hold that Delaware's Freedom of Information Act is an unconstitutional burden on the Privileges and Immunities Clause.

No party to this case objects to the Reporters Committee filing this brief as *amicus curiae* on behalf of the Appellee, Mr. Matthew Lee. The Reporters Committee is authorized to file this brief pursuant to Rule 29(a) Fed. R. App. P.

STATEMENT OF THE ISSUE

Does Delaware's Freedom of Information Act, 29 D.C.A. § 10001 (2003), (hereinafter "FOIA"), which discriminates against non-Delaware citizens by

limiting the right to inspect and copy public state records to citizens of Delaware, violate the Privileges and Immunities Clause of Article IV, Section 2, of the U.S. Constitution?

STATEMENT OF THE CASE

Matthew Lee, a citizen of the State of New York, earns his salary as the Executive Director of Inner City Press/Community on the Move, a nonprofit organization with many functions that publishes reports on business and financial matters and regulatory proceedings occurring in the State of Delaware. Mr. Lee earns additional income as a freelance journalist, regularly publishing articles in national print media such as *American Banker* and *U.S. Banker*. Mr. Lee gathers information for his reports by attending meetings and hearings in the State of Delaware as well as by reviewing documents and other materials that are produced in the state. Delaware public records are a vital part of reporting on the business, financial, and regulatory issues necessary to Mr. Lee's livelihood.

Mr. Lee has made frequent requests for Delaware public records under the state's Freedom of Information Act. 29 D.C.A. §§ 10001-10005 (2003). This case arose after the Delaware State Solicitor rejected two of Mr. Lee's requests, dated January 12, 2003, and September 3, 2003, based on the FOIA citizenship requirement. Mr. Lee challenged the constitutionality of the "citizens only"

provision of the Delaware FOIA in the U.S. District Court for the District of Delaware. The court held the citizens-only provision unconstitutional under the Privileges and Immunities Clause. The district court noted the importance of Delaware as “the ‘corporate home’ for thousands of corporations in the United States” and recognized that the state controls public records that “have an impact on noncitizens” as well as citizens. *Lee v. Minner*, 369 F. Supp. 2d 527, 534 (Del. 2005). The district court’s ruling should be affirmed.

SUMMARY OF ARGUMENT

Access to government records is essential for the media to gather and report news to the public, both locally and nationally. Limiting access to public records, as Delaware aims to do, frustrates both journalists’ ability to fulfill their duty to the public and the public’s interest in learning what government is doing.

Delaware, an economic hub for the nation, gives its own citizens an unconstitutional advantage to report on public government records by preventing access to nonresidents. As the district court noted, Delaware’s public records have an impact on both citizens and noncitizens. *Minner*, 369 F.Supp.2d at 534. If a New York reporter covering economic issues for a nationwide audience cannot access records he needs to properly report on matters of public interest, not only will the journalist find his livelihood burdened, the public will not benefit from the

information it depends upon the journalist to provide. A reporter who cannot fully report on matters within Delaware cannot fully report on business in the U.S.

Journalism is a constitutionally protected pursuit and is important to society in the same way as other trades protected under the Privileges and Immunities Clause.¹ U.S. Const. art. IV, § 2, cl. 1. The U.S. Supreme Court has said that pursuit of a common calling is “one of the most fundamental of those privileges protected by the Clause.” *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 219 (1984). In line with the common calling cases, journalism contributes to the economic landscape of this country, and those who practice it are engaged in a trade. Additionally, the Supreme Court has “never held that the Privileges and Immunities Clause protects only economic interests.” *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 282 n.11 (1985). Journalism also provides a noncommercial venue for dissemination of information, triggering social and political discourse among the citizenry. State laws such as Delaware’s unconstitutionally burden out-of-state journalists’ pursuit of these goals, preventing them from engaging in their common calling.

¹ See, e.g., *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 288 (1985) (holding that a lawyer’s interest in practicing law is a protected privilege); *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 222-3 (1984) (stating that construction contracting is within the purview of the clause); *Toomer v. Witsell*, 334 U.S. 385, 403 (1948) (holding that commercial shrimping is a common calling under the clause).

ARGUMENT

I. Access to Information is Necessary to the Pursuit of Journalism, Which Serves the Public Interest.

Delaware is a national headquarters for business and economic news. More than a half-million corporations are incorporated in the state, including more than half of the Forbes 500 companies.² Shareholders for those corporations reside across the nation and the world, and not only follow what occurs in Delaware, but are directly affected by it. The public has a great interest in the public records created by virtue of the developments within the borders of this economic hub. *See Cox v. Cohn*, 420 U.S. 469, 495 (1975) (“Public records by their very nature are of interest to those concerned with . . . government, and a public benefit is performed by the reporting of the true contents of the records by the media.”)

Hundreds of publications from specialized business journals to large regional newspapers cover issues that arise and occur in Delaware. News interest in these issues spans the globe. Reporters who do not reside in Delaware cannot fully do their job without access to the state’s public records. Public records are “of critical importance to our type of government” with members of the public as

² *Delaware’s Legal System ranked #1 for Fourth Consecutive Year*, State of Delaware Division of Corporations, available at <http://www.state.de.us/corp/DE%20legal%20sys%202005.shtml>.

the “final judge” of what entails public business. *Id.* This flawed law deprives Delaware citizens of the ability to read about state operations in a national publication unless that publication happens to have a Delaware-resident reporter. This not only disadvantages out-of-state journalists but also the public.

Journalists have a duty to function as “surrogates for the public.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). A reporter who cannot access public records necessary for her reporting is effectively prevented from fulfilling that duty and is a poor surrogate for the public.

For example, without access to public records in several states, *The Kansas City Star* could not have produced its 1997 series investigating the National Collegiate Athletic Association. As a private organization, the NCAA’s records are not open to the public. However, by filing FOIA requests for NCAA records kept by universities in several states, the newspaper was able to uncover lax NCAA safety measures at major universities – some of which may have caused the death of collegiate athletes.³ Journalists may also file FOIA requests in multiple states to trace the disciplinary history of newly relocated medical professionals to

³See Steven Rock, *Risking players’ safety: NCAA doesn’t require medical supervision*, K.C. STAR, Oct. 8, 1997, available at <http://www.kcstar.com/ncaa/part4.html> (uncovering the NCAA’s scant medical protection and safety requirements using FOIA requests in several states).

ensure they are not concealing any past wrongdoing. In many stories, reporters need access to public records in other states to track national health and safety concerns.

Journalists who report on Delaware’s corporate, business, and economic news are located across the country and their product is produced, distributed, and consumed across the country. Delaware citizen-journalists, who have full access to the state’s public records, are given the distinct privilege of premiere coverage of business and economic issues concerning the state, while the remainder of the nation’s reporting, such as Mr. Lee’s, suffers lack of depth and substance.

The overwhelming majority of states allow any person access to public records.⁴ In practice, even those states whose laws refer to “citizens” of the state, may not actually require citizenship.⁵

⁴*See, e.g.*, Colorado Public Records Law, COLO. REV. STAT. § 24-72-203(1)(a) (2005) (“All public records shall be open for inspection by any person”); Florida Public Records Law, FLA. STAT. ANN. § 119.01(1) (2005) (“all . . . records shall . . . be open for a personal inspection by any person.”); Massachusetts Public Records Law, MASS. GEN. LAWS ANN. ch. 66 § 10(a) (2005) (Records are available to “any person” for inspection and copying.).

⁵In Montana, the Open Records Act’s “citizen” provision is interpreted to include any citizen from anywhere, based on the state constitution’s language that “no person” may be deprived of the right to examine state documents. MONT. CONST. art. II, § 9, Montana Public Records Act, MONT. CODE ANN. § 2-6-102 (2005), *see Belth v. Bennett*, 740 P.2d 638, 641 (1987) (favoring constitutional interpretation of a statute when differing possible interpretations exist).

II. Delaware’s “Citizens Only” Provision Prohibits Noncitizens From Engaging in the Common Calling of Journalism.

A. A Common Calling is a Fundamental Right Under the Privileges and Immunities Clause of the U.S. Constitution.

The Supreme Court has established that the “[p]ursuit of a common calling is one of the most fundamental of those privileges protected by the Clause.”

United Bldg., 465 U.S. at 219. The clause’s objective, “to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned,” thus applies to any person pursuing a common calling in any state. *Paul v. Virginia*, 75 U.S. 168, 180 (1868). The clause precludes states from discriminating against noncitizens unless that discrimination bears a substantial relationship to the state’s objectives. *United Bldg.*, 465 U.S. at 222.

The Privileges and Immunities Clause as a whole was intended to “fuse into one Nation a collection of independent, sovereign States.” *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). Journalism weaves the fabric of our nation together in the interest of making the country’s citizenry informed as a whole. The reporter’s fundamental right to engage in a common calling is burdened when she cannot fully access information needed to further the public interest and continue to solidify our nation as one informed people.

B. Journalism’s Importance to the National Economy as well as its Noncommercial Role Classifies it as a Common Calling Under Supreme Court Jurisprudence.

The U.S. Supreme 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 Virginia v. Friedman*, 487 U.S. 59, 66 (1988), to determine whether a pursuit is classified as a common calling. *See Piper*, 470 U.S. at 288 (holding the practice of law to be a protected pursuit); *United Bldg.*, 465 U.S. at 222-3 (constitutionally protecting construction contracting); and *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 figures. Further, it is a major source of information on economic and commercial issues. But the “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” is also relevant to whether a pursuit falls “within the ambit” of the 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. Reporting may be a journalist’s means of livelihood, but it is also his contribution to society.

C. Delaware Does Not Have a Substantial Reason for its Discrimination Against Nonresident Journalists Engaged in their Common Calling and this Law Unduly Burdens Them.

In determining whether the law is closely related to substantial advancement of the state's interest, this Court should look at alternative means of furthering the state's purpose without implicating constitutional concerns. *Piper*, 470 U.S. at 284 (discussing the Court's consideration of less restrictive means in determining whether nonresident classifications are constitutional). If the Court finds that a substantial relationship does not exist, the classification is an undue burden under the Privileges and Immunities Clause. *Id.* At 288.

Delaware's "citizens only" classification invalidly discriminates against out-of-state residents because it bears no substantial relationship to the state's objectives. *Id.* Delaware's FOIA plainly states its objective for "public business [to] be performed in an open and public manner," giving citizens "easy access to public records." 29 DEL. CODE ANN. § 10001 (2003). Yet, the FOIA clearly fails to advance this objective under the citizens-only provision, which denies "easy access" to Delaware public records to any out-of-state citizen. Journalists, no matter where they reside, publicize government actions of interest to the public by acting on behalf of all persons regardless of state borders. The citizens of Delaware are clearly better served if more sources of news are available to them.

The U.S. Supreme Court has found residency requirements unconstitutional. In *Friedman*, the Court held a residency requirement to be an undue burden for a lawyer's admission to a state bar because nonresident lawyers are no "less likely to respect the bar and further its interests solely because they are nonresidents." 487 U.S. at 68. The Court wrote that because the nonresident earned her living working in the state, she had a "substantial stake" in that pursuit. *Id.* Similarly, a reporter conveying news regarding Delaware business is no less likely to respect Delaware's business practices and interests simply by virtue of living in another state and has a substantial stake in reporting on those matters. A reporter's role is to gather information and transmit it to the public. His residence has no correlation to his ability to protect the public interest and perform his job to gather and disseminate the news.

Delaware's concern that Mr. Lee seeks access to government records not to pursue a common calling, but to participate in the political and legal processes in the state is misdirected. The state wants to cut off access to important government records from all noncitizens so Mr. Lee cannot "monitor the performance of public officials' duties" in his research and writing. Opening Brief for Appellants at 20. This undercuts the ability for the law to achieve its objective that "public business be performed in an open and public manner," 29 DEL. CODE ANN. § 10001 (2003),

by preventing most reporters from making public business available.

Preventing access for all noncitizen reporters is not the least restrictive means for Delaware to prevent noncitizens from participating in its political and legal and processes and monitoring its government. Instead, the state need only have a voter residency requirement or citizenship requirement to run for state office. The current overbroad prohibition halts access to information of great importance to the general national public, as well as Delaware citizens, and prohibits reporters from gathering that information and reporting it when appropriate. It leaves nonresidents, such as Mr. Lee, “deprived of a means of livelihood by the system,” *Baldwin v. Fish & Game Comm’n of Montana*, 436 U.S. 371, 388 (1978), disrupting their ability to fully access the information needed to perform their job and potentially forcing them to find a new means of earning a living.

CONCLUSION

The public depends on journalists to gather and report news. Without access to records, journalists cannot fulfill their duty as a surrogate for the public to thoroughly report the news; and potentially crucial information remains undisclosed. The Delaware FOI Act thwarts the out-of-state journalist from doing his job and the public suffers. Many persons interested in and affected by

Delaware's corporate, business and economic news are deprived of information they need.

Amicus curiae respectfully urge this Court to recognize the importance of a journalist's access to public information, by holding that Delaware's Freedom of Information Act unconstitutionally burdens the Privileges and Immunities Clause of the U.S. Constitution in preventing noncitizen reporters from engaging in the common calling of journalism within the state, and that the state's reasons for the citizens-only limitation does not substantially further its interest in the least restrictive manner. For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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⁶ Counsel wishes to acknowledge the substantial assistance provided by Corinna Zarek, a legal fellow at The Reporters Committee for Freedom of the Press, in the preparation of this brief.

CERTIFICATIONS

1. *Bar Membership*: I, Lucy A. Dalglish, counsel of record for *amicus curiae* The Reporters Committee for Freedom of the Press, hereby certify that the appropriate documents for my application for admission to the Bar of this Court have been filed and my application is pending.

2. *Word Count*: Pursuant to Rule 29(d), Fed. R. App. P., I hereby certify that the foregoing brief is in compliance with the word limitations set forth in Rule 29(d) inasmuch as the brief contains fewer than 7,000 words, when measured by WordPerfect version 10.0, the word processing program used to prepare the brief, which counted 2,852 words.

3. *Service on the Court and Opposing Counsel*: I hereby certify that on November 21, 2005, I caused to be served, by U.S. mail, an original and nine copies of the Brief of Amicus Curiae The Reporters Committee for Freedom of the Press in support of Appellee to the Clerk of the Court; I further certify that on November 21, 2005, I sent an identical copy of that brief, in PDF format, to the Clerk of the Court; and I further certify that on November 21, 2005, I caused two copies of the foregoing brief to be served by U.S. mail, first class, postage prepaid, upon counsel of record for appellants, W. Michael Tupman, Deputy Attorney General, Delaware Department of Justice, 102 W. Water St., 3rd Floor, Dover, Delaware 19904; and upon counsel of record for appellee, David C. Vladick, Institute for Public Representation, Georgetown Law Center, 600 New Jersey Ave., NW, Washington, D.C. 20001.

4. *Identical Copies*: I hereby certify that the electronic copy of the brief that I submitted to the Clerk's office is identical to the foregoing brief.

5. *Virus Check*: I hereby certify that the copy of the brief sent to the Clerk's office was checked for virus using Norton Antivirus Corp. Ed., version 7.60.926.

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