

No. 22-2110

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

COURTHOUSE NEWS SERVICE,
Plaintiff-Appellant,

v.

**JACQUELINE C. SMITH, in her official capacity as Clerk of the Circuit
Court for Prince William County, Virginia,**
Defendant-Appellee,

and

COMMONWEALTH OF VIRGINIA,
Intervenor/Defendant-Appellee.

On Appeal from the United States District Court for
the Eastern District of Virginia, Richmond Division,
Case No. 3:21-cv-460-HEH

**MOTION FOR LEAVE TO LATE-FILE PROPOSED AMICUS CURIAE
BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE
PRESS IN SUPPORT OF PLAINTIFF-APPELLANT'S
PETITION FOR REHEARING OR REHEARING EN BANC**

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The Reporters Committee for Freedom of the Press (the “Reporters Committee”) respectfully moves the Court pursuant to Federal Rule of Appellate Procedure 29(b) for leave to file the accompanying amicus curiae brief in support of Plaintiff-Appellant Courthouse News Service’s Petition for rehearing or rehearing en banc (hereinafter, “the Petition”), Doc. No. 81.

The Reporters Committee regrettably files this motion and the accompanying proposed amicus curiae brief on February 14, 2025, two days after the applicable deadline. *See* Fed. R. App. P. 29(b). Appellant consents to the relief sought by this motion. Appellees take no position on the motion.

In support of its requested relief, the Reporters Committee states as follows:

1. The opinion and judgment of the panel issued in the above-captioned appeal on January 22, 2025. Doc. No. 79. The Petition was filed February 5, 2025. Fed. R. App. P. 40(a); Loc. R. 40(c). Amicus briefs in support of Appellant were due February 12, 2025. Fed. R. App. P. 29(b)(5).

2. Counsel for the Reporters Committee, which previously filed as amicus curiae in this matter, Doc. No. 27, mistakenly calendared Appellant’s deadline to seek rehearing for February 7, and the corresponding amicus deadline as February 14.

3. The filing of the accompanying proposed amicus brief two days late was entirely inadvertent. It was not done with the intent to prejudice any party or

delay resolution of Appellant's Petition, nor would prejudice be caused by acceptance under these circumstances.

4. The Reporters Committee has a strong interest in the constitutional court access questions presented by this appeal. It is an unincorporated nonprofit association founded by journalists and media lawyers in 1970, which provides pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee regularly files as amicus in cases before this Court implicating the First Amendment and newsgathering rights of the press. *See, e.g., Br. of Amici Curiae Reporters Comm. for Freedom of the Press & 17 Media Orgs., People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815 (4th Cir. 2023) (No. 20-1776), 2021 WL 807832. The Reporters Committee filed a brief in this appeal on February 10, 2023, which was joined by 38 other media organizations. Doc. No. 27.¹

¹ Those 38 amici included The Associated Press; The Atlantic Monthly Group LLC; Axios Media Inc.; The Center for Investigative Reporting (d/b/a Reveal); The E.W. Scripps Company; First Amendment Coalition; Freedom of the Press Foundation; Gannett Co., Inc.; Institute for Nonprofit News; International Documentary Association; Investigative Reporting Workshop at American University; The McClatchy Company, LLC; The Media Institute; Mother Jones; National Freedom of Information Coalition; National Newspaper Association; The National Press Club; National Press Club Journalism Institute; National Press Photographers Association; New England First Amendment Coalition; The New York Times Company; The News Leaders Association; News/Media Alliance;

5. The accompanying brief contains information and argument that the Reporters Committee believes will aid the Court in resolution of the Petition. It addresses the constitutional issues raised by the panel's analysis and why those issues warrant rehearing or review by the full Court. It also provides updated information on the impact of the Virginia court access restriction to the news media.

For the foregoing reasons, the Reporters Committee respectfully requests that the Court accept its late-filed proposed amicus curiae brief in support of Appellant's Petition for rehearing or rehearing en banc.

Dated: February 14, 2025

Respectfully submitted,

/s/ Bruce D. Brown

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North Carolina Open Government Coalition; North Carolina Press Association; Pro Publica, Inc.; Radio Television Digital News Association; Society of Environmental Journalists; Society of Professional Journalists; South Carolina Press Association; Student Press Law Center; TEGNA Inc.; TIME USA, LLC; Tribune Publishing Company, d/b/a the Daily Press and The Virginian-Pilot; Tully Center for Free Speech; Virginia Coalition for Open Government; Virginia Press Association; and The Washington Post.

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2025, I caused the foregoing Motion for Leave to Late-File Proposed Amicus Curiae Brief of the Reporters Committee for Freedom of the Press in Support of Plaintiff-Appellant's Petition for Rehearing or Rehearing En Banc to be electronically filed with the Clerk of the Court using the appellate CM/ECF system, which will automatically send notice of such filing to all counsel of record.

Dated: February 14, 2025

/s/ Bruce D. Brown

Bruce D. Brown

Counsel for Amicus Curiae

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE1

SOURCE OF AUTHORITY TO FILE2

FED. R. APP. P. 29(a)(4)(E) STATEMENT.....2

INTRODUCTION3

ARGUMENT5

 I. The Court should rehear this case because of its exceptional
 importance to the press and public.5

 II. The Court should rehear this case to correctly apply the law on a
 matter of First Amendment importance.11

CONCLUSION13

CERTIFICATE OF COMPLIANCE.....14

CERTIFICATE OF SERVICE15

TABLE OF AUTHORITIES

Cases

Associated Press v. U.S. District Court,
705 F.2d 1143 (9th Cir. 1983)8

Citizens United v. Fed. Election Comm’n,
558 U.S. 310 (2010).....12

Civ. Beat L. Ctr. for Pub. Int., Inc. v. Maile,
117 F.4th 1200 (9th Cir. 2024)3

Courthouse News Serv. v. Planet,
947 F.3d 581 (9th Cir. 2020) 5, 7, 8

Courthouse News Serv. v. Schaefer,
2 F.4th 318 (4th Cir. 2021) *passim*

Cox Broad. Corp. v. Cohn,
420 U.S. 469 (1975).....5

Doe v. Pub. Citizen,
749 F.3d 246 (4th Cir. 2014) 3, 5, 14

Globe Newspaper Co. v. Superior Court,
457 U.S. 596 (1982).....3

Grove Fresh Distribs., Inc. v. Everfresh Juice Co.,
24 F.3d 893 (7th Cir. 1994)7, 8

Int’l News Serv. v. Associated Press,
248 U.S. 215 (1918).....8

Leathers v. Medlock,
499 U.S. 439 (1991).....13

Neb. Press Ass’n v. Stuart,
427 U.S. 539 (1976).....8

Press-Enter. Co. v. Superior Court,
478 U.S. 1 (1986)..... 3, 12, 14

<i>Press-Enter. Co. v. Superior Court</i> , 464 U.S. 501 (1984).....	3
<i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015).....	12
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555, 569 (1980).....	3, 5
<i>Rushford v. New Yorker Mag., Inc.</i> , 846 F.2d 249 (4th Cir. 1988)	3

Other Authorities

Alexander Gladstone & Andrew Scurria, <i>Purdue Pharma Backs Creditor Lawsuit Against Sacklers for Shifting Assets</i> , Wall St. J. (July 8, 2024), https://www.wsj.com/articles/purdue-pharma-backs-creditor-lawsuit-against-sacklers-for-shifting-assets-e15ae1e3	6
Br. of Amici Curiae Reporters Comm. for Freedom of the Press & 17 Media Orgs., <i>People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, Inc.</i> , 60 F.4th 815 (4th Cir. 2023) (No. 20-1776), 2021 WL 807832	1
Brad Adgate, <i>Newspapers Have Been Struggling and Then Came the Pandemic</i> , Forbes (Aug. 20, 2021), https://perma.cc/3CKC-PSUD	10
<i>Browns QB Deshaun Watson settles latest civil lawsuit brought by woman alleging sexual assault</i> , Associated Press (Oct. 8, 2024), https://www.nfl.com/news/browns-qb-deshaun-watson-settles-latest-civil-lawsuit-brought-by-woman-alleging-sexual-assault	6
Christopher Connell, <i>As Newspapers Struggle, Local News is Harder to Find in Virginia</i> , Va. Humanities (May 1, 2023), https://virginiahumanities.org/2023/05/news-about-local-news/	11
Elizabeth Grieco et al., <i>About a third of large U.S. newspapers have suffered layoffs since 2017</i> , Pew Rsch. Ctr. (July 23, 2018), https://perma.cc/Y9ES-DT47	10

Erin Karter, Nw. Now (June 29, 2022),
<https://news.northwestern.edu/stories/2022/06/newspapers-close-decline-in-local-journalism/>10

How Americans Describe Their News Consumption Behaviors,
Am. Press Inst. (June 11, 2018),
<https://perma.cc/M3L2-84PB>8

Karri Peifer, *Virginia’s Newspaper Decline*,
Axios Richmond (Dec. 4, 2023),
<https://www.axios.com/local/richmond/2023/12/04/virginias-newspaper-decline>11

Laura French, *New information in \$387 million lawsuit against Cumberland Children’s Hospital*, WTVR (July 31, 2023),
<https://www.wtvr.com/news/local-news/cumberland-childrens-hospital-lawsuit-update-07-31-2023>6

Mil. Just. Rev. Panel, *Comprehensive Review and Assessment of the Uniform Code of Military Justice* (2024),
<https://mjrj.osd.mil/sites/default/files/MJRP%202024%20Comprehensive%20Review%20and%20Assessment%20of%20the%20UCMJ.pdf>7

News Release, Applications Open for PACER User Group,
U.S. Courts (Aug. 2, 2024),
<https://www.uscourts.gov/data-news/judiciary-news/2024/08/02/applications-open-pacer-user-group>6

Penelope Muse Abernathy, Univ. N.C., *News Deserts and Ghost Newspapers: Will Local News Survive?* (2020),
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Sierra Krug, *Civil lawsuit reveals new details in infamous ‘Catfish Killer’ triple murder*, WRIC (Feb. 6, 2024),
<https://www.wric.com/news/virginia-news/western-virginia/civil-lawsuit-reveals-new-details-in-infamous-catfish-killer-triple-murder/>6

INTEREST OF AMICUS CURIAE

The Reporters Committee for Freedom of the Press (“Reporters Committee”) is an unincorporated nonprofit association dedicated to protecting the First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee regularly files as amicus in cases implicating the media’s First Amendment and newsgathering rights. *See, e.g.,* Br. of Amici Curiae Reporters Comm. for Freedom of the Press & 17 Media Orgs., *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed’n, Inc.*, 60 F.4th 815 (4th Cir. 2023) (No. 20-1776), 2021 WL 807832.¹

It has a strong interest here in ensuring that the public’s presumptive right to inspect judicial records under the First Amendment is not infringed and that unconstitutional, speaker-based restrictions on the exercise of First Amendment rights are not imposed. It writes in support of rehearing to emphasize the public interest at stake.

¹ The Reporters Committee previously filed a brief in support of Appellant, *see* Doc. No. 27, with 38 media organizations identified in the accompanying motion.

SOURCE OF AUTHORITY TO FILE

The Reporters Committee moves to file pursuant to Federal Rule of Appellate Procedure 29(b)(2). Appellant consents to the filing of this brief, and Appellees take no position.

FED. R. APP. P. 29(a)(4)(E) STATEMENT

No party's counsel authored any part of this brief. No person or entity other than the Reporters Committee contributed money to its preparation or submission.

INTRODUCTION

The public’s presumptive right of access to court proceedings and records under the First Amendment is essential to public trust in—and the effective functioning of—government institutions. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569, 575–77 (1980) (plurality opinion). Press and public access promotes accountability, ensures that proceedings are fair, and fosters confidence in the system. *See, e.g., Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 327–28 (4th Cir. 2021); *Doe v. Pub. Citizen*, 749 F.3d 246, 267 (4th Cir. 2014). It also “leads to a better-informed citizenry,” which “tends to deter government officials from abusing the powers of government,” *Civ. Beat L. Ctr. for Pub. Int., Inc. v. Maile*, 117 F.4th 1200, 1207 (9th Cir. 2024) (citation omitted), and “serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government,” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

A rule denying or delaying contemporaneous access to court records would itself be subject to strict scrutiny under *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“*Press-Enterprise II*”). Here, a rule that limits access for one group (*i.e.*, the press and public) and does not apply to other speakers raises constitutional concerns demanding similar scrutiny. The Reporters Committee agrees with Appellant Courthouse News Service (“CNS”), Doc. No. 81, and with Judge Gregory

in his dissenting opinion, that the majority erred in its application of the law. The Reporters Committee writes to emphasize the exceptional importance of this issue to the news media and the practical harm the panel's decision will have on the press's ability to report, and public's ability to receive, the news.

Unlike reporters covering federal court filings available through the Public Access to Court Electronic Records ("PACER") system, or judicial proceedings in the majority of states with unrestricted remote online access to court records, journalists who report on Virginia circuit courts must travel to each individual courthouse to view non-confidential civil records on its public access terminal. Virginia reserves remote, electronic access, through the Officer of the Court Remote Access ("OCRA") system, for lawyers. More than a mere inconvenience, the burdens imposed by this access restriction significantly hamper the news media's ability to timely and accurately report on court cases of interest and importance to the public that are pending in the 105 Virginia circuit courts that utilize OCRA and span a distance of over 30,000 square miles. JA149–150 ¶ 29.

For the reasons herein, the Reporters Committee respectfully urges the Court to grant CNS's Petition for rehearing or rehearing en banc.

ARGUMENT

I. The Court should rehear this case because of its exceptional importance to the press and public.

The press plays a crucial role in informing the public about court cases of public interest and the judicial system as a whole. A well-functioning democracy requires a public that is knowledgeable and informed about the workings of the judicial branch. Given that “each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.” *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975). As a “surrogate[] for the public,” *Richmond Newspapers, Inc.*, 448 U.S. at 573, the press may have no weightier responsibility than to report on government, especially the courts.

Much of this news reporting requires contemporaneous access to court records. And the constitutional right of access assumes timely access. *E.g.*, *Schaefer*, 2 F.4th at 328 (“[T]he public and press generally have a *contemporaneous* right of access to court documents and proceedings when the right applies.” (quoting *Pub. Citizen*, 749 F.3d at 272)); *Courthouse News Serv. v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020) (“[A] necessary corollary of the right to access is a right to timely access.” (collecting cases)). Court records help ensure reporting about the judicial

system is accurate and complete, and reporters and the public alike benefit when news reports can directly reference court documents.²

Although the Commonwealth has a system allowing 24/7 access to non-sealed court records, the press and public are prohibited from accessing the records *except* in person at the specific county courthouse where the records were filed and during those days and times the courthouse is open. It does this as a matter of policy, not “extraordinary circumstances.” *Schaefer*, 2 F.4th at 328.³ The majority dismissed

² Many important stories rely on court records. *See, e.g., Purdue Pharma Backs Creditor Lawsuit Against Sacklers for Shifting Assets*, Wall St. J. (July 8, 2024), <https://www.wsj.com/articles/purdue-pharma-backs-creditor-lawsuit-against-sacklers-for-shifting-assets-e15ae1e3>; *New information in \$387 million lawsuit against Cumberland Children’s Hospital*, WTVR (July 31, 2023), <https://www.wtvr.com/news/local-news/cumberland-childrens-hospital-lawsuit-update-07-31-2023>; *Civil lawsuit reveals new details in infamous ‘Catfish Killer’ triple murder*, WRIC (Feb. 6, 2024), <https://www.wric.com/news/virginia-news/western-virginia/civil-lawsuit-reveals-new-details-in-infamous-catfish-killer-triple-murder/>; *Browns QB Deshaun Watson settles latest civil lawsuit brought by woman alleging sexual assault*, Associated Press (Oct. 8, 2024), <https://www.nfl.com/news/browns-qb-deshaun-watson-settles-latest-civil-lawsuit-brought-by-woman-alleging-sexual-assault>.

³ PACER provides a single access point to over 1 billion documents from over 200 federal courts, for more than 4.7 million registered accounts. *See* News Release, U.S. Courts (Aug. 2, 2024), <https://www.uscourts.gov/data-news/judiciary-news/2024/08/02/applications-open-pacer-user-group>. There is no evidence that public access through PACER (or any state courts systems) has resulted in widespread data misuse. *Op.* at 15–17. The Military Justice Review Panel recently recommended that all military courts move to fully integrated online public docket systems, signaling confidence that privacy concerns can be satisfied. *See* Mil. Just. Rev. Panel, *Comprehensive Review and Assessment of the Uniform Code of Military Justice* 14–15 (2024), <https://mjrj.osd.mil/sites/default/files/MJRP%202024%20Comprehensive%20Review%20and%20Assessment%20of%20the%20UCMJ.pdf>.

the media's concerns over OCRA's restrictions in part as Appellant's desire "to skip the trip to the courthouse and view civil court records remotely on the internet." Op., Doc. No. 79, at 3. Yet, the access restrictions here are significant for the news media's practical ability to monitor and obtain records from civil cases of legitimate public interest for real-world practical reasons that have constitutional dimension:

First, precluding court record access at night and on weekends is a meaningful restriction on the ability to report and can impose delays. As the Ninth Circuit has explained, because "old news" often "does not receive[] much public attention," denying access "at the time [the] audience would be most receptive would be effectively equivalent to a deliberate statutory scheme of censorship." *Planet*, 947 F.3d at 594 (citation and internal quotation marks omitted); *accord Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure . . . may have the same result as complete suppression."). Absent a compelling justification by the government, delays in access to court filings, even brief ones, have been found to be unconstitutional. *See Schaefer*, 2 F.4th at 329 (requiring court to provide access to new civil complaints on same day as filed); *Associated Press v. U.S. District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (vacating order imposing 48-hour sealing period as "a total restraint on the public's first amendment right of access even though the restraint is limited in time").

Prompt access to judicial records ensures that the public learns about important cases while they are newsworthy, promotes accuracy in reporting, and informs public debate about cases and the institutions handling them. *See Grove Fresh Distribs., Inc.*, 24 F.3d at 897 (delaying disclosure “undermines the benefit of public scrutiny”). According to one study, “nearly two-thirds of adults now say they look at news at least several times a day.” *How Americans Describe Their News Consumption Behaviors*, Am. Press Inst. (June 11, 2018), <https://perma.cc/M3L2-84PB>. The public recognizes the “value of news” and relies on the press for timely, accurate information about our increasingly complex and interconnected world. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918) (“The peculiar value of news is in the spreading of it while it is fresh[.]”); *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 561 (1976) (“[T]he element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.”).

Second, requiring non-attorney members of the public to travel to the courthouse imposes a hardship exclusive to them, felt especially keenly by the press, that the majority opinion did not appear to consider. The circuit courts of 105 counties, spanning 30,000 square miles, use OCRA. Each has its own terminal offering viewing capabilities for only those cases filed there. When parties submit filings at courthouses, particularly in remote parts of the Commonwealth, the news media’s ability to timely obtain, analyze, and report on such filings may be rendered

impracticable by a variety of factors, such as staffing, weather, distance to the courthouse, and related resource issues. The impracticalities of traveling to the more than 100 Virginia courthouses to view and report on court records mean that these publications must inevitably limit their coverage to a small number of courts, potentially leaving Virginians without reporting on many proceedings.

The majority did not appear to consider evidence that in some cases, the burden placed by the OCRA restriction is tantamount to a denial of access for the many news organizations unable to devote the manpower and resources required to travel. The U.S. news industry remains under financial strain, and staff and reporting budgets tight, as advertising revenue has declined over the last two decades. *See, e.g.,* Brad Adgate, *Newspapers Have Been Struggling and Then Came the Pandemic*, *Forbes* (Aug. 20, 2021), <https://perma.cc/3CKC-PSUD>; Elizabeth Grieco et al., *About a third of large U.S. newspapers have suffered layoffs since 2017*, *Pew Rsch. Ctr.* (July 23, 2018), <https://perma.cc/Y9ES-DT47>. A 2022 study estimated the United States would lose one-third of its newspapers by 2025. Erin Karter, *Nw. Now* (June 29, 2022), <https://news.northwestern.edu/stories/2022/06/newspapers-close-decline-in-local-journalism/>; *see also* Penelope Muse Abernathy, Univ. N.C., *News Deserts and Ghost Newspapers: Will Local News Survive?* 11 (2020), <https://perma.cc/4PSK-3QUY> (finding that more than 2,000 weekly and nondaily news outlets shuttered between 2004 and 2019). The demise

of news outlets had contributed by 2020 to the existence of over 1,800 so-called “news deserts,” defined as communities with no local newspaper or whose “residents are facing significantly diminished access to” the kind of “local news and information” important to self-government. Abernathy, *supra*, at 9–12, 115.

These difficulties are no less real in Virginia, where news organizations have experienced closures, mergers, and reductions of news staff. See Christopher Connell, *As Newspapers Struggle, Local News is Harder to Find in Virginia*, Va. Humanities (May 1, 2023), <https://virginiahumanities.org/2023/05/news-about-local-news/> (“[A]bout 42 Virginia newspapers . . . closed or were merged” as of September 202 and “several other weeklies . . . closed or merged” in 2023.); Karri Peifer, *Virginia’s Newspaper Decline*, Axios Richmond (Dec. 4, 2023), <https://www.axios.com/local/richmond/2023/12/04/virginias-newspaper-decline> (“Virginia’s local newspapers are declining more rapidly than predicted” while “[s]tudies have shown that civic engagement declines when they close.”). As of 2023, seven counties in Virginia lacked a local newspaper, and some newspapers were operating without any local journalists on staff. See Peifer, *supra*; Abernathy, *supra*, at 20.

Where public access is limited in this way, it is the public that suffers, and this consideration is one of exceptional importance and constitutional weight. The ability to access non-confidential civil court records remotely through OCRA would

aid the news media in covering court proceedings across the Commonwealth and, ultimately, make for a more informed public.

II. The Court should rehear this case to correctly apply the law on a matter of First Amendment importance.

The majority erred in finding that the OCRA access restriction for non-attorneys is not subject to strict scrutiny under *Press-Enterprise II* and is instead a content-neutral provision subject only to intermediate scrutiny under a time, place, and manner analysis. Op. at 8–10. This issue is one of First Amendment import that merits review by the full Court, or reconsideration by the panel.

The First Amendment presumptively prohibits government action regulating expression based on the identity of the speaker. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340, 352–53 (2010); accord *Reed v. Town of Gilbert*, 576 U.S. 155, 169–71 (2015) (recognizing that because speaker-based restrictions “are all too often simply a means to control content,” they “demand strict scrutiny” (citations omitted)). Such restrictions are presumptively unconstitutional unless the government can demonstrate that the restrictions “further[] a compelling interest and [are] narrowly tailored to achieve that interest.” *Citizens United*, 558 U.S. at 340 (citation omitted).

As Judge Gregory’s dissent observed, the OCRA restriction here selectively and discriminatorily denies members of the press contemporaneous access to non-confidential civil court records outside of courthouse hours, on weekends and

holidays, while providing such access to favored speakers (or, as he put it, “listeners”), *i.e.*, Virginia attorneys and certain government agencies, Op. at 36 (Gregory, J., dissenting). Such speaker-based restrictions impose unconstitutional delays and, in some instances—such as when distance or travel conditions preclude a reporter’s journey to a physical courthouse in a distant part of the Commonwealth—may, as a practical matter, constructively deny access to judicial records altogether. Because it makes reporting on court proceedings across the Commonwealth—particularly in “news deserts” that lack a local news outlet—impracticable if not impossible, the OCRA restriction presents “the danger of suppressing[] particular” news coverage entirely. *Leathers v. Medlock*, 499 U.S. 439, 453 (1991). Indeed, these burdens resulting in *less* access to court records were the very purpose of the implemented restriction, and were not adequately considered by the majority here. Op. at 17-20.

The panel’s determination that there is no right of access to civil court records online sidesteps the significant constitutional concern recognized in the dissent. *Compare* Op. at 8–9, 12, *with id.* at 41–42 (Gregory, J., dissenting). The means by which judicial records are made available—electronically, in-person, or both—are not determinative of whether there is a fundamental First Amendment right of access to such records. This Court has repeatedly held that there is a presumptive First Amendment right of access to most civil court records. *See, e.g., Pub. Citizen*, 749

F.3d at 267–69; *Schaefer*, 2 F.4th at 328. And, in implementing OCRA, Appellees chose to make non-confidential civil court records (to which the presumptive right of access attaches) available only to certain members of the public via online access. Having chosen to make such records available electronically through OCRA, Appellees now must show that any restrictions on that form of access—including discriminatory restrictions denying access to certain members of the public, including the press—are narrowly tailored to a compelling government interest. *See Press-Enterprise II*, 478 U.S. at 9–10.

CONCLUSION

For the foregoing reasons, amicus Reporters Committee urges the Court to grant the Petition of CNS and order rehearing or rehearing en banc.

Dated: February 14, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(b)(4) and Fed. R. App. P. 32(c) because it contains 2,454 words, excluding the portions exempted by Fed. R. App. P. 32(f). The 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: February 14, 2025

/s/ Bruce D. Brown

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Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2025, I caused the foregoing Brief of Amicus Curiae the Reporters Committee for Freedom of the Press in Support of Plaintiff-Appellant's Petition for Rehearing or Rehearing En Banc to be electronically filed with the Clerk of the Court using the appellate CM/ECF system, which will automatically send notice of such filing to all counsel of record.

Dated: February 14, 2025

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