RECORD NO. 13-5335

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The
United States Court of Appeals
For The District of Columbia Circuit

CAUSE OF ACTION,

Plaintiff – Appellant,

v.

FEDERAL TRADE COMMISSION,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE* THE DAILY CALLER NEWS FOUNDATION IN SUPPORT OF APPELLANT

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Certificate as to Parties, Rulings, and Related Cases

A. Parties and Amici

All parties, intervenors, and amici appearing before the district court are listed in the brief for Appellant Cause of Action. Except for the following, all parties, intervenors, and amici appearing before this Court are also listed in the brief for Appellant Cause of Action:

The Daily Caller News Foundation

B. Rulings Under Review

All rulings under review are listed in the brief for Appellant Cause of Action.

C. Related Cases

All related cases are listed in the brief for Appellant Cause of Action.

Rule 26.1 Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, The Daily Caller News Foundation ("DCNF") states that it is an independent, nonprofit organization incorporated under the laws of the state of Delaware. DCNF has not issued any shares or debt securities to the public, and it has no parent companies. It has no subsidiaries or affiliates that have issued any shares or debt securities to the public. No publicly-held company has a 10% or greater ownership interest in DCNF.

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COA	Cause of Action
DCNF	The Daily Caller News Foundation
FOIA	Freedom of Information Act
FTC	Federal Trade Commission
RCFP	Reporters Committee for Freedom of the Press

Statement of Interest of Amicus Curiae

Movant and *Amicus Curiae*, The Daily Caller News Foundation ("DCNF"), is a nonprofit, 501(c)(3) organization engaged in news gathering and dissemination, including gathering information from Appellant Cause of Action ("COA") and other nonprofit public interest groups. Because the district court's decision threatens the ability of nonprofit public interest groups to gather information for its use and dissemination, DCNF seeks leave to file a brief bringing relevant matters to this Court's attention. By motion, DCNF has requested authority to file its brief pursuant to Fed. R. App. P. 29(a) and D.C. Circuit Rule 29(b).

Rule 29(c)(5) Certification

Pursuant to Fed. R. App. P. 29(c)(5), *amicus* states that A) no party's counsel authored the brief in whole or in part; B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and C) no person—other than *amicus*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

Circuit Rule 29(d) Certification

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amicus curiae* certifies that a separate brief is necessary. DCNF has sought leave to file this brief bringing to this Court's attention relevant matters concerning the Freedom of

Information Act's ("FOIA") public interest fee waiver provision,[1] which are not discussed or fully addressed by COA or the other *amicus*, Reporters Committee for Freedom of the Press ("RCFP"). Counsel understands that RCFP's brief will be focused on the "representative of the news media" fee waiver provision[2] and, it is anticipated, the issues raised by DCNF's *amicus* brief will not be adequately addressed, if at all, by RCFP's brief.

Statutes and Regulations

Pursuant to D.C. Cir. Rule 28(a)(5), all applicable statutes and regulations are contained in the Addendum to the Brief for Appellant Cause of Action.

Summary of Argument

Congressional intent requires that the FOIA fee waiver provisions be construed liberally. The district court violated that intent by imposing the burden on Appellant COA to prove its request "satisfie[d] the public interest standard." The requester has only the burden of production, that is to provide with specificity the factual bases for the required criteria.

The district court also failed to account for new media methods used by startup nonprofits in deciding that COA could not sufficiently disseminate the "requested information" to "increase understanding of the public at large." Additionally, by refusing to account for a nonprofit's use of other sources for

[1] 5 U.S.C. § 552(a)(4)(A)(iii).
[2] 5 U.S.C. § 552(a)(4)(A)(ii)(II).

dissemination, the district court turned what should have been a positive factor supporting COA's ability to disseminate—middleman status—into a negative factor.

Imposing the burden of proof on the requester, failing to recognize new media dissemination processes, and finding the status of middleman as impeding rather than supporting the ability to disseminate information result in giving the Agency the broad discretion, which Congress tried to eliminate, to deny fee waivers based on content of speech in violation of the First Amendment.

Argument

I. In passing and amending FOIA, Congress intended fee waivers for "public interest" entities to be broadly applied.

FOIA was "[i]ntended to 'ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.'" *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) ("*Rossotti*"), quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

In one of his first official communications, President Obama wrote the Heads of Executive Departments and Agencies: "A democracy requires accountability, and accountability requires transparency." Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 21, 2009) ("Presidential Directive"). The

President directed that FOIA "be administered with a clear presumption: . . . All agencies should adopt a presumption in favor of disclosure . . . . " *Id.* (emphasis added).

Since its initial passage in 1966, FOIA amendments have consistently expanded requesters' access to learn what our government is doing.[3] These amendments have been necessary because, as Congress has lamented, "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act." *Openness Promotes Effectiveness in Our National Government Act of 2007*, Pub. L. No. 110–175, § 2, 121 Stat. 2524.

Fee waivers for "public interest"[4] requests reflect Congressional intent to provide the public access to governmental information. It was included in FOIA "to prevent government agencies from using high fees to discourage certain types of requesters, and requests." *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 89 (D.C. Cir. 1986); Sen. Comm. on the Judiciary, Amending the FOIA, S. Rep. No. 854 (1974), *reprinted in* 1974 *U.S.C.C.A.N.* 6267. Yet, after passage,

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[3] FOIA has been amended ten times since enactment in 1966: 1967, 1974, 1976, 1978, 1984, 1986, 1996, 2002, 2007, and 2009.

[4] "Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor." 5 U.S.C. § 552(a)(4)(A)(iii). This *amicus* brief does not address the issue of whether the Court improperly denied COA status as "a representative of the news media." 5 U.S.C. § 552(a)(4)(A)(ii)(II).

federal agencies applied restrictive standards for FOIA fee waivers to public interest entities, thereby thwarting the legislative goal. Therefore, in 1980, a Senate subcommittee recommended that the Department of Justice develop guidelines to address the problem. *Better Gov't Ass'n*, 780 F.2d at 89 (citation omitted). The Subcommittee emphasized that "fees should not be utilized to discourage requests or to place obstacles in the way of such disclosures," and forbade the "use of fees as toll gates on the public access road to information." *Id*. at 78 (internal citations and quotation marks omitted).

In 1986, frustrated with the Executive's continued inconsistent and limited granting of fee waivers for public interest requests, Congress amended the provision because of concern about "the current narrow interpretation of the act's intent by Federal agencies . . . ." 132 Cong. Rec. S16489. Congress wanted to ensure that nonprofit, public interest groups had ready access to FOIA fee waivers.

Sen. John Kerry (D-MA) made clear Congress wanted "waivers and reductions of fees available to all requesters when the information released contributes to public understanding of the Government." *Id.* (statement of Sen. Kerry).

Rep. English (D-OK) praised the 1986 amendments because "[T]he standard for fee waivers is broader than current law and will require the granting of more

fee waivers." 132 Cong. Rec. H9455 (daily ed. Oct. 8, 1986) (statement of Rep. English).

In a colloquy, Sens. Kerry and Leahy discussed the legislative intent of the 1986 amendment:

> Mr. KERRY. If I may ask my distinguished colleague from Vermont, was it not the intention of this amendment to make more generous the FOIA's fee waiver provisions for the news media and public interest users, not to restrict them? ***
>
> Mr. LEAHY. My distinguished colleague from Massachusetts understands the amendment perfectly. Any statements in the record which give a more restrictive meaning to the amendment with regards to the waiver and reduction of fees conflict with the clear language of the amendment itself. ***

132 Cong. Rec. S16489 (daily ed. Oct. 14, 1986).

Soon after, in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282 (9th Cir. 1987), the court "heeded" this legislative intent. "The amendment's main purpose was 'to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.'" *Id.* at 1284.[5] *McClellan* compared the original with the new test for fee waivers and noted the judiciary's less deferential standard of review over agencies' decisions:

> Under the old test, an agency was required to waive or reduce fees when to do so was in the public interest because furnishing the information can be considered as primarily benefiting the general

[5] Citing 132 Cong. Rec. S16496 (Oct. 15, 1986) (Sen. Leahy).

> public. Under the new test, "Documents shall be furnished without any charge or at a charge reduced…if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."
>
> In addition, the amendment alters the standard of judicial review for waiver of fees. A court no longer applies the "arbitrary and capricious" standard to an agency's action. Instead, "in any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo . . . ."

Id. at 1284 (underlined emphasis added; citations omitted).

Thus, the 1986 amendments took aim at both agency decisions and judicial review of those decisions. By lessening the standard for when information is in the "public interest" and retaining "shall," Congress removed the broad discretion previously accorded agencies when deciding fee waivers. By changing the standard for judicial review from the highly deferential "arbitrary and capricious" to "*de novo*," Congress sought to reign in the wide variability among agencies in fee waiver decisions. There is a need for "uniformity among the agencies in their application of FOIA." *Oglesby v. United States Dep't of Army*, 920 F.2d 57, 66 n.11 (D.C. Cir. 1990).

II. Because Congress intended the FOIA fee waiver provision be "liberally construed," the trial court erred in placing the burden of proof on requester COA to establish that its "request satisfies the public interest standard for fee waivers."

Crucial to implementing the congressional intent of broadly construing the FOIA fee waiver provision for public interest entities is whether and what burden

is on the requester. Even prior to the 1986 amendment, courts recognized there was a "presumption" that nonprofit requesters should be granted fee waivers. *Better Gov't Ass'n*, *supra*, 780 F.2d 86, was a consolidated case in which this Court admonished three executive agencies[6] for using guidelines that did not recognize this presumption when providing fee waivers to nonprofit, public interest groups:[7]

> The guidelines should note that the presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public.

Id. at 95. (Emphasis added). The Court, which disapprovingly observed "[n]o such presumption appears in the 1983 DOJ guidelines,"[8] also criticized them for making "no mention of non-profit groups." *Id*. After the 1986 amendment, courts have characterized this presumption as a provision that should be "liberally construed in favor of waivers and non-commercial requesters." *Rossotti*, 326 F.3d at 1312, quoting *McClellan*, 835 F.2d at 1284, in turn quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (Sen. Leahy).

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[6] Departments of State, Interior, and Justice.

[7] The three agencies initially denied the fee waivers and then reversed, asking the Court to consider the issue "moot" and unripe. The Court refused, citing the continued existence of the defective guidelines and future harm to a frequent FOIA requester. *Better Gov't Ass'n*, 780 F.2d at 91-92, 95.

[8] All three agencies utilized the DOJ guidelines when denying fee waivers. *Id*. at 89-90.

The Federal Trade Commission ("FTC") utilizes a regulation to decide FOIA fee waivers. The relevant sections basically restate 5 U.S.C. § 552(a)(4)(A)(iii) (2012), dividing the statutory text into a four-part test with no further guidance.[9] FTC regulations, just like the inadequate DOJ guidelines in *Better Gov't Ass'n*, provide no presumption or guidance to "liberally construe[ ]" fee waiver requests. Nor do they address nonprofit public interest requesters. Thus, FTC guidelines fail even the legal requirements extant prior to the 1986 liberalizing fee waiver amendment. They also violate the Presidential Directive that "the presumption of disclosure be applied to all FOIA decisions." (Emphasis added.)

COA, created in 2011, is a startup, nonpartisan, nonprofit, public interest group. It uses public advocacy and legal reform strategies to ensure greater transparency in government and to protect taxpayer interests and economic freedom. In upholding the agency's fee waiver denial, the district court not only ignored the absence of a presumption for public interest requesters in the FTC regulations, but moreover compounded that error by specifically placing on COA the "burden of proving that its request satisfies the public interest standard for fee waivers." A384.

[9] 16 C.F.R. §§ 4.8(e)(2)(A-D).

The error can be traced to *Larson v. CIA*, 843 F.2d 1481 (D.C. 1988), a *pro se* case, where this Court erroneously cited *McClellan*, supra, as holding that "the burden for satisfying the public interest standard remains on the requesters." *Id.* at 1483, citing *McClellan* at 1284-85. *McClellan* did not so hold. Rather, *McClellan*, citing *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 647 (D.C. Cir. 1987), stated that "[a] requester seeking a fee waiver bears the initial burden of identifying the public interest to be served." *McClellan* at 1285 (emphasis added).

The burden of going forward to establish a factual element is not the same as carrying the burden to prove that fact.[10] In *Dir. v. Greenwich Collieries*, 512 U.S. 267, 273 (1994) ("*Greenwich*"), the Supreme Court discussed, under the Administrative Procedure Act (APA), the distinction between the "burden of persuasion" and the "burden of production." It observed that the term "burden of proof" had an "ambiguous" history and had been used to refer to both persuasion and production burdens. The Court found such ambiguity "largely….eliminated by the early twentieth century," 512 U.S. at 276, and held that today "burden of proof" means "burden of persuasion." *Id.*

By imposing on COA the burden of proof (persuasion), the district court found no presumption in favor of a fee waiver. If the district court had "liberally

[10] The district court leaves unanswered the standard of that burden. Is it preponderance of the evidence or clear and convincing?

construed" COA's fee waiver request, it would have required the request only be "reasonably specific" and "non-conclusory." *Rossotti*, 326 F.3d at 1310.

Without explicitly using the term "prima facie," *Rossotti* placed no burden of proof on the fee waiver requester, but required only non-conclusory specificity about the requester's dissemination capability. *Id.* at 1314. It found sufficient the mere listing of past methods of dissemination without any assertion of who would distribute the requested FOIA material, stating that nothing in FOIA or prior decisions required "such pointless specificity." *Id.*

The Ninth Circuit understood the *Greenwich* burden distinction. In *Friends of the Coast Fork v. United States DOI*, 110 F.3d 53, 54 (9th Cir. Or. 1997), the court explained that the burden on the requester is an "initial burden" that requires the fee waiver requester to make a "prima facie showing of entitlement, which the government [must then] satisfactorily rebut." (Emphasis added).

> Friends and ONRC have passed the test. They identified why they wanted the administrative record, what they intended to do with it, to whom they planned on distributing it, and the zoological expertise of their membership. . . . [T]hey made it clear . . . that they meant to challenge publicly the scientific basis for the western pond turtle listing denial. This suffices as a prima facie showing that disclosure to Friends and ONRC is "likely to contribute significantly to public understanding."

Id. at 56 (emphasis added).

The district court required no "satisfactory[] rebut[tal]" by FTC, but rather imposed on COA "the burden of proving that its request satisfies the public

interest . . . ." A384 (emphasis added). By so doing, the district court 1) ignored the defective FTC regulations, which fail to establish a presumption in favor of fee waivers for public interest entities; and 2) confused the burden of producing a specific factual basis with the persuasion burden of proving that fact. Thus, an agency may set the factual bar as high—or as low—as it pleases in deciding fee waiver requests, thereby permitting it to elude the Congressional intent for FOIA fee waivers and revert to the broad discretion Congress tried to eliminate in 1986.

III. The district court's anachronistic reading of "dissemination" fails to account for the new media revolution and prevents startup, nonprofits from publicizing information about government conduct.

Despite impermissibly placing the burden of proof on the requester, the district court found that COA fulfilled three of the required elements, failing only one. It held that COA did not "prove" the "requested information would increase understanding of the public at large," 16 C.F.R. § 4.8(e)(2)(i), A389, because COA did not sufficiently display an ability to "disseminate" the requested information, faulting COA for "relying on another source" for dissemination. A391.

When all other criteria for a public interest fee waiver have been satisfied, except for "increasing the understanding of the public at large," what sort of non-conclusory factual hurdle must the requester clear to show it is capable of informing the public?

The relevant FTC regulation requires the requester to state how "likely" it is that the information will contribute to "the understanding of the public at large, as opposed to the understanding of the individual requester or a narrow segment of interested persons." 16 C.F.R. § 4.8(e)(2)(i)(C) (2013) (emphasis added).[11]

The district court levied an additional obstacle on COA by requiring it to carry the "burden of proving it has the intent and ability to effectively convey the information to a broad segment of the public." A391 (emphasis added). The district court added to that error by failing to credit COA for dissemination techniques it had listed, *id.* at 391, negatively observing that dissemination was "discussed only in footnotes." *Id.* at 390.[12]

Courts have not imposed such a high standard to fulfill that element. "The relevant inquiry . . . is whether the requester will disseminate the disclosed records

[11] On March 21, 2014, the FTC published a revised 16 C.F.R. § 4.8(e)(2)(i)(C), which adds the parenthetical, "(e.g., by providing specific information about the requester's expertise in the subject area of the request and about the ability and intention to disseminate the information to the public)." Final Rule 79 FR 15680, 15685. Such revision clarifies these are examples of an ability to disseminate, not specific requirements of how to fulfill this element.

[12] The district court miscited the holding in *Oglesby*, 920 F.2d 57, claiming this Court had found "a writer's past work insufficient to justify a fee waiver." A391. *Oglesby*, however, never reached the merits of the request because the plaintiff had not exhausted administrative remedies. Instead, this Court suggested that the plaintiff's listing of past journals where he had published, "which could be future forums for his work," was sufficient to justify a fee waiver. 920 F.2d at 66 n.11 (*dicta*) (emphasis added). Observing that another agency had granted plaintiff a fee waiver request and, citing the "need for uniformity among the agencies in their application of FOIA," this Court invited the agency being sued to revisit its denial. *Id.* at 66.

to a reasonably broad audience of persons interested in the subject." *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 815, 815 n.4 (2d Cir. 1994) (rejecting DOJ argument that requester "shoulder the formidable burden of demonstrating that any records released actually will be disseminated to a large cross-section of the public," and holding that its decision "is consistent with Senator Hatch's view in that we conclude that Carney has shown that disclosure to him will have a sufficient 'breadth of benefit' beyond his own interests") (emphasis added); *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 27 (D.D.C. 2006) (a small, nonprofit journal concerned with prisoner rights granted fee waiver with showing information would be widely disseminated only to "relevant public"); *Forest Guardians v. DOI*, 416 F.3d 1173 (10th Cir. 2005) (small nonprofit's use of emailed newsletter to just a few thousand people plus an intent "to establish an interactive … website" satisfied dissemination element for fee waiver).

Other courts have found that a requester's ability to disseminate information can be inferred from past work. *McClellan*, 835 F.2d at 1286 ("history of disseminating" similar information could show ability to convey requested information); *Rossotti*, 326 F.3d at 1314 (agency should infer future dissemination from listing of prior publications and activity).

COA informed the FTC that its experienced staff

> use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public, either through

> memoranda, reports, or press releases. Furthermore, Cause of Action has contacts with news media organizations that feature our work. In addition, Cause of Action will disseminate any documents it acquires from this request to the public through its website, www.causeofaction.org, which also includes links to thousands of pages of documents Cause of Action acquired through its previous FOIA requests, as well as documents related to Cause of Action's litigation and agency complaints.

A46-A47. COA provided 17 articles (print and online) from September through December 2011 that relied on information from its previous FOIA requests. *Id.* at n. 8. COA also stated that it had "published information on Facebook, Twitter, and via an email newsletter to 'subscribers' during the previous five months." A391 at n.11.

In deciding COA did not fulfill the public dissemination requirement, the district court applied criteria inapplicable to new media organizations. It criticized COA for not specifying, prior to receiving any documents, "the organizations which would disseminate this information."[13] A391. Nothing "in FOIA," the FTC regulations, or this Court's case law "requir[es] such pointless specificity." *Rossotti*, 326 F.3d at 1314.

Furthermore, in upholding the fee waiver denial, the district court levied yet another obstacle on COA, claiming that it needed to "demonstrate other ways in

[13] The district court leaves unanswered how to specify which organizations will disseminate information prior to having received any documents, much less prior to reviewing and developing content from those documents. Publication commitments, even with the old media, are usually not so speculative.

which it would disseminate the information itself, without relying on another source." A391 (emphasis added). This criterion is inapplicable to a public interest fee waiver analysis. It appears the district court used the same analysis for fee waivers it used for a "representative of the news media." In also denying COA that status, the district court claimed that COA did not qualify because it was "more like a middleman for dissemination to the media." A406 (emphasis added).

Agencies are forbidden to use FOIA fees as "toll gates" to the information. *Better Gov't Ass'n*, 780 F.2d at 94. Imposing this new and unsupported "middleman" hurdle into a public interest fee waiver analysis ignores the purpose and important role nonprofits play in the news world in 2014. The district court penalized COA for being a "middleman" when it should have considered that status as a factor supporting COA's ability to disseminate. By their very nature, nonprofits are indispensable "middlemen" for dissemination. Organizations such as DCNF utilize for their own publications the investigative work of nonprofits. They publish raw material and original works generated by the nonprofits. They also use this information to create their own original news stories and commentary.

The district court also failed to credit COA's past use of new media techniques and current capabilities to disseminate information. In fact, these

uncredited techniques and capabilities are most used and most usable by a startup, nonprofit because they are astonishingly effective at getting information to the public at little or no cost.

Ironically, an established nonprofit that could pass the district court's test using early-2000 dissemination techniques could end up reaching fewer and less-interested people because newsletters, blast faxes, and radio and television are not nearly as effective at reaching a target audience. Indeed, the district court's test is more applicable to traditional media as it existed in the last century.[14] The new media is so effective at dissemination, there should be a presumption that a nonprofit using such techniques has the ability to disseminate information to the public at large, both directly and via third parties, e.g. internet search engines. *D.C. Tech. Assistance Org. v. United States HUD*, 85 F. Supp. 2d 46, 49 (D.D.C. 2000) ("In this Information Age, technology has made it possible for almost anyone to fulfill [the dissemination] requirement.")

"Social Media Strategy," is a term for how news and information can effectively be publicly disseminated in 2014. Dissemination often starts with a

[14] Cases cited from just ten years ago were written in a media milieu that is antediluvian compared to 2014 media capability. Facebook was launched in February 2004; Twitter, July 2006; Ustream, May 2007; Instagram, October 2010.

website or blog,[15] or both. Bloggers frequently break news stories. Blogs reference other blogs and websites—hyperlinking to each other—to magnify reach and connection to the community of people interested in particular subjects with multiple perspectives.

Often, a news website has multiple interlinked blogs, which become an integral part of websites dealing with specific issues. Blogs are read by regular visitors or those drawn there by an email alert (or other link) about a posting. That posting, with commentary, can be referenced on a Twitter, Linked-In, Facebook, or Google Plus (or other microblogging system) account, which is then read by followers of those accounts. Other readers may post a link to the original blog or other commentary on their blogs, leading to another cycle of references on social media accounts and yet more readers. There are tens of millions of public blogs and hundreds of millions of users. All this information becomes retrievable by the general public when it is indexed by search engines and available to anyone who has an interest in the subject.

The new media process has overshadowed and supplanted traditional media. Nonprofits use websites and blogs to bring attention to their causes, raise money, and publish original content derived from FOIA-obtained documents. Other news

[15] "A frequently updated website consisting of personal observations, excerpts from other sources, etc., typically run by a single person, and usually with hyperlinks to other sites; an online journal or diary." OED Online. Oxford University Press, March 2014. Accessed May 6, 2014.

entities (both profit and nonprofit) use their social media tools, including their blogs and websites, to draw attention to websites of nonprofits like COA. These new media strategies not only guarantee that a nonprofit requester will be able to reach an audience, but that it will also do so in a more effective way than traditional media strategies. *Carney*, 19 F.3d at 815 n. 4 (requester need only show "breadth of benefit" beyond his own interests).

There has been a sea change in the process for disseminating information, but judicial application of those processes has not kept pace. Any judicial test should presume the granting of fee waivers for nonprofits, *Rossotti*, 326 F.3d at 1312 (citing *McClellan*, 835 F.2d at 1284), and promote "uniformity among the agencies in their application of FOIA," *Oglesby*, 920 F.2d at 66 n.11. The district court's test does neither. In fact, it raises significant First Amendment concerns.

IV. The decision permits broad agency discretion and, when combined with the requirement for the requester to explain use of the information, invites viewpoint discrimination in violation of the First Amendment.

To get a fee waiver, a nonprofit must explain "what [it] intend[s] to do with" the requested information. *Friends of the Coast Fork*, 110 F.3d at 55. Disclosing an intent to criticize the agency has the predictable effect of incentivizing it to deny a fee waiver request or withhold documents.

When the government provides a subsidy—here, the fee waiver—that promotes First Amendment activity, it must do so in a neutral manner. If the government is not neutral, it promotes or undermines a specific message. Allowing Executive agencies broad discretion in granting fee waivers invites discrimination based on the content of the requester's message. The confluence of imposing the burden of proof upon public interest groups and not recognizing modern media techniques provides agencies broad discretion—which the 1986 amendment attempted to overrule—to provide fee waivers to friends while denying them to perceived opponents, as it has here.

"Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984). In *Time*, the Court struck down a statute permitting printing of United States currency illustrations only for educational or newsworthy purposes because it allowed the government to discriminate on the content of the message:

> Under the statute, one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not. The permissibility of the photograph is therefore often dependent solely on the nature of the message being conveyed.

Id. at 648.

Similarly, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 224 (U.S. 1987), Arkansas had a generally applicably 4% sales tax on gross receipts but with numerous exemptions, including "gross receipts or gross proceeds derived from the sale of newspapers," and "religious, professional, trade and sports journals and/or publications printed and published within this State. . . ." (Citations omitted). Plaintiff was a general interest magazine that, although it occasionally published articles touching on religion or sports, was not a "religious, professional, trade, [or] sports journal[]." *Id.* The Supreme Court held:

> this case involves a . . . disturbing use of selective taxation . . . because the basis on which Arkansas differentiates . . . . is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its content. * * * If articles in Arkansas Times were uniformly devoted to religion or sports, the magazine would be exempt . . . . However, because the articles deal with a variety of subjects . . . ., the Commissioner has determined that the magazine's sales may be taxed. [T]o determine whether a magazine is subject to sales tax, Arkansas' "enforcement authorities must necessarily examine the content of the message that is conveyed . . . ." Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press.

Arkansas Writers' Project, 481 U.S. at 229-30 (emphasis added, citation omitted).

The prohibition is not absolute. *See*, *e.g.*, *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (U.S. 1983) (permissible for Congress to allow tax deductibility of contributions to veterans' organizations engaged in lobbying while denying it to other lobbying organizations); *Rust v. Sullivan*, 500 U.S. 173,

208 (U.S. 1991) (government may refuse to subsidize family planning services that provide counseling on abortion services while offering subsidies to services that do not provide such counseling). However, the government is not permitted to "discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas." *Regan*, 461 U.S. at 548 (U.S. 1983).

In *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585, 587 (U.S. 1998) artists challenged a statute that directed the National Endowment for the Arts ("NEA") to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in determining federal grants. The Court, relying on *Rust*, found no First Amendment violation because "the very assumption of the NEA is that grants will be awarded according to the artistic worth of competing applications, and absolute neutrality is simply inconceivable." Crucial to the decision, however, was the fact that no artist alleged specific discrimination in any funding decision. Accordingly, the Court had "no occasion . . . to address an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination." *Finley*, 524 U.S. at 586-87. The Court warned:

> If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. [In providing] subsidies, the Government may not aim at the suppression of dangerous ideas, and if a subsidy were manipulated to have a coercive effect, then relief could be appropriate. * * * [A] more pressing constitutional question would

> arise if government funding resulted in the imposition of a disproportionate burden calculated to drive certain ideas or viewpoints from the marketplace.

Id. at 587 (emphasis added).

Fee waivers subsidize the speech of individuals and organizations by providing a government benefit—time and reproduction costs. COA informed the FTC that it intended to create and disseminate material criticizing the agency's premiere policy rollout. In requesting documents concerning "enforcement actions against businesses or individual bloggers," COA explained that because the FTC's new advertising policies "put restrictions on the commercial speech of bloggers and other marketers, the FTC's actions in this area justify close scrutiny." A026.

First Amendment discrimination is at risk because the high hurdles and broad discretion the district court has given permit the agency to impose a "disproportionate burden," depending on the requester. In fact, the record contains evidence that the FTC used its power to grant and withhold fee waivers based on overly subjective criteria and "… calculated to drive certain ideas or viewpoints from the marketplace." *Finley*, 524 U.S. at 587. Left-leaning organizations such as the AFL-CIO, the Environmental Defense Fund ("EDF"), the Marin Institute, and the Environmental Working Group ("EWG") received fee

waivers from the FTC with far less detail and proof of ability to disseminate than COA. A269.[16] EDF's fee request stated, *in toto*:

> EDF is a non-partisan, non-profit, tax-exempt organization that provides information and advocacy on environmental issues to a wide range of community organizations, environmental groups and interested persons. We do not charge fees for these activities, and we are not seeking this requested information for any commercial purpose. This request will contribute to a greater public understanding of key air pollution issues of considerable public interest. Accordingly, we respectfully request that the documents be furnished without charge.

A96. This fee waiver was granted February 11, 2011. A139. Marin Institute's request stated only:

> Please waive any applicable fees. Release of the information is in the public interest because it will contribute significantly to public understanding of government operations and activities. This information will contribute to the public's understanding of how the government works in collaboration with the alcohol industry, which can potentially undermine the government's ability to restrict the alcohol industry's harmful trade practices and deceptive marketing campaigns.

A082. This fee waiver was granted March 26, 2010. A136. EWG requested:

> the FTC to waive search or review fees related to this FOIA request in accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 16 C.F.R. § 4.8(e). Granting a fee waiver is in the public interest because this request will help the public more fully understand the risks associated with certain consumer products and how government agencies are addressing

[16] EWG was granted a fee waiver in January 2011, despite the fact that the FTC located only thirty-five responsive pages. By contrast, the FTC argues here that COA's fee waiver request is "moot" because its FOIA request produced fewer than the 100 pages that are available without charge. A273.

them. EWG's interest in the requested documents is purely non-commercial.

A112. This fee waiver was granted January 18, 2011. A147.

Disparate treatment and message-based discrimination is not confined to the FTC. The House Committee on Oversight and Government Reform ("Committee") found that federal agencies' fee waiver practices are not in accord with the intent of FOIA. Although "many requesters qualify for a waiver of fees," "[a]gencies have not fully complied with the statute. Some agencies charge excessive fees, or engage in fee assessment practices designed to dissuade requesters. H.R. Rep. 113-155 at 6 (2013) (emphasis added).[17]

When the government subsidizes First Amendment activity it must ensure it does so neutrally. Under the district court's test, however, with its high hurdles unsupported by statutory text or case law, an agency is given broad discretion to impose disproportionately high burdens on hostile FOIA fee waiver requesters in violation of the First Amendment.

[17] Citing *Washington Examiner*, "EPA Inspector General Investigating Claims Agency Used Fees to Block FOIA Requests," May 16, 2013 (emphasis added).

V. The district court's requirement that requester has the burden of proof and its refusal to recognize newly created dissemination techniques undermine the increasingly important role of nonprofits as investigative journalists in this new media era.

The last ten years have seen a marked decline in investigative journalism, a profession

> at risk. Many news organizations have increasingly come to see it as a luxury….[n]ew models are, therefore, necessary to carry forward some of the great work of journalism in the public interest that is such an integral part of self-government, and thus an important bulwark of our democracy.

"About Us," *ProPublica.com*.[18] As a consequence, "[j]ournalism thinkers and doers have looked to non-profits as a way to fill the gaps left by dwindling newspaper staff." Ryan Chittum, "Nonprofit News and the Tax Man," *Columbia Journalism Review* (Online) (Nov. 17, 2011).[19]

DCNF, founded in 2012, is a nonprofit, 501(c)(3) organization focused on investigative reporting, policy reporting, and training investigative journalists. It gathers news through traditional reporting methods and submits its own FOIA requests. Significant to the district court's decision, DCNF also utilizes information derived from FOIA requests by nonprofits, like COA, by distributing FOIA-generated raw information and creating articles and commentary from that material.

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[18] Available at http://www.propublica.org/about/.
[19] Available at http://www.cjr.org/the_audit/nonprofit_news_and_the_tax_man.php?page=all.

DCNF licenses its reporting free and automatically sends its reporting via a real-time news feed to its network of publishers for their publishing consideration, giving it access to a potential audience of over 70 million people per month. That network disseminates information through its websites, blogs, daily emails, Facebook, Twitter, and Google Plus. It also makes information available on video sharing websites, such as YouTube. News aggregators also pick up this content.

Despite the increase in non-profit activity, the gap left by budget cuts to news organizations is not being filled:

> Even [non-profits] that are breaking even are doing so on a scale that makes them unlikely candidates to fully fill the reporting gaps left by newspapers. A 2010 gathering of leaders of the top 12 local nonprofit news sites revealed that together they employed only 88 staff reporters. * * * While foundations have contributed more than $180 million to local news start-ups over five years, the Poynter Institute's Rick Edmunds estimates that budget cuts in traditional media have constituted a $1.6 billion drop in newspaper editorial spending per year. The uneven math tells the story: billions out, millions in.[20]

Nonprofits, especially startups like COA, rely on fee waivers to develop content and disseminate information about government conduct, a vital First Amendment activity that only begins to fill the gap left by weakened for-profit newspapers.

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[20] Steve Waldman and the Working Group on Information Needs of Communities, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age* at 124 (July 2011). Available at http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

Conclusion

By placing the burden of proof on fee waiver requesters, the decision ignores case law and Congressional intent to "liberally construe" fee waivers for public interest groups. A requester need only show that the information will have a sufficient "breadth of benefit" beyond his own interest to show the information will contribute to the understanding of the public at large. Moreover, the district court's decision is an anachronism in the context of modern news dissemination technology. The test ignores how news is disseminated in 2014, thereby establishing an insurmountable roadblock for startup nonprofits and providing broad discretion to an agency to deny fee waivers based on content in violation of the First Amendment.

DCNF respectfully requests that the Court reverse the district court decision, find the FTC regulations violate Congressional intent, and direct the FTC to amend its regulations by including a presumption of fee waivers for nonprofit, public interest groups, specifying the requester has the burden of production, not the burden of persuasion. Additionally, DCNF requests the Court to clarify that the requester need only show that the information will have a sufficient "breadth of benefit" beyond his own intent to show the information will contribute to the understanding of the public at large.

Dated: May 12, 2014

Respectfully submitted,

THE DAILY CALLER NEWS FOUNDATION

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Dated: May 12, 2014

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