IN THE COURT OF APPEALS OF VIRGINIA

RECORD NO. 1669 – 23 – 2

NATIONAL PUBLIC RADIO, INC., CHIARA EISNER,
and IAN KALISH,
Appellants

v.

VIRGINIA DEPARTMENT OF CORRECTIONS
Appellee

BRIEF OF AMICI CURIAE THE ASSOCIATED PRESS; THE ATLANTIC MONTHLY GROUP LLC; GANNETT CO., INC.; GRAY MEDIA GROUP, INC.; THE INTERCEPT MEDIA, INC.; LEE BHM CORP.; THE MARSHALL PROJECT; THE NATIONAL PRESS CLUB JOURNALISM INSTITUTE; THE NATIONAL PRESS CLUB; THE NEW YORK TIMES COMPANY; NEWS/MEDIA ALLIANCE; PROPUBLICA, INC.; RADIO TELEVISION DIGITAL NEWS ASSOCIATION; TEGNA INC.; THE VIRGINIA COALITION FOR OPEN GOVERNMENT; AND WP COMPANY LLC IN SUPPORT OF APPELLANTS

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February 1, 2024

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INTERESTS OF AMICI CURIAE

Amici curiae – sixteen media and government transparency organizations, *see* Appendix[1] – submit this brief in support of Appellants. Amici (and their journalists and members) frequently utilize the Virginia Freedom of Information Act, Va. Code Ann. § 2.2-3700, et seq. ("VFOIA" or the "Act"), to gather information to report on matters of public interest and shed light on the activities of government. This includes, in particular, reporting on how the death penalty was implemented (when it was operational in Virginia), how prisons in the Commonwealth (and nationwide) operate, and how prisoners are treated.

Amici submit this brief specifically to highlight the longstanding and significant public interest in the death penalty and criminal punishment and to emphasize that courts interpreting VFOIA must take this public interest into account. The Circuit Court's broad ruling below condoning government secrecy ignored the public interest in contravention of the principles of government transparency and accountability animating VFOIA. The ruling threatens to seriously undermine the press' and public's role in democratic oversight of these often controversial government functions.

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[1] The Appendix attached hereto contains a description of each of the amici, as well as their corporate disclosure statements.

ARGUMENT

VFOIA strongly indicates that, in construing its exemptions – including Section 2.2-3706(B)(4) of the Virginia Code (exempting "records of persons imprisoned"), at issue in this case – courts must consider the goals underpinning the statute, including service of the public interest. There can be little doubt that the disclosure of the audio recordings Appellants seek documenting executions conducted in Virginia serves a significant public interest. Indeed, whether and how governments execute their citizens have been matters of tremendous public interest and debate for centuries. Disclosure of information about such government activities equips the public with the knowledge necessary to ensure oversight of executions, to hold government officials accountable, and to make informed decisions about the future of criminal punishment. The lower court erred in failing to consider this longstanding public interest, and its decision should be reversed.

I. Consideration of the Public Interest Is Necessary to "Broadly Construe" VFOIA's Disclosure Provisions

The goal of VFOIA is to ensure that "the affairs of government" not be "conducted in an atmosphere of secrecy" because the "public is . . . the beneficiary of any action taken at any level of government." Va. Code Ann. § 2.2-3700(B). That is, the Legislature enacted VFOIA because it

recognized the strong public interest in the electorate understanding how the government conducts itself. *See id.* (VFOIA enacted "to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government"); *see also Cartwright v. Commw. Transp. Comm'r of Virginia*, 270 Va. 58, 64 (2005) (VFOIA is "salutary statutory scheme to provide freedom of information consistent with open government"). To serve that public interest, VFOIA provides presumptive access to all government records and unequivocally provides that its disclosure provisions must "be liberally construed" and its exemptions "narrowly construed." Va. Code Ann. § 2.2-3700; *see also, e.g.*, *Gloss v. Wheeler*, 887 S.E.2d 11, 21 (Va. 2023) (VFOIA places "heavy 'interpretive thumb on the scale in favor of' open and transparent government"); *Hawkins v. Town of South Hill*, 301 Va. 416, 424 (2022) (same).

A "liberal" construction of VFOIA is necessarily one which (among other things) "will carry out the legislative intent behind the statute." *Id*. at 425. VFOIA's intent is to facilitate public oversight of government activity, particularly when the public has a meaningful and legitimate interest in such activity, in the absence of some compelling and specific governmental interest to the contrary. Naturally, then, under a "liberal" construction of the

statute, courts cannot ignore the question of whether disclosure of the records at issue would serve the public interest and help to promote government accountability. Courts interpreting sunshine laws throughout the country consistently underscore that such laws should not be applied so as to allow governments to shield themselves from public oversight on issues of great public importance and interest absent some compelling reason.[2] *See, e.g.*, *Bos. Globe Media Partners, LLC v. Dep't of Crim. Just. Info. Servs.,* 140 N.E.3d 923, 933 (Mass. 2020) (courts "cannot read exemption[s] . . . so broadly" that they contravene the general rule of disclosure)*; N.J. Media Grp., Inc. v. Twp. of Lyndhurst*, 163 A.3d 887, 907 (N.J. 2017) ("The public's interest in transparency favors disclosure . . . in matters of great public concern."); *Predisik v. Spokane Sch. Dist. No. 81,* 346 P.3d 737, 742 (Wash. 2015) (emphasizing importance of public interest; noting that "secrecy can breed suspicion" and "government cannot be held accountable for actions it shields from the public's eye").

In short, VFOIA must be interpreted with an eye toward the goal of maximum public disclosure, particularly where disclosure serves a significant public interest. The Circuit Court failed to do this when it broadly

[2] *See Hawkins*, 301 Va. at 421-22 (courts interpreting VFOIA may be "aided by the statutes and cases from other states").

interpreted VFOIA § 2.2-3706(B)(4) so as to fully shield the requested audio recordings from public review. The lower court's overbroad reading of the phrase "records of persons imprisoned" threatens not only the public's access to records about the implementation of the death penalty (which has a long history of openness), but also its access to records about how the government operates prisons more generally. This cannot be what VFOIA intends.

II. Public Interest in the Death Penalty Is Acute and Longstanding, and Access to Information About it Is Crucial to Public Debate and Oversight

The public has a significant and undeniable interest in access to information about the implementation of the death penalty because execution – a sentence the government imposes in the name of the people – is the most extreme and irrevocable form of punishment. Accordingly, capital punishment has long been the subject of intense ethical, political, and legal debates in public forums across the country, including in the media, legislatures, courts, and churches.[3] This interest is also rooted in

[3] Even putting aside the public interest generated because of the ethical concerns about capital punishment, public interest in this topic is also substantial given the amount of taxpayer dollars dedicated to it. *See, e.g.*, Alanna Durkin Richer, *Execution Costs Spike in Virginia,* ASSOCIATED PRESS (Dec. 12, 2016), http://tinyurl.com/2keabxtf; Keri Blakinger & Maurice Chammah, *A $6,300 Bus. A $33 Last Meal. What New Documents Tell Us About Trump's Execution Spree*, MARSHALL PROJECT (Jan. 14,

the Eighth Amendment's prohibition against "cruel and unusual punishment," which "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Kennedy v. Louisiana*, 554 U.S. 407, 419, *as modified* (Oct. 1, 2008) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). The public has *always* sought information about executions, drawn by a need to understand how the government deals with the most violent crimes, how it imposes the ultimate punishment, and to assess whether justice is done.

Since the beginning of the Republic, Americans have made it known that capital punishment is an important issue to them and that they care about how it is implemented. Historically, the public gathered in large crowds to attend executions, *see* Stuart Banner, THE DEATH PENALTY, AN AMERICAN HISTORY 10–11 (2002), and witnesses often numbered in the thousands, *see* Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551, 564 (1994); *see also Cal. First Amend. Coal. v. Woodford*, 299 F.3d 868, 875 (9th Cir. 2002) ("Executions were fully open events in the United States . . . ."). For example, the press reported that a

2021), http://tinyurl.com/4xabew4w. All news articles referenced in this brief are collected in the Appendix.

"thousand people" witnessed the 1902 execution of George Robinson in Virginia. *George Robinson Hanged*, BALT. SUN, Aug. 2, 1902, at 9, *available at* http://tinyurl.com/44hcscbh.

With knowledge of how the government carried out capital punishment, gained from access to executions, members of the public exercised their right of public oversight. In New York in the 1880s, public agitation about "disastrous" hangings led the governor to appoint a commission to study "every execution method ever used throughout history" to "find a less barbaric means to execute." *See* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 62 (2007).

Access to information about executions gave rise to a similar public action in Minnesota in 1906, when William Williams was executed. *See* Ben Welter, *Feb. 13, 1906: Minnesota's Last Execution*, STAR TRIBUNE (May 1, 2014), http://tinyurl.com/267uen34. A news report of the execution described the botched hanging, which caused Williams to be slowly strangled for 14 minutes before he was pronounced dead. *Id.* Reports about the incident "ignited a movement . . . to abolish capital punishment," and governors commuted every death sentence imposed in Minnesota until the death penalty was abolished five years later. *See* John D. Bessler,

Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions, 45 FED. COMM. L.J. 355, 364 & n.42 (1993); *see also* John D. Bessler, *The 'Midnight Assassination Law' and Minnesota's Anti-Death Penalty Movement, 1849-1911*, 22 WM. MITCHELL L. REV. 577, 700 (1996) ("[T]he newspapers that exposed the gruesome details of Williams' execution . . . made it Minnesota's last hanging.").

In modern times, access to information about the execution of prisoners continues to serve the public interest and the goals of public oversight. Just for example:

- In Florida, the publication of photographs of the 1999 electric chair execution of Allen Lee Davis "whipped up renewed passion in an old debate that . . . signal[ed] the end of the electric chair in Florida and perhaps the rest of the nation." Rick Bragg, *Florida's Messy Executions Put the Electric Chair on Trial*, N.Y. TIMES (Nov. 18, 1999), http://tinyurl.com/4shfumka. Shortly after, Florida's legislature switched its method of execution to lethal injection. *See* Deborah W. Denno, *Adieu to Electrocution*, 26 OHIO N.U. L. REV. 665, 668 (2000).

- In Oklahoma, a reporter for Tulsa World "wrote a dramatic account" of the 2014 execution of Clayton Lockett, who "writh[ed]" for "43 minutes after he received what was supposed to be a lethal injection." This reporting led to calls for an "investigation" and a "moratorium" on the death penalty in the state, and caused the governor to issue a temporary stay of upcoming executions. *See* Lindsey Bever, *Botched Oklahoma Execution Reignites Death Penalty Debate*, WASH. POST (Apr. 30, 2014), http://tinyurl.com/hjkyev55. Afterwards, the reporter obtained numerous records about the execution through an open records request, which identified the many failures in the

process. *Reporters Committee Attorneys Help Win Oklahoma Lawsuit over Delayed Release of Records Related to 2014 Botched Execution*, REPORTERS' COMM. FOR FREEDOM OF THE PRESS (Apr. 23, 2018), http://tinyurl.com/4hepu42r; *see also* Andrew Cohen, *How Oklahoma's Botched Execution Affects the Death Penalty Debate*, THE ATLANTIC (Apr. 30, 2018), http://tinyurl.com/mryna6bb.

- In Arizona, after reports about the botched execution of Joseph Wood, *see, e.g.*, Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, ARIZ. REPUBLIC (Nov. 6, 2014), http://tinyurl.com/tuwab7sb, the state took an "eight-year hiatus" from the death penalty and then paused it again "due to" its "history of mismanaging executions," *see* Jacques Billeaud, *Arizona Governor Won't Proceed with Execution Set by Court*, ASSOCIATED PRESS (Mar. 3, 2023), http://tinyurl.com/2s4bz6fb.

- Recently in Alabama, news articles, based on access to additional information about the execution of Joe Nathan James, told a "radically different tale than the narrative offered by the Alabama Department of Corrections." Elizabeth Bruenig, *Dead to Rights: What Did the State of Alabama Do to Joe Nathan James in the Three Hours Before His Execution?*, THE ATLANTIC (Aug. 14, 2022), http://tinyurl.com/5ct2x75s. After the reporting on this and other botched executions, "Alabama Gov. Kay Ivey sought a pause in executions and ordered a 'top-to-bottom' review of the state's capital punishment system." Jay Reeves, *Alabama Pausing Executions After 3rd Failed Lethal Injection*, ASSOCIATED PRESS (Nov. 21, 2022), http://tinyurl.com/2jz8akcx.

Here in Virginia, lawmakers decided to allow condemned individuals a choice between electrocution and lethal injection after multiple botched electrocutions, which a witness compared to "violent torture." Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 462-63 n.921 (1997). Following the change, the press continued to

report on executions (even with only limited access to them), including one that required "a 22-minute delay to allow medical personnel to find a vein large enough for the needle," *Store Clerk's Killer Executed in Virginia*, N.Y. TIMES (Jan. 25, 1996), http://tinyurl.com/3s278pvd, and another that "appeared to take an inordinately long time – more than a half-hour – to place the IV lines and do other procedures," Frank Green & Ali Rockett, *Executed: Ricky Gray Put to Death for Murders of Harvey Girls*, RICHMOND TIMES-DISPATCH (Jan. 19, 2017), http://tinyurl.com/4smah3st. Reports like these and others helped drive discussion of the death penalty, which was eventually abolished in 2021. *See* Denise Lavoie, *Virginia, with 2nd-Most Executions, Outlaws Death Penalty*, ASSOCIATED PRESS (Mar. 24, 2021), http://tinyurl.com/mr245jzt.

Courts have recognized the need for information about executions, emphasizing that "[i]ndependent public scrutiny – made possible by the public and media witnesses to an execution – plays a significant role in the proper functioning of capital punishment." *Woodford*, 299 F.3d at 876-77 (emphasizing "historical tradition" and "functional importance" of public access to information about the death penalty); *see also Phila. Inquirer v. Wetzel*, 906 F. Supp. 2d 362 (M.D. Pa. 2012) ("permitting the press to view the entire execution without visual or auditory obstruction contributes to the

proper functioning of the execution process" because, among other functions, it "may promote a more informed discussion of the death penalty" and "exposes the execution process to public scrutiny"); *Schad v. Brewer*, 2013 WL 5551668, at *8-9 (D. Ariz. Oct. 7, 2013) (providing information "to the public" about how the death penalty is implemented "furthers the . . . goal of an informed public debate"); *Roth v. Dep't of Just.*, 642 F.3d 1161, 1176 (D.C. Cir. 2011) (public interest in records is "strengthened" when records relate "to the ultimate punishment"); *New Jerseyans for Death Penalty Moratorium v. N.J. Dep't of Corr.*, 883 A.2d 329, 340 (N.J. 2005) ("capital punishment" is "issue of signal public importance").

At the end of the day, "few issues in American society have generated as much impassioned debate as the death penalty," making public interest in this topic "heightened," *ACLU of N. Cal. v. Superior Court*, 134 Cal. Rptr. 3d 472, 484-87 (Cal. Ct. App. 2011), including especially in Virginia. *See, e.g.*, Madeleine Carlisle, *Why It's So Significant Virginia Just Abolished the Death Penalty*, TIME (March 4, 2021), http://tinyurl.com/yw27cvhe (tracing Virginians' views).

III. The Public Also Has Substantial Interest in How the Government Punishes Crime Generally

The Circuit Court's reading of VFOIA's "records of persons imprisoned" exemption, which is so broad as to disrupt the public's

longstanding access to information about the death penalty, could likewise prevent access to information about *all* prison-related government functions. But the public interest in how the government carries out other forms of criminal punishment on behalf of the people is also significant. Not only do governments devote substantial public resources to the prison system, *see* Michael McLaughlin, et al., *The Economic Burden of Incarceration in the U.S.*, INST. FOR JUST. RSCH. & DEV. (2016), http://tinyurl.com/e2e5hudh (costs of incarceration far exceed $80 billion), but more than five percent of Americans are going to spend time in a state or federal prison in their lifetime, *see* Alexander F. Roehrkasse & Christopher Wildeman, *Lifetime Risk of Imprisonment in the United States Remains High and Starkly Unequal*, SCIENCE (Dec. 2, 2022), http://tinyurl.com/5n7b9br8. Access to information about how the government operates inside those prisons is crucial to the public's ability to evaluate the system and exercise democratic oversight.

Reporting on prison-related government functions is critical to that oversight. Indeed, many problems within the carceral system have been exposed by the news media, and were only addressed, because public were made available. Again, just for example:

- Documents obtained through a records request by The Columbus Dispatch provided insight into several deadly

incidents at a prison in Ohio, including two violent clashes with guards leading to inmates' deaths, four suicides, and potential pepper spray abuse. In response, officials at the prison announced they were taking remedial steps, including adding more cameras and increasing their storage capacity, emphasizing de-escalation tactics to staff and holding them more accountable, and strengthening suicide prevention efforts. *See* Laura Bischoff, *Documents Show Problems with Medical Care, Supervision and Violence at Ohio Prison*, COLUMBUS DISPATCH (Oct. 29, 2021), http://tinyurl.com/yck3puw4.

- Based on numerous public records (among other things), ProPublica reported on one California county's placement of hundreds of prisoners on suicide watch every year, where they were "held for days or weeks in rooms without mattresses and sometimes toilets." This practice increased, rather than decreased, prisoner suicides. ProPublica's reporting caused the county to improve conditions, including to provide blankets and additional mental health professionals. *See* Jason Pohl & Ryan Gabrielson, *A Jail Increased Extreme Isolation to Stop Suicides. More People Killed Themselves*, PROPUBLICA (Nov. 5, 2019), http://tinyurl.com/bdehcfd7.

- Hundreds of pages of public records, in addition to other sources, helped The New York Times journalists reveal how "the groundwork for the violence and disorder on Rikers was laid" and how, as a result of that groundwork, "guards [were] posted throughout the system in wasteful and capricious ways, generous benefits like sick leave [were] abused and detainees had the run of entire housing areas." Jan Ransom & Bianca Pallaro, *Behind the Violence at Rikers, Decades of Mismanagement and Dysfunction*, N.Y. TIMES (Dec. 21, 2021), http://tinyurl.com/3jpsupbm. Reporting about Rikers has led to specific reforms, *see, e.g.*, George Joseph, *City Council Passes Bill to Restore Reentry Services to Trans Women on Rikers Island*, THE CITY (June 8, 2023), http://tinyurl.com/yc4zhpex, and there are now efforts to place the jail under federal oversight, *see* Hurubie Meko, *Federal Prosecutor Asks Judge to Strip New York of Control over Rikers*, N.Y. TIMES (Nov. 18, 2023), http://tinyurl.com/4xe3a4wv.

- The Marshall Project's 2022 reporting on violence at the Special Management Unit at Thomson Prison, based in part on information obtained from prison records, led the Bureau of Prisons to shut down the unit and convert the entire prison to a minimum security prison. *See* Christie Thompson & Joseph Shapiro, *How the Newest Federal Prison Became One of the Deadliest*, MARSHALL PROJECT (May 31, 2022), http://tinyurl.com/277zh69t; Impact, MARSHALL PROJECT, http://tinyurl.com/4vsv4h9z.

- The New York Times reported that "[d]eaths in state and federal prisons across America rose nearly 50 percent during the first year of the pandemic" and "more than doubled" in six states. Jennifer Valentino-DeVries & Allie Pitchon, *As the Pandemic Swept America, Deaths in Prison Rose Nearly 50 Percent*, N.Y. TIMES (Feb. 19, 2023), http://tinyurl.com/yck75mvy. The reporting followed a Senate investigation revealing that the Justice Department was "failing to effectively implement" a law requiring data collection on deaths in federal and state prisons. Public record requests are tools used to "fill that void." *Id.*; *see also UCLA Law Researchers Find Prison Mortality Rates Skyrocketed Nationwide During Pandemic*, UCLA NEWSROOM (Feb. 19, 2023), http://tinyurl.com/y36drahf ("[T]he UCLA Law Behind Bars Data Project began requesting public records and compiling other data to ensure that records of [prison] deaths were available for and accessible to researchers, advocates and reporters attempting to hold the government accountable for deaths behind bars.").

Time and again, access to public records has played a key role in informing the public about how the government exercises its punishment power over millions of incarcerated individuals.

IV. The Public Interest and the Principles of VFOIA Are Served by Disclosure of the Records Requested Here

The Circuit Court ignored the longstanding and crucial role of records like those Appellants seek in facilitating democratic oversight, which is precisely VFOIA's purpose. The ruling below prevents the public from auditorily "witness[ing] the operations of government," Va. Code Ann. § 2.2-3700, thus depriving it of meaningful insight into how the Commonwealth carried out the ultimate judgment in dozens of executions. *See First Amend. Coal. of Ariz., Inc. v. Ryan*, 938 F.3d 1069 (9th Cir. 2019) ("barring witnesses from hearing" execution proceedings means "that the public [does] not have full information regarding the administration of capital punishment"). Capital punishment is carried out in the name of the people, pursuant to rules and procedures that the people have authorized through the democratic process. Keeping secret the information that the public needs to make decisions about the system severely disserves the public interest and undermines the legitimacy of the whole process. It is exactly the "atmosphere of secrecy" that VFOIA disallows. *See* Va. Code Ann. § 2.2-3700.

Even though Virginia recently abolished the death penalty, there is still significant value in permitting the public to hear contemporaneous accounts of the proceedings to ensure that the public understands all that

happened in and around Virginia's execution chambers, especially as executions continue throughout the United States. *See* Abigail Brooks & Erik Ortiz, *Alabama AG Calls First Nitrogen Gas Execution 'Textbook,' but Witnesses Say Inmate Thrashed in Final Moment*, NBC NEWS (Jan. 26, 2024), http://tinyurl.com/4jwf5k46. Transparency about past executions also fosters trust in government, providing a "significant community therapeutic value," *Phila. Inquirer*, 906 F. Supp. 2d at 368, which is not lessened by the passage of time.

Public interest in the recordings at issue here is particularly acute given that the Commonwealth has identified no countervailing governmental interest in keeping them secret. There is none. Indeed, many of the families of the inmates themselves have publicly expressed that they "wanted Virginia to release the recordings to the public." Chiara Eisner & Tirzah Christopher, *Families of Executed Prisoners Want Death Penalty Tapes Made Public,* NPR (Dec. 20, 2023), http://tinyurl.com/7ey6j5m6. They said they "were less concerned with their own privacy and more interested in being able to hear whether the state had acted correctly when it put their loved one to death." *Id.* (also quoting death penalty lawyer: "'If an individual's family members do not object to the release of

that information, then I can't conceive of a relevant public policy interest in keeping the information secret.").

The death penalty is the strongest punishment a government can wield. When the government has authority over life, liberty, and death, all citizens become both culpable and responsible for how that power is wielded. Whether a person supports or opposes the death penalty, and no matter how they feel about mass incarceration, they are entitled to understand how the machinery of official punishment operates. Any interpretation of VFOIA that ignores this reality and allows unjustified secrecy into the process is wholly antithetical to the very principles of open government and service of the public interest that VFOIA is meant to foster.

CONCLUSION

For the foregoing reasons, and for those stated in Appellants' brief, amici urge this Court to reverse the order issued by the Circuit Court.

Dated: February 1, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies the foregoing Brief of Amici Curiae contains 3,824 words in compliance with Rule 5A:19.

Dated: February 1, 2024

/s/*Alia L. Smith*
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