

No. 11-1099

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

MARK J. MCBURNEY and ROGER W. HURLBERT,

Plaintiffs-Appellants,

v.

NATHANIEL L. YOUNG, JR., Deputy Commissioner and Director, Division of Child Support Enforcement,
Commonwealth of Virginia and THOMAS C. LITTLE, Director, Real Estate Assessment Division, Henrico
County, Commonwealth of Virginia,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District
of Virginia, Richmond Division, No. 3:09cv044 (JRS)

**BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN
SOCIETY OF NEWS EDITORS, ASSOCIATION OF CAPITOL REPORTERS AND EDITORS, CITIZEN MEDIA
LAW PROJECT, THE E.W. SCRIPPS COMPANY, FIRST AMENDMENT COALITION, HEARST
CORPORATION, MAGAZINE PUBLISHERS OF AMERICA, INC., MARYLAND D.C. DELAWARE
BROADCASTERS ASSOCIATION, NBCUNIVERSAL MEDIA, LLC, THE NATIONAL PRESS CLUB,
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, NPR, INC., NEWSPAPER ASSOCIATION OF
AMERICA, THE NEWSPAPER GUILD – CWA, NORTH JERSEY MEDIA GROUP INC., RADIO
TELEVISION DIGITAL NEWS ASSOCIATION, SOCIETY OF PROFESSIONAL JOURNALISTS, STUDENT
PRESS LAW CENTER, TIME INC., VIRGINIA COALITION FOR OPEN GOVERNMENT AND THE
WASHINGTON POST, IN SUPPORT OF PLAINTIFFS-APPELLANTS URGING REVERSAL**

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Pursuant to Fed. R. App. P. 26.1 and 29, *amici* state as follows:

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IDENTITY OF *AMICI CURIAE*

Amici comprise national and regional news organizations, nonprofit freedom of information (“FOI”) and First Amendment advocacy groups and news professional and trade associations that regularly gather and disseminate valuable news and information to the public in a variety of media or otherwise support and defend such efforts to do so.¹

STATEMENT OF INTEREST

Amici and their members regularly investigate and report on government action and government relations with private sector interests. To fully realize their constitutionally protected watchdog role, *amici* naturally rely on freedom of information laws across the country to uncover information and provide the public with insight on important newsworthy events involving government. To that end, they are seasoned experts in the FOI process and have an ongoing stake in how FOI laws are executed and interpreted across the country.

¹ *Amici* include The Reporters Committee for Freedom of the Press, American Society of News Editors, Association of Capitol Reporters and Editors, Citizen Media Law Project, The E.W. Scripps Company, First Amendment Coalition, Hearst Corporation, Magazine Publishers of America, Inc., Maryland D.C. Delaware Broadcasters Association, NBCUniversal Media, LLC, The National Press Club, National Press Photographers Association, NPR, Inc., Newspaper Association of America, The Newspaper Guild – CWA, North Jersey Media Group Inc., Radio Television Digital News Association, Society of Professional Journalists, Student Press Law Center, Time Inc., Virginia Coalition for Open Government and The Washington Post. A complete description of each *amici* is set forth in the addendum to this brief.

The Virginia Freedom of Information Act (“VFOIA”) generally restricts access to public records to citizens of the commonwealth. *See* VA. CODE ANN. § 2.2-3704(a) (2011). While § 2.2-3704(a) provides for a limited exception to this citizenship requirement applicable to representatives of news media entities that circulate newspapers or broadcast their reports within the commonwealth, it effectively shuts out most members of the national media from gaining access to commonwealth records. As discussed below, given the strong national interest in matters and events that routinely occur in or relate to Virginia, the citizenship requirement severely frustrates non-citizen journalists from reporting on matters of concern to the nation at large (as well as burdening all citizens who live in border communities that, for example, work or attend school in Virginia or otherwise have substantial interaction with the commonwealth).

Further, as the profession of journalism is a common calling—with the right of access to government records established centuries ago in the common law—such discriminatory laws constitute a direct, substantial burden on the rights of journalists, violating their equal rights. Undoubtedly, the ability to readily access government information lies at the core of the journalistic pursuit. Hence, the VFOIA’s citizenship requirement constitutes an unconstitutional violation of the Privileges and Immunities Clause of the U.S. Constitution. As such, *amici* respectfully urge this Court to reverse the district court’s ruling and hold that the

VFOIA violates the U.S. Constitution. To strike down the VFOIA's citizenship requirements would align the commonwealth with the overwhelming majority of states (and the federal government) that make records available to any person under their respective open government laws thereby rejecting discrimination against non-citizens.²

As the issues ultimately to be settled in this case will necessarily affect the access rights of a far greater number of people than the Appellants, this Court should give due consideration to those individuals whose interests in Virginia records are supplemental to those raised by the Appellants in this appeal.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this brief.

RULE 29(c)(5) COMPLIANCE

Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* state: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel

² At most, only six other states arguably impose a similar residency requirement. *See* ALA. CODE § 36-12-40 (2011); ARK. CODE. ANN. § 25-19-105(a)(1)(A) (2010); GA. CODE. ANN. § 50-18-70(b) (2011); N.H. REV. STAT. ANN. § 91-A:4(I) (2011); N.J. STAT. ANN. § 47:1A-1 (2011); TENN. CODE ANN. § 10-7-503(a)(2)(A) (2011). In Montana, the state's statutory "citizen" provision is subordinate to the state constitution's language that "no person" may be deprived of the right to examine state documents. MONT. CONST. art. II, § 9; MONT. CODE ANN. § 2-6-102(1) (2010); *Belth v. Bennett*, 740 P.2d 638, 641 (Mont. 1987) (favoring the constitutional interpretation of a statute when differing possible interpretations exist).

contributed money intended to fund preparing or submitting this brief; and (c) no person—other than *amici curiae*, their members, or their counsel—contributed money intended to fund preparing or submitting the brief.

ARGUMENT

I.

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

A. Events that occur within Virginia are newsworthy beyond its borders, and non-citizen journalists across the country require access to state records in every jurisdiction

At the outset, it is worth noting that, given the strong national interest in events that routinely occur in Virginia, the VFOIA's limited exemption for certain journalists from the "citizens only" requirement does little to ensure that journalists nationwide can help provide citizens with "every opportunity . . . to witness the operations of government." VA. CODE ANN. § 2.2-3700(B) (2011). By narrowly limiting the media representatives eligible for the exemption to only those who work for organizations that circulate newspapers or broadcast their reports within the commonwealth, the exception, as demonstrated below, actually works to hinder access for most journalists nationwide—including the growing number of online journalists. As such, the exemption does not save the statute from its unconstitutional restraint on a journalist's pursuit of his or her common calling (discussed *infra*).

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). Many activities that occur in Virginia are certainly no exception to this general rule and—as the following evidence indicates—have proven to be of national interest and significance in various sectors of reporting, including the following which under Virginia law most journalists have no right to access commonwealth records related to such topics:

- Criminal Matters

The 2007 shootings at Virginia Polytechnic Institute and State University (“Virginia Tech”) attracted worldwide attention and prompted colleges and universities nationwide to reexamine their safety procedures. *See* Stephanie Ebbert, *Colleges Reviewing Security Policies; Shootings Prompt Questions from Student Prospects*, THE BOSTON GLOBE, Feb. 16, 2008, at B1, *available at* 2008 WLNR 3165951.³ Nearly four years later, mention of the tragedy regularly appears in news stories about gun use and campus safety, from California to New Jersey. *See, e.g.*, Bruce Baron, Editorial, *Campus Safety is Everyone’s Responsibility and Concern*, THE (San Bernardino County) SUN, Mar. 8, 2011,

³ To facilitate access to secondary sources, “WLNR,” or Westlaw NewsRoom, citations are provided whenever possible.

available at 2011 WLNR 4538489; Bruce Shipkowski, *Legislators Tout Campus Safety*, THE (Trenton) TIMES, Aug. 30, 2010, at A5, available at 2010 WLNR 17259247.

At the time of the tragedy, *The New York Times* extensively covered the event; its reporting included, among other in-depth features, a graphic that reconstructed the shootings, with maps and diagrams of campus buildings, and profiles of each of the 32 victims.⁴ Virginia Tech is a public school subject to the commonwealth's open records law. Non-citizen reporters interested in informing the public about the steps university officials undertook in the wake of the shooting would look to the VFOIA to gain access to this information. Under current law, the overwhelming majority of journalists have no right to access such records.

In October 2002, the nation was captivated when a pair of snipers randomly opened fire on the Washington, D.C., metropolitan area, killing ten people and injuring three others during a three-week period that terrorized the region. *See* Bob Dart & John Manasso, *Search for a Killer: Terror Colors Everyday Life as Sniper Attacks Mount*, ATLANTA J. & CONST., Oct. 11, 2002, at A1, available at 2002 WLNR 4689172. Three fatalities and one injury occurred in Virginia, where juries convicted the shooters, Lee Boyd Malvo and John Allen Muhammad, and judges

⁴ Much of this coverage is available at http://topics.nytimes.com/topics/reference/timestopics/organizations/v/virginia_polYTECHNIC_institute_and_state_university/index.html.

sentenced them to life in prison and death, respectively, for the deaths of Virginia residents.

Had the Atlanta-based reporters who covered the shootings as they occurred wanted to provide readers with greater in-depth reporting about the Beltway sniper attacks, they may have sought access to, for example, certain Virginia police records about the four shootings that occurred within commonwealth limits. Under current Virginia law, the overwhelming majority of journalists have no right to access those records.

- Political Matters

Former Virginia Governor Tim Kaine has recently been the subject of national media attention as various news organizations have reported that Kaine, the current chairman of the Democratic National Committee, is considering running for the U.S. Senate, leaving the committee top spot vacant. *See* Molly Ball, *Democrats Play Post-Tim Kaine DNC Guessing Game*, POLITICO, Mar. 12, 2011;⁵ Ben Pershing, *Webb Will Not Run for 2nd Term*, WASH. POST, Feb. 10, 2011, at A1, *available at* 2011 WLNR 2627856. Obviously, such political races have enormous national implications as they could ultimately determine the balance of power in the U.S. Senate where Democrats currently hold a slim advantage. Out-of-state reporters covering national politics as well as the public would naturally be

⁵ *Available at* <http://www.politico.com/news/stories/0311/51168.html>.

interested in commonwealth records covering Kaine's governorship. The information contained in such documents may provide insight into, among other things, Kaine's political positions, leadership abilities, and ethical behavior. Under current Virginia law, the overwhelming majority of journalists have no right to access those records.

- Economic Matters

According to 2010 statistics, 20 Fortune 500 companies are currently headquartered in Virginia.⁶ Additionally, numerous other multinational corporations, including Airbus, Volkswagen, Rolls-Royce and Siemens, have divisions in the commonwealth. *See generally* VA. ECON. DEV. P'SHIP, INTERNATIONALLY OWNED COMPANIES IN VIRGINIA (2009–2010).⁷ The federal bailout of McLean, Va.-based, Fortune 500 mortgage finance company Freddie Mac was “a seismic event” in one of the nation's “worst housing crisis in decades” and garnered front page headlines nationwide. *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. Also based in McLean, Capital One Financial, a Forbes 500 banking giant, made national news as one of the ten banks

⁶ *See* 2010 Fortune 500 company listing for Virginia, *available at* <http://money.cnn.com/magazines/fortune/fortune500/2010/states/VA.html>.

⁷ *Available at* http://www.yesvirginia.com/pdf/Internationally_Owned_Companies.pdf.

that received the most bailout aid during the recent financial crisis. *See* Eileen AJ Connelly, *Bailed-Out Banks Spent Big on Financial Lobbying*, THE SEATTLE TIMES, Sept. 1, 2010, at A10, *available at* 2010 WLNR 17433743.

Moreover, Virginia is home to no fewer than 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. SITE & FACILITY PLANNING, Apr. 1, 2006, *available at* 2006 WLNR 7417919 (noting 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).

While national reporting on federal government military spending may focus more on an examination of federal records under the federal Freedom of Information Act, local records pertaining to such contractors are of equal importance to non-citizen journalists. The public generally, as well as shareholders of these economic powerhouses, obviously have a strong interest in corporate developments in Virginia—and resultant interactions with commonwealth and local entities—even though they reside across the nation and world. Such contacts

can range from taxation and revenue issues to workplace safety inspection records to economic development plans.

Consider, for example, the recent news that Boeing plans to construct a new corporate office complex in the Crystal City section of Arlington, Va. *See* Marjorie Censer & Jonathan O’Connell, *Boeing Ramping up D.C. Presence*, WASH. POST, Mar. 7, 2011, at A9, *available at* 2011 WLNR 4418885. The company’s request for building permits, building plans, possible zoning changes and local compliance records could be of potential interest to citizens across the nation where Boeing maintains a significant presence as it could affect the local Boeing job markets nationwide. The same would be true if an automobile manufacturer were considering opening a production plant in Virginia. The details of any such plant would be of great interest to those currently working at similar plants across the country. Under current Virginia law, the overwhelming majority of journalists have no right to access those records.

- Legal and Social Policy Matters

Virginia has legally challenged the federal government’s controversial, healthcare reform legislation. *See* Kevin Sack, *Virginia to ask Supreme Court to Rule on Health Law*, N.Y. TIMES, Feb. 4, 2011, at A16, *available at* 2011 WLNR 2241822. To provide context and depth to a report, a non-citizen journalist covering the Virginia lawsuit would likely want to include information about the

current state of healthcare in the commonwealth, including, for example, the number of citizens who do not have health insurance and, thus, receive medical services from government health clinics. Under current Virginia law, the overwhelming majority of journalists cannot get those records.

As the above examples demonstrate, events that occur in Virginia are often of national import. Thus, journalists and the public outside the commonwealth and its immediate area have a strong interest in its public records. *See Cox Broad. Corp. 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.”). Obviously, non-citizen journalists have and do report on matters such as those listed above. However, without ready access to Virginia records, the reporting suffers. Out-of-state journalists who report for media entities that do not circulate or air their reports within Virginia are unable to provide the depth and context that most public affairs reporting demands. As such, the “citizens only” requirement strips the public of the information it needs to effectively participate in democracy.

B. Access to state public records by non-citizens aids comparative and macro-analysis reporting thereby allowing the press to fulfill its watchdog role

Public records compiled from many states often reveal national trends or evidence of large-scale malfeasance not necessarily apparent through the

examination of information from a single state. Indeed, had she been limited by a “citizens only” requirement in various states’ FOI laws, a reporter for ProPublica, a Pulitzer Prize-winning news organization that produces investigative journalism in the public interest, likely would not have uncovered wide disparities in performance and outcomes among dialysis centers nationwide. *See* Robin Fields, *In Dialysis, Life-Saving Care at Great Risk and Cost*, PROPUBLICA, Nov. 9, 2010.⁸ Investigative reporter Robin Fields requested state health officials’ inspection reports of dialysis clinics in six large states—California, New York, North Carolina, Ohio, Pennsylvania and Texas—to ascertain whether problems or inspection processes varied by region. From these records, she created a database that tracked and quantified unsanitary and unsafe conditions, prescription errors, infection control breaches and serious patient safety lapses at more than 1,500 dialysis clinics coast to coast and with regularity in all the states examined. Had the reporter been prohibited from obtaining records from any of the representative regions, however, the existence of a serious public health issue national in scope likely would have remained unknown.

Additionally, *The Kansas City (Mo.) Star* could not have produced its 1997 series investigating the National Collegiate Athletic Association (“NCAA”) without access to public information from various states. As a private

⁸ This piece and others in this series are available at <http://www.propublica.org/topic/diagnosing-dialysis>.

organization, NCAA records are not open to the public. However, by filing FOI requests for NCAA records kept by universities in several states, the newspaper was able to uncover lax NCAA safety measures—some of which may have caused the death of collegiate athletes—at major universities. *See* Steven Rock, *System Puts Players at Risk: NCAA Doesn't Require Medical Supervision*, THE KANSAS CITY (Mo.) STAR, Oct. 8, 1997, at A1, *available at* 1997 WLNR 6454162.

Similarly, investigative journalists at *The Columbus (Ohio) Dispatch* used multistate public records requests to reveal uneven and inappropriate application of the Family Educational Rights and Privacy Act (“FERPA”) by numerous collegiate athletic departments nationwide. *See* Jill Riepenhoff & Todd Jones, *Secrecy 101: College Athletic Departments Use Vague Law to Keep Public Records from Being Seen*, THE COLUMBUS (Ohio) DISPATCH, May 31, 2009, at A1, *available at* 2009 WLNR 10328545. Although FERPA was intended to shield a limited class of academic records (e.g., student transcripts) from public view, documents received from the 69 of 119 institutions that responded to requests showed athletic departments’ use of the federal law to hide public records on a myriad of nonacademic matters, including student-athletes’ criminal behavior, academic cheating incidents and recruiting violations. *See id.*

Additional examples of comparative, macro-view investigative reporting abound. For example, *USA Today*⁹ journalists examined hundreds of “misadministration” and “irregularity” reports from state Departments of Education in Florida, California and Arizona that detailed incidents of missing standardized test booklets and teachers whispering answers to students during such testing. *See* Jodi Upton, Denise Amos & Anne Ryman, *For Teachers, Many Ways and Reasons to Cheat on Tests*, USA TODAY, Mar. 10, 2011, at A1, *available at* 2011 WLNR 4717508. The records were used in part to report on the larger, nationwide investigation into how some teachers across the country have improperly given assistance to students in connection with federally mandated testing under the “No Child Left Behind” initiative. *See id.*

A “citizens only” requirement—or similarly qualified, yet restrictive version of such a law—in any of these state’s FOI laws would have severely frustrated reporting on these matters of great public concern. Indeed, similar Virginia records would have likely been unavailable as a matter of right to journalists conducting similar reporting from other states.

⁹ *USA Today* is headquartered in McLean, Va., and circulates in the state. Hence, it would receive the benefit of the VFOIA’s limited media exception. The story highlighted above is presented rather to demonstrate the important comparative reporting that can be accomplished by having ready access to records in all state jurisdictions.

As all of the above examples clearly demonstrate, for many stories reporters across the nation need ready access to public records in other states to report on “local” news of national concern and uncover national trends and occurrences that only become evident by reviewing and analyzing records of interest in other jurisdictions.

II.

Virginia’s “Citizens Only” Provision Prohibits Non-Citizens 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 U.S. Supreme Court has established that the “pursuit of a common calling is one of the most fundamental of those privileges protected by the [Privileges and Immunities] Clause.” *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 219 (1984). The clause’s objective, “to place the citizens of each state upon the same footing with citizens of other states,” thus applies to any person pursuing a common calling in any state. *United States v. Harris*, 106 U.S. 629, 643 (1883). The clause precludes states from discriminating against non-citizens unless that discrimination bears a substantial relationship to a state objective. *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

To determine whether a pursuit is classified as a common calling, 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," *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 281 (1985), 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 practice of law to be a protected pursuit); *United Bldg.*, 465 U.S. at 222–23 (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" 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.

Reporting may be a journalist’s means of livelihood, but it is also an important contribution to society at large for immeasurable non-economic reasons. And that contribution—holding government accountable to the people—at its core means that journalists need access to public records in all jurisdictions. Access is therefore directly related to a journalist’s ability to engage in his constitutionally protected common calling. The VFOIA’s citizenship restrictions are therefore not an incidental burden on this calling.

C. Virginia does not have a substantial reason for discriminating against non-citizen journalists engaged in their common calling, and this law unduly burdens them

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

Virginia's "citizens only" classification unconstitutionally discriminates against out-of-state residents because it bears no substantial relationship to the state's open government objectives. The VFOIA plainly states that its policy objective is "to promote an increased awareness by all persons of governmental activities," giving citizens "every opportunity . . . to witness the operations of government." VA. CODE ANN. § 2.2-3700(B) (2011). Yet, the 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 regardless of state borders. The citizens of Virginia and of the United States are clearly better served if more sources of news are available to the public.

The U.S. Supreme Court has found Virginia residency requirements unconstitutional in other contexts. In *Friedman*, the Court held a Virginia residency requirement to be an undue burden on a lawyer's admission to a state bar because non-resident lawyers are no "less likely to respect the bar and further its interests solely because they are nonresidents." *Friedman*, 487 U.S. at 68. The Court wrote that because the non-resident earned her living working in the state, she had a "substantial stake" in that pursuit. *Id.* Similarly, a reporter conveying news regarding Virginia business is no less likely to respect Virginia'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 of gathering and disseminating the news.

Virginia's concerns in this case that non-citizens would overwhelm VFOIA administration by diverting time and resources and financially burden Virginia taxpayers are misdirected.¹⁰ Denying access to non-citizen journalists and other members of the public undercuts the ability for the law to achieve its objective that "[t]he affairs of government are not . . . to be conducted in an atmosphere of secrecy," by preventing most reporters from making the affairs of Virginia open and available to the public. VA. CODE ANN. § 2.2-3700(B) (2011).

Further, preventing access to all non-citizen reporters is not the least restrictive means for Virginia to ensure the system is not overburdened by a flood of records requests or that taxpayers are stuck footing the bill for these extra

¹⁰ Appellees argue that even if the "citizens only" restriction discriminates against a fundamental right, the restriction is permissible because it is closely related to a substantial state interest, namely the commonwealth's ability to provide efficient, timely and effective services to its citizens. *See* Memorandum of Law in Support of Defendant's Cross-Motion for Summary Judgment dated Nov. 12, 2010 pp.16–17. According to Appellees, responding to out-of-state FOIA requests frustrates this interest by consuming time and resources that would otherwise be available for processing in-state FOIA requests and rendering other services to Virginia citizens. *Id.*

requests. Instead, the state need only ensure personnel are properly trained, requesters better informed of how to file proper, clear requests so they can be processed efficiently, and fees properly charged and collected, to ensure the taxpayers are not overburdened by the cost of responding to requests. Like anyone else, journalists are not exempt from paying such fees under the VFOIA.

The current overbroad prohibition halts access to information of great importance to the general national public, as well as Virginia citizens, and prohibits reporters from gathering that information and reporting it when appropriate. Additionally, it promotes a system that can leave non-residents “deprived of a means of livelihood by the system,” *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 388 (1978), disrupting their ability to fully access the information needed to perform their job and potentially inhibiting their ability to earn a living.

III.

There is a Fundamental Common Law Right of Access to Government Records in the United States Predating Similar Statutory Rights

A. Both English and American courts have historically recognized a common law right to access public records

For purposes of the Privileges and Immunities Clause, fundamental rights are those rights recognized as “sufficiently basic to the livelihood of the Nation.”

Id. In finding that the VFOIA’s citizenship requirement does not violate the

Privileges and Immunities Clause, the court below erroneously concluded that access to information is not a fundamental right within the meaning of the clause. *See* Joint Appendix at 111A–114A. “Because freedom of information statutes did not come into existence until the middle of the twentieth century, it is clear that the right to information has not ‘[a]t all times, been enjoyed by the citizens of the several states....’” *Id.* at 113A. The court below, however, misstates history and ignores the fact that common law access rights to non-judicial government records have been recognized for centuries.¹¹ With roots in English common law,¹² American courts have long recognized the right of the people 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 [sic] 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).

¹¹ The longstanding common law access right to court records was upheld by the U.S. Supreme Court in *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589 (1978).

¹² *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).

Admittedly, statutory provisions at both the state and federal level presently serve as the primary vehicle for asserting access rights and are of relatively recent genesis. However, rather than establishing newfound rights, statute-based FOI laws often serve to codify—and even co-exist with—longstanding common law access rights. For example, 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. 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).

Moreover, states such as New Jersey continue to recognize a common law right of access to government records that coincides with additional, yet distinct, statutory rights. “The New Jersey courts have long recognized a limited common-law right to inspect governmental records.” *S. Jersey Publ’g. Co. v. N.J. Expressway Auth.*, 591 A.2d 921, 925 (N.J. 1991) (citing *Ferry v. Williams*, 41 N.J.L. 332 (N.J. 1879); *Casey v. MacPhail*, 65 A.2d 657 (N.J. Super. Ct. Law Div.

1949)). Further, “the common-law and statutory rights are not mutually exclusive” and serve to “complement each other, together embodying the [s]tate’s strong commitment to access to public records.” *Id.* at 927.

The fact that many common law access rights have been subsequently subsumed by statute does nothing to negate the fact that such rights have historically been recognized in American jurisprudence. For example, a Pennsylvania court held well over a century ago that the right to access municipal documents was already “regarded as settled law in this country” and that “every corporator or citizen of a municipality has the right, on all proper occasions, to inspect and copy its records, books and documents.” *Biddle v. Walton*, 6 Pa. D. 287 (Pa. Ct. Comm. Pl. 1897) (citing cases upholding similar common law rights in New York, New Jersey and Missouri). The Philadelphia County court held that no special interest in the records needed to be shown by the requester. *See id.*

In *Burton*—decided eight years earlier than *Biddle*—the Michigan Supreme Court held that citizens had a right to inspect public records regardless of whether there was a public or private motive for requested access or whether an individual could show a “special interest” in the records. *See Burton*, 44 N.W. at 285. By 1928, the Michigan Supreme Court held that there was “no question” that there was a “common-law right of the people at large to inspect public documents and records.” *Nowack v. Fuller*, 219 N.W. 749, 750 (Mich. 1928).

As such controversies continued to arise, additional American courts in the late nineteenth and early twentieth centuries repeatedly held that the general public had a right to access government records of agencies—which today would almost always be requested pursuant to FOI statutes. *See generally, e.g., Mushet v. Dep't of Pub. Serv. of the City of L.A.*, 170 P. 653 (Cal. Dist. Ct. App. 1917) (holding that publicly owned utilities must make their papers available to the public under the common law right of inspection); *Colescott v. King*, 57 N.E. 535 (Ind. 1900) (holding that, aside from any statutory basis, one is entitled to inspect and copy public records); *Fagan v. State Bd. of Assessors*, 77 A. 1023 (N.J. 1910) (finding that it is the duty of citizenry to keep checks on the government through the inspection of records and that the republic should not erect technical barriers by which these duties are discouraged or denied); *Palacios v. Corbett*, 172 S.W. 777 (Tex. Ct. App. 1915) (holding that appellees had a right under common law to inspect county records for evidence of mishandling of public funds); *Clement v. Graham*, 63 A. 146 (Vt. 1906) (finding that the common law right to inspect public records and public documents exists with all persons).

It is clear that the court below erred when it failed to consider that access rights to non-judicial government records were not born of statute in the second half of the twentieth century. Rather, such rights were enshrined for centuries at common law and were viewed as fundamental rights that inured in all citizens.

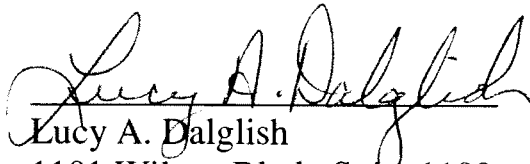
Hence, it would simply stand in complete contrast to history to hold that access rights are not fundamental under the Privileges and Immunities Clause. For this reason alone, this Court must reverse the lower court and hold the VFOIA's citizenship requirement unconstitutional.

CONCLUSION

For all of the foregoing reasons, the decision of the district court finding that the VFOIA's citizenship requirement does not unconstitutionally burden a fundamental right within the meaning of the Privileges and Immunities Clause of the U.S. Constitution should be reversed.

Dated: Arlington, VA
 March 23, 2011

Respectfully submitted,

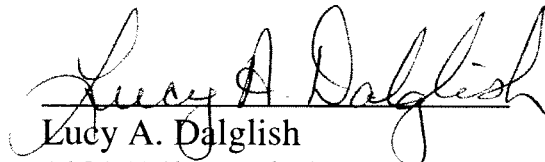

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 5,841 words, excluding those portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Further, I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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ADDENDUM

Identity of *amici*:

The Reporters Committee for Freedom of the Press

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.

American Society of News Editors

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.

Association of Capitol Reporters and Editors

The Association of Capitol Reporters and Editors was founded in 1999 and has approximately 200 members. It is the only national journalism organization for those who write about state government and politics.

Citizen Media Law Project

The Citizen Media Law Project (“CMLP”) provides legal assistance, education and resources for individuals and organizations involved in online and citizen media. CMLP 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, and the Center for Citizen Media, an initiative to enhance and expand grassroots media. CMLP is an unincorporated association hosted at Harvard Law School, a nonprofit educational institution.

The E.W. Scripps Company

The E.W. Scripps Company is a publicly-traded company, and no individual stockholder owns more than ten percent of its stock. The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information websites 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

The 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.

Hearst Corporation

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.

Magazine Publishers of America, Inc.

The Magazine Publishers of America (“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.

Maryland D.C. Delaware Broadcasters Association

The Maryland D.C. Delaware Broadcasters Association unites public and commercial radio and television across Maryland, D.C. and Delaware. The main purpose of the association is to represent and further the interests of broadcasters, communicate relevant information to broadcasters through meetings and publications and provide educational services through webinars, workshops or other appropriate means in order to better serve the public.

NBCUniversal Media, LLC

NBCUniversal Media, LLC is one of the world's leading media and entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline NBC" and "Meet the Press."

The National Press Club

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

The National Press Photographers Association ("NPPA") is a nonprofit organization dedicated to the advancement of photojournalism in its creation,

editing and distribution. NPPA's almost 9,000 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.

NPR, Inc.

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.

Newspaper Association of America

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 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspaper companies. A major issue affecting NAA members is the ability of media

companies to gather and report on matters of public concern without unreasonable restraints.

The Newspaper Guild – CWA

The Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, news magazines, 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. It is America's largest communications and media union, representing over 700,000 men and women in both private and public sectors.

North Jersey Media Group Inc.

North Jersey Media Group Inc. ("NJMG") is an independent, family-owned printing and publishing company and 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 websites and online services associated with the print publications.

Radio Television Digital News Association

The 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.

Society of Professional Journalists

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.

Student Press Law Center

The Student Press Law Center ("SPLC") is a nonprofit, 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.

Time Inc.

Time Inc. is the largest magazine publisher in the United States. It publishes over 100 titles, including *Time*, *Fortune*, *Sports Illustrated*, *People*, *Entertainment Weekly*, *InStyle* and *Real Simple*. Time Inc. publications reach over 100 million adults and its websites, which attract more visitors each month than any other publisher, serve close to 2 billion page views each month.

Virginia Coalition for Open Government

Founded in 1996, the Virginia Coalition for Open Government (“VCOG”) is a non-partisan organization dedicated to making access to records and meetings of state and local government in Virginia as open and accessible as possible. VCOG has more than 150 individual and institutional dues-paying members; membership is open to anyone.

The Washington Post

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

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2011, the foregoing brief *amici curiae* was filed with the Court's CM/ECF system. I further certify that I caused to be served 2 true and correct copies of the foregoing brief *amici curiae* by first-class mail, postage prepaid on the following counsel of record for all parties:

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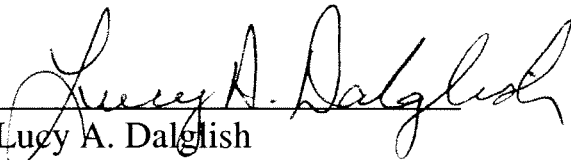
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