No. 12-17

In The
Supreme Court of the United States

MARK J. McBURNEY and ROGER W. HURLBERT,

Petitioners,

v.

NATHANIEL L. YOUNG, JR., in his Official Capacity as DEPUTY COMMISSIONER AND DIRECTOR, DIVISION OF CHILD SUPPORT ENFORCEMENT, COMMONWEALTH OF VIRGINIA, and THOMAS C. LITTLE, DIRECTOR, REAL ESTATE ASSESSMENT DIVISION, HENRICO COUNTY, VIRGINIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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STATEMENT OF THE CASE

In 1968, the General Assembly of the Commonwealth of Virginia enacted the Virginia Freedom of Information Act (VFOIA). *See* 1968 Va. Acts 690. The purpose of the enactment was then, and remains, "ensur[ing] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted." Va. Code Ann. § 2.2-3700(B); *see* 1976 Va. Acts 546. For "[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government." Va. Code Ann. § 2.2-3700(B).

As adopted, VFOIA provided that "official records," those that are "regulated by statute to keep and maintain," would "be open to inspection and copying" by the "citizens of this State having a personal or legal interest" in them, as well by "representatives of newspapers published in this State," and "representatives of radio and television stations located in this State." 1968 Va. Acts 691. In 1974, the requirement that the requester have "a personal or legal interest" was stricken, 1974 Va. Acts 514; however, at no time has this right of access extended to nonresidents, other than those specified. In its present form, the VFOIA provides, in pertinent part, that

> [e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying *by any citizens of the Commonwealth* during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth.

Va. Code Ann. § 2.2-3704(A) (emphasis added). The Virginia law authorizes "[a] public body" to impose only "reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records," and prohibits such bodies from "impos[ing] any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body." Va. Code Ann. § 2.2-3704(F). Accordingly, a significant portion of the costs associated with provision of public records is borne by the taxpayers of the Commonwealth, not by the requesters of public records.

Petitioners have each sought certain Virginia "public records," Va. Code Ann. § 2.2-3701, that they deem useful to their personal interests. In the case of McBurney, a resident of Rhode Island, he mailed two written requests to Virginia's Division of Child Support Enforcement (DCSE), seeking documents relevant to his claim for child support payments. (4th

Cir. J.A. No. 11-1099, at 9a, 11a, 33a, 41a.) On April 8, 2008, McBurney requested "'all emails, notes, files, memos, reports, policies, [and] opinions'" in DCSE's custody regarding him, his son, and his former wife and "'all documents regarding his application for child support'" and how similar applications are handled. (*Id*. at 11a.) These requests were filed in response to DCSE's alleged error in filing a petition for child support requested by McBurney that resulted in his not obtaining child support payments for nine months. (*Id.*) McBurney specifically pled that the requests were made to obtain documents to "help him resolve the issues surrounding his child support application." (*Id.* at 11a; *see* 37a-38a) ("I wish to obtain these documents to find out more about the circumstances of DCSE's handling of my child support application. I want to uncover the exact circumstances that resulted in DCSE failing to file my petition in the correct court until nine months after I filed my application with DCSE. I want to use this information to advocate for my interests and to see if there is any available avenue to get reimbursed for the nine months worth of child support I have been denied."). McBurney resubmitted his request using a Virginia address. (*Id.* at 11a; 36a.) Although both requests were denied in part on the ground that McBurney is not a Virginia citizen, (*id*. at 36a, 42a, 45a), DCSE "did . . . inform McBurney that he could obtain the requested information" under another Virginia statute. (*Id*. at 11a, 36a-37a, 45a.) Ultimately, McBurney "obtained some, but not all, of the" requested information under that statute, "over

eighty requested documents." (*Id.* at 104a; Pet. App. at 54a); *see also* (*id*. at 36a-37a).

Petitioner Hurlbert, a resident of California who has made a business of obtaining "real estate tax assessment records" for his clients "from state governmental agencies across the country" utilizing state FOIA laws, telephoned a request in June of 2008, seeking such records for all real estate parcels located in Henrico County, Virginia. (*Id*. at 12a, 46a-47a.) The Henrico County Real Estate Assessor's Office denied the June 2008 request on the ground that he is not a citizen of the Commonwealth. (*Id*. at 12a, 47a.)

Petitioners filed suit under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Virginia, seeking declaratory and injunctive relief. (*Id*. at 3a, 8a.) The suit claimed that VFOIA's "citizens-only provision" violates the Privileges and Immunities Clause by denying them "their right to participate in Virginia's governmental and political processes" by barring them "from obtaining information from Virginia's government." (*Id*. at 15a-16a.) Petitioner Hurlbert also claimed that VFOIA violated the dormant Commerce Clause by excluding him, as a noncitizen, "from pursuing any business stemming from Virginia public records on substantially equal terms with Virginia citizens." (*Id*. at 18a-19.)

After an initial appeal and remand, *McBurney v. Cuccinelli*, 616 F.3d 393, 404 (4th Cir. 2010), (*id*. at

5a), the parties filed cross-motions for summary judgment on the merits. (*Id.* at 102a.) The district court held that the record failed to identify any fundamental right protected by the Privileges and Immunities Clause that was abridged by VFOIA. *McBurney v. Cuccinelli*, 780 F. Supp. 2d 439, 451 (E.D. Va. 2011). Moreover, it concluded that the law was not a "[d]iscriminatory restriction[ ] on commerce" and did not otherwise violate the dormant Commerce Clause because, "[w]hile the law may have some incidental impact on out-of-state business, [its] goal is not to favor Virginia business over non-Virginia business." *Id.* at 452-53.

A unanimous panel of the United States Court of Appeals for the Fourth Circuit agreed. *McBurney v. Young*, 667 F.3d 454, 470 (4th Cir. 2012). Applying this Court's "two-step inquiry" for Privileges and Immunities claims, *id.* at 462 (citing *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988)), the court of appeals "conclud[ed] that the [law] does not infringe on any of the Appellants' fundamental rights or privileges protected by the Privileges and Immunities Clause." *Id.* at 467. Consequently, the Fourth Circuit did not proceed to the second step of evaluating the state interest advanced by the citizens-only provision. *Id.* at 468. The court of appeals also rejected petitioner Hurlbert's dormant Commerce Clause claim, concluding that the district court properly applied "[t]he second tier of dormant Commerce Clause analysis[,] the *Pike* test," rather than the first tier, because the law "does not facially,

or in its effect, discriminate against interstate commerce or out-of-state economic interests," but "is wholly silent as to commerce or economic interests, both in and out of Virginia." *Id.* at 468-69 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)). The court also noted that Hurlbert had not appealed the district court's resolution of this issue, and thus, had "waived any challenge to" "how the [district] court undertook the *Pike* analysis." *Id.* at 469-70.

At the heart of the Fourth Circuit's analysis of petitioners' Privileges and Immunities claims was the holding that petitioners had failed to identify any protected privilege that was being infringed. In so holding, the court of appeals, following "the Supreme Court's jurisprudence, recognized that states are permitted to distinguish between residents and nonresidents so long as those distinctions do not 'hinder the formation, the purpose, or the development of a single Union of those States'" by abridging "'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity." *Id.* at 462-63 (emphasis omitted) (quoting *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 383 (1978)). The court observed that petitioners asserted a number of "rights," but that only two of them arguably touched on fundamental rights as identified by this Court: "the right to access courts and the right to pursue a common calling." *Id.* at 463. The former, asserted only by McBurney, *id.* at 463 n.3, was rejected because the right claimed "is something much different than any court access right previously

recognized," because the law does not "speak[ ] to the [petitioners'] ability to file a proceeding in any court or otherwise enforce a legal right within Virginia" and the "Privileges and Immunities Clause is not a mechanism for pre-lawsuit discovery." *Id.* at 467.

In rejecting petitioner Hurlbert's Privileges and Immunities claim—that the law abridged his right to pursue a common calling in Virginia on "'terms of substantial equality'" with Virginia residents—the Fourth Circuit again concluded that the law just does not regulate in any sense that implicates that right. *Id.* at 464-65. Nothing prohibits Hurlbert from a common calling. The court reasoned that the law "limits one method by which Hurlbert may carry out his business and thus has an 'incidental effect' on his common calling in Virginia," but "does not implicate Hurlbert's right to pursue a common calling." *Id.* at 465.

The Fourth Circuit held that the other alleged privileges and immunities that petitioners jointly asserted, namely the right to "'equal access to information'" along with their "'ability to pursue their economic interests on equal footing,'" are not fundamental rights protected by the Privileges and Immunities Clause at all. *Id.* at 463, 465-67. As for the right to pursue their economic interests on equal footing, the Fourth Circuit explained that no case had identified such a "novel generic right," and held that, insofar as this right is protected by the Privileges and Immunities Clause, it is protected under the common calling and access to courts principles, neither of

which were offended by the Virginia law. *Id.* at 467 (citation omitted).

The Fourth Circuit, in rejecting petitioners' "'equal access to information claim,'" distinguished *Lee v. Minner*, 458 F.2d 194 (3d Cir. 2006), and observed that "the specific right that *Lee* identified is not one previously recognized by the Supreme Court, or any other court, as an activity within the scope of the Privileges and Immunities Clause." *McBurney*, 667 F.3d at 465. *Lee* only recognized this right of equal access to information for nonresidents seeking "'to engage in the political process with regard to matters of both national political and economic importance,'" that is, access to information sought "to advance the interests of other citizens or the nation as a whole, or that is of political or economic importance." *Id.* (quoting *Lee*, 454 F.3d at 199). Because petitioners, on the other hand, sought "information of [only] *personal* import"—McBurney to determine whether he had a legal claim against a Virginia agency and Hurlbert to fulfill his private contract for hire—the court of appeals held their claims of entitlement to information were not within "*Lee*'s rationale." *Id.* at 465-66. The Fourth Circuit also declined to read into the Privileges and Immunities Clause "a 'broad right of access to information'" that is "grounded in 'the First Amendment's guarantees of free speech and free press,'" reasoning that the two clauses protect different rights. *Id.* at 466 (citations omitted).

Finally, the Fourth Circuit rejected the additional right petitioner McBurney appended to the "right to equal access to information" claim—"his '[right] to advocate for his [political] interests and the interests of others similarly situated'"—for the same reasons identified for rejecting the equal access to information and equal access to courts claims and also because petitioner McBurney had pled that he was requesting information "on his own behalf" "to advance *his own* interests," not those of others. *Id*. at 463, 466-67 (citation omitted). (App. at 14a, 21a-22a.)

Petitioners' interesting history of title recordation in America is entirely beside the point. (Pet'rs Br. at 2-6.) As documents required by law to be kept by clerks of court, title documents are expressly exempted from the Virginia Freedom of Information Act, and may be made available to the public via remote access. Va. Code Ann. § 2.2-3703(A)(5); *see* Va. Code Ann. §§ 17.1-223(A) and (D); -234, and -294; *see also id.*, §§ 16.1-69.53 through -69.58. What petitioner Hurlbert sought were miscellaneous real estate tax assessment records from the Tax Assessor of Henrico County, Virginia. (Pet'rs Br. at 12-13.) Nor is petitioner McBurney's claim a case about access to the records of a judicial or administrative proceeding, but rather an inquest into "general policy information . . . about how" the Virginia Division of Child Support Enforcement "handles cases like his." (Pet'rs Br. at 13-14.) Inasmuch as McBurney acknowledged that he received "some documents about his case under a different statute," (*id.* at 14), and given the fact that

the agency provides guidance of this sort on its website. Virginia Dep't of Social Servs., Child Support, http://www.dss.virginia.gov/family/dcse/. The issue actually presented in this case is whether a recently invented, nontraditional state governmental service designed to further the exercise of state political rights must be accorded on an equal basis to noncitizens of that State under either the Privileges and Immunities Clause or the dormant Commerce Clause.

SUMMARY OF THE ARGUMENT

The petitioners urge this Court to adopt the ahistorical position that the Privileges and Immunities Clause of Article IV, Section 2 guarantees noncitizens equal claim to statutory rights of recent vintage crafted to enhance political participation in a State's polity. Neither the logic of the provision, the common law at the time of the Founding, nor this Court's precedents provide any support for the conclusion that statutory FOIA rights are "fundamental" for purposes of that constitutional provision. To hold that they are would not only throw into doubt a wide range of state and local governmental services, but also would run counter to basic constitutional fact: "this is a Nation composed of individual States." *Baldwin*, 436 U.S. at 383. Because none of the fundamental rights recognized by this Court as Article IV privileges or immunities are implicated by petitioners' claims, and, in any case, the

Commonwealth has a substantial interest in reserving her governmental services to those who are a member of the Commonwealth's political community and who finance their provision, petitioners' Privileges and Immunities claim should fail.

With regard to petitioners' dormant Commerce Clause claim, Virginia's citizenship limitation on FOIA rights does not facially discriminate against interstate commerce as such, but regulates the provision of a state service that furthers political participation. Petitioners' effects argument based on *Pike*, 397 U.S. 137, are both procedurally defaulted and irrelevant in view of this Court's governmental function cases. *See Davis*, 553 U.S. at 353-56, 359-61. In sum, the differential treatment accorded the noncitizen petitioners merely "reflect[s] the essential and patently unobjectionable purpose of state government—to serve the citizens of the State," and thus does not run afoul of either the Privileges and Immunities Clause or dormant Commerce Clause jurisprudence. *Reeves v. Stake*, 447 U.S. 429, 442 (1980).

ARGUMENT

I. THE CITIZENSHIP LIMITATION ON THE DUTY OF VIRGINIA PUBLIC OFFICERS TO RESPOND TO PUBLIC RECORDS REQUESTS DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV.

A. The Privileges and Immunities Clause Was Designed to Remove the Disabilities of Alienage and to Protect a Limited Class of Long-Held "Fundamental" Rights.

Upon declaring independence from Britain, Virginia became a sovereign entity, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991), with the "Full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." *Declaration of Independence* (capitalization original). Indeed, the Articles of Confederation confirmed that Virginia retained "its sovereignty, freedom, and independence, which is not by this confederation, expressly delegated to the United States, in Congress assembled." *Articles of Confederation* art. II. In other words, Virginia, and the other former colonies, became independent states like Great Britain and France except to the extent they expressly ceded sovereignty to Congress. This created a potential problem for the new nation. At common law, foreign citizens were subject to "'the disabilities of alienage.'" *Baldwin*, 436 U.S. at 380-81

& n.19 (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869)).

As Blackstone noted, an alien was not permitted to purchase, convey, or hold real property for his own use, nor was he able to inherit or transmit by inheritance such property; aliens were subject to special commercial taxes; and they were at times forbidden from working in certain trades. 2 William Blackstone, *Blackstone's Commentaries on the Laws of England* 371-74 (photo. reprint 1969) (St. George Tucker ed., Phil., Birch & Small 1803). Such restrictions, of course, are destructive of commerce and undermine the process of forging a single union out of a disparate group of States. *See The Federalist No. 22*, at 137 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961) ("The interfering and unneighbourly regulations of some States contrary to the true spirit of the Union, have in different instances given just cause of umbrage and complaint to others; and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord, than injurious impediments to the intercourse between the different parts of the confederacy.").

To address this problem, Article IV of the Articles of Confederation provided:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this union, the free

> inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

Articles of Confederation art. IV, § 1. When the Articles of Confederation were replaced with our present constitution, the framers retained a similar provision, which provides that the "Citizens of Each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2.

In the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75 (1873), this Court observed: "There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each." The Court explained that common purpose in 1948 in these words:

> The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation.

Toomer v. Witsell, 334 U.S. 385, 395 (1948). Petitioners seek to erect a perfect universal rule of nondiscrimination based upon *Toomer*. (Pet'rs Br. at 19-20; 35.) But that is not what the later and recent cases say.

"It has not been suggested, however, that state citizenship or residency may never be used by a State to distinguish among persons."[1] *Baldwin*, 436 U.S. at 383. "Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do." *Id.* Only those activities "sufficiently basic to the livelihood of

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[1] "[T]he terms 'citizen' and 'resident' are 'essentially interchangeable' for purposes of analysis of most cases under the Privileges and Immunities Clause." *United Bldg. & Const. Trades Council v. City of Camden*, 465 U.S. 208, 216 (1984) (quoting *Austin v. New Hampshire*, 420 U.S. 656, 662 n.8 (1975)).

the Nation" are protected by the Clause. *Id.* at 388; *see also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279-82 (1985) (explaining that the Privileges and Immunities Clause only applies to those rights which are "fundamental."). Other "distinctions between residents and non-residents merely reflect the fact that this is a Nation composed of individual States." *Baldwin*, 436 U.S. at 383. In other words, the scope of the Privileges and Immunities Clause is not absolute; it does not require each State to treat its own citizens and out-of-state citizens identically in every respect. Furthermore, "if the challenged restriction deprives nonresidents of a protected privilege," the restriction is invalidated only if it "is not closely related to the advancement of a substantial state interest." *Friedman*, 487 U.S. at 65.

What, then, is a fundamental right for purposes of the Clause? In *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871), the Court concluded that the Privileges and Immunities Clause

> secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.

The subsequent decisions of the Court adhere to this outline. This Court has concluded that practicing a trade or profession in a sister State is a fundamental privilege that is protected by the Clause. *See Toomer*, 334 U.S. at 403 (nonresident fishermen could not be required to shrimp in South Carolina on terms much more onerous than South Carolinians); *Hicklin v. Orbeck*, 437 U.S. 518, 533-34 (1978) (striking a hiring preference for residents of Alaska). Access to the courts also constitutes such a fundamental privilege, *Canadian Northern Railway Company v. Eggen*, 252 U.S. 553, 560-63 (1920), as do the ownership and disposition of privately held property within a State, *Blake v. McClung*, 172 U.S. 239, 252-53 (1898), and obtaining access to medical services available within the territory of a State, *Doe v. Bolton*, 410 U.S. 179, 200 (1973).

In contrast, big-game recreational hunting is not a fundamental privilege within the intendment of the Clause. *Baldwin*, 436 U.S. at 388. Therefore, a State may favor its own residents in that setting. *Id.* Public employment is not a fundamental privilege for purposes of the Clause. *Salem Blue Collar Workers Ass'n v. City of Salem*, 33 F.3d 265, 270 (3d Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995). A city also may favor its own residents for handicapped parking permits, because such permits do not implicate a privilege that is "'basic to the livelihood of the Nation.'" *Lai v. City of New York*, 991 F. Supp. 362, 365 (S.D.N.Y. 1998), *aff'd,* 163 F.3d 729, 730 (2d Cir. 1998).

Hence, the threshold Privileges and Immunities Clause question before the Court is whether a statutorily created right to an at or below cost search of government records is a fundamental privilege for purposes of the Clause. Va. Code Ann. § 2.2-3704(E) ("Failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of this chapter"); Va. Code Ann. § 2.2-3704(F) ("A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body.").

B. Neither History nor Precedent Supports the Notion that Statutorily Created FOIA Rights Are Fundamental Under the Privileges and Immunities Clause.

1. FOIA is a modern statutory creation, not a foundationally important fundamental right (Pet'rs Br. at 34-46).

FOIA statutes are of relatively recent origin. Virginia did not enact its freedom of information act until 1968. *See* 1968 Va. Acts 690. Similarly, the federal government did not pass a freedom of information act until 1966. *See* Freedom of Information Act, Pub. L. No. 89-554, § 1, 80 Stat. 378, 383 (Sept. 6, 1966). The recent vintage of these

statutes undermines the notion that they are so "basic to the livelihood of the Nation" that they should trigger the protections of the Clause. *Baldwin*, 436 U.S. at 388. As a consequence, Petitioners find it vitally important to mischaracterize the law as an economic enactment or regulation in an attempt to bolster Hulbert's common calling claim. (Pet'rs Br. at 19-24.)

Virginia's FOIA statute contains a declaration of purpose and policy. Va. Code Ann. § 2.2-3700(B) (entitled "Short title; policy"). The purpose of the law is political, not economic; it is a species of sunshine law intended to increase transparency in the political process. As such, its benefits are logically and properly bestowed on those directly affected by that political process—i.e., citizens—and on media with a Virginia presence. This provides a substantial reason for Virginia's unwillingness to assume the burden of responding to FOIA requests from noncitizens with no direct stake in Virginia politics and governance. *See Sáenz v. Roe*, 526 U.S. 489, 502 (1999) (discussing substantial reasons).

2. Contrary to Hurlbert's argument, Virginia has not violated his right to ply his trade, practice his occupation, or pursue a common calling (Pet'rs Br. at 35-39).

Hurlbert's reliance on common calling jurisprudence is misplaced. What he advances is the broadest grammatically possible scope for common

calling jurisprudence: a rule that no state benefit can be withheld from a nonresident if it has a remote or incidental effect on whatever business model that nonresident chooses to adopt. None of his Privileges and Immunities Clause cases go so far or support the rule he advocates. (Pet'rs Br. at 35-36.) Those cases instead involve either an outright ban on nonresidents performing work or involve the imposition of discriminatory taxes and fees on work performed in state by nonresidents.[2] Distinctions drawn between residents and nonresidents which have the potential to indirectly disadvantage a business have been upheld as a matter of course where the right or privilege at issue is not fundamental. *See*, *e.g*., *Zobel v. Williams*, 457 U.S. 55 (1982) (natural resources royalty payments to residents); *Chemung Canal Bank v. Lowery*, 93 U.S. 72 (1876) (tolling statute of limitations); *In re Merrill Lynch Relocation Mgmt., Inc.*, 812 F.2d 1116 (9th Cir. 1987) (nonresident cost bond); *Brewster v. N. Am. Van Lines, Inc.*, 461 F.2d 649 (7th Cir. 1972) (same); *O'Brien v. Wyoming*, 711 P.2d 114 (Wyo. 1986) (sports and recreation not fundamental); *Bode v. Flynn*, 252 N.W. 284 (Wis. 1934) (statute of limitations).

[2] *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59 (2003), did not address the merits on the Privileges and Immunities claim. *Id.* at 64, 67. (Pet'rs Br. at 38.) The cases of *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 302-03 (1998), *Austin*, 420 U.S. at 659, and *Chalker v. Birmingham & Northwestern Railway Co.*, 249 U.S. 522, 525-26 (1919), all involved discriminatory taxation of nonresident businesses or workers. (Pet'rs Br. at 38.)

As demonstrated immediately below, Virginia does not prohibit Hurlbert's business in Virginia. Nor does it impose unequal taxes or fees. It simply declines to ply Hurlbert's trade for him under a statute that does not regulate a fundamental right.[3]

3. Hurlbert's property argument is misplaced (Pet'rs Br. 39-42).

While it is true that the ability to transfer title is a fundamental right under the Privileges and Immunities Clause, *Baldwin*, 436 U.S. at 387; *Paul*, 75 U.S. (8 Wall.) at 180, VFOIA has nothing to do with title records. Those "records required by law to be maintained by the clerks of the courts" are exempt from VFOIA. Va. Code Ann. § 2.2-3703(A)(5); Va. Code Ann. §§ 17.1-223(A) and -227 through -254 (circuit court clerks); *see also* Va. Code Ann. § 17.1-200 and -204 (Supreme Court of Virginia); *id.*, §§ 16.1-69.40 and 16.1-69.53 through -69.58 (district courts). Furthermore, those documents, including title documents, Va. Code Ann. § 55-106, judgment liens, *id.*, § 8.01-446, -477, tax liens, *id.*, § 55-142.1, 58.1-314, 58.1-908(A)(2), 58.1-1805(A), 58.1-2021(A), 58.1-3172, and financing statements, *id.*, § 8.9A-501(a)(1), are "open to inspection" and copying by "any person." Va. Code Ann. § 17.1-208; *see* Va. Code Ann.

[3] The arguments of amici attempting to challenge VFOIA as violative of other common callings, *see* Amicus Br. of ACLU at 6-12; Br. Amici Curiae of Reporters Comm. at 25-32, are not before the Court.

§ 17.1-225 and -226 (remote inspection of circuit court records). So Hurlbert's arguments, found at pages 39-42 of Petitioners' Brief under the heading "Property," are quite beside the point.

4. McBurney's "public proceedings" argument is incoherent (Pet'rs Br. 42-44).

As the district court correctly ruled, "McBurney's right to access courts is not implicated in this case." *McBurney*, 780 F. Supp. 2d at 449. (4th Cir. J.A. at 114a.) And access to an administrative agency is not implicated by analogy either. McBurney had full access to the agency which acted on his behalf at his request. What he is complaining about is that the agency allegedly partially bungled the job when he asked for its help. When he requested documents under FOIA, the Department of Social Services refused, suggesting that he seek them "pursuant to the Government Data Collection and Dissemination Practices Act." (4th Cir. J.A. at 45a.) When "McBurney submitted a request under this Act," he "obtained some, but not all, of the documents he would have received under" FOIA. McBurney also sought documents concerning practices and procedures of the agency, although the record does not disclose what else, if anything, was available but not on the agency website. Virginia Dep't of Social Servs., Child Support, http://www.dss.virginia.gov/family/dcse/. On this record it cannot be found that McBurney was denied access to any agency

proceeding. What he was denied was some undefined portion of the presuit discovery which he wanted the government to perform on his behalf, but such assistance has never been thought to be a fundamental right protected by the Privileges and Immunities Clause.

5. An equal right of access to all governmental information has never been deemed fundamental for Privileges and Immunities purposes (Pet'rs Br. at 44-46).

The recognized privileges and immunities are few and defined and resemble each other in kind. Article IV's protection of Privileges and Immunities has its source in Article IV of the Articles of Confederation. *Baldwin*, 436 U.S. at 379-80 & n.17. The Articles provided an illustrative list of Privileges and Immunities in these terms:

> the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restrictions shall be laid by any

> State, on the property of the United States, or either of them.

Articles of Confederation art. IV, cl. 1. Although the illustrative list was omitted from the Constitution, U.S. Const. art. IV, § 2, cl. 1; *see The Federalist No. 42*, at 25 (James Madison) (Jacob E. Cooke, ed., 1961) ("[W]hat was meant by super-adding 'to all privileges and immunities of free citizens'—'all the privileges of trade and commerce,' cannot easily be determined."), the agreed purpose of this provision was to remove from nonresidents "the disabilities of alienage," *Baldwin*, 436 U.S. at 380-81 & n.19, a set of legal restrictions known to the common law and imposed upon foreign citizens by virtue of their foreign status. 2 William Blackstone, *Blackstone's Commentaries on the Laws of England* 371-74 (photo. reprint 1969) (St. George Tucker ed., Phil., Birch & Small 1803) (listing prohibitions on ownership of real property, inheriting or transmitting an inheritance, working in certain trades and the imposition of special commercial taxes). The first federal case construing the rights protected by the Privileges and Immunities Clause, *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (Case No. 3,230), described the rights protected as being "confin[ed]" to "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." *Id.* at 551-52.

Thus, the provision does not require a state "to extend to the citizens of all the other states the same advantages as are secured to their own citizens" especially with regard to "regulating the use of the common property of the citizens of such state." *Id.* at 552.

Justice Washington in *Corfield* also provided an illustrative list. That list included the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal." *Id.*; *see also Ward*, 79 U.S. (12 Wall.) at 430 (providing a similar listing of rights).

Lack of access to public records upon request was not a disability of alienage under the common law, nor has the right of such access, "at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign," as neither the states nor the federal government provided citizens general assistance in obtaining access to non-judicial public records, upon mere request without a showing of standing or private right, until the last third of the twentieth century. *Id.*; *see* 5 U.S.C. § 552; The Freedom of Information Act, Pub. L. No. 89-554, § 1, 80 Stat. 378, 383 (Sept. 6, 1966); *cf.* David C. Vladeck, *Access and Dissemination of Information: Information Access—Surveying the Current Legal Landscape of*

Federal Right-to-Know Laws, 86 Tex. L. Rev. 1787, 1795-96 (2008) (describing the federal government's enactment of its own freedom of information laws in 1966 as "truly an experiment in open government" and noting that, "[a]t the time of its passage, only two countries—Sweden and Finland—had open record laws resembling" the federal FOIA). Recognition of an Article IV privilege to demand the assembly of public records by state officials would require the Court to take leave of any historical understanding of what counts as "fundamental" for purposes of the Privileges and Immunities Clause.

For, outside of land title records and judicial records, public access to official records depended at the time of the Founding upon a showing of private right and interest. Contrary to the contentions of petitioners and certain of their amici,[4] neither English nor American common law at that time recognized a general right for all persons to access all public records, and thus the Privileges and Immunities Clause, incorporating the protections of Article IV of the Articles of Confederation, could not have rendered such a claimed right fundamental. Rather, English courts limited a requester's entitlement, even with respect to judicial records and land records, to persons with "a proprietary interest in the document or upon a need for it as evidence in a

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[4] *See* (Pet'rs. Br. at 45); (Amicus Br. of Public Justice, P.C. at 4-15); (Br. Amici Curiae, The Reporters Comm., et al. at 26-29); (Br. of Amici Curiae Judicial Watch, Inc., et al. at 5-9).

lawsuit." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-98 (1978). They generally rejected claims of a right to inspect non-judicial records altogether. *See, e.g.*, *Rex v. Justices of Staffordshire*, 6 Ad. & E. 84, 101, 112 Eng. Rep. 33, 39 (K.B. 1837).

Many American courts followed this approach, *see, e.g.*, *Burton v. Reynolds*, 68 N.W. 217 (Mich. 1896) (refusing access to records of court proceeding affecting title sought by title abstractor); *Cormack v. Wolcott*, 15 P. 245, 246 (Kan. 1887) (same), while making a distinction between judicial records, which are not at issue here, and public records. *See Tennessee ex rel. Welford v. Williams*, 75 S.W. 948, 956 (Tenn. 1903). The rights of public access were viewed in these terms:

> It is not the unqualified right of every citizen to demand access to, and inspection of the books or documents of a public office, though they are the property of the public, and preserved for public uses and purposes. The right is subject to the same limitations and restrictions, as is the right to an inspection of the books of a corporation, which strangers can not claim, and which is allowed only to the corporators, when a necessity for it is shown, and the purpose does not appear to be improper.

Brewer v. Watson, 71 Ala. 299, 305 (Ala. 1882) (noting that "the individual who claims access to public records and documents (not judicial records, of which, by statute and unvarying usage, the custodian, upon

the payment of the fee allowed by law, is bound to furnish copies), can properly be required to show that he has an interest in the document which is sought, and that the inspection is for a legitimate purpose." (citations omitted)). It is true that some American courts, breaking with the English common law, came to view the status of a citizen/taxpayer to be enough, recognizing an interest in the management of the public fisc. *Compare Welford*, 75 S.W. at 954-55 (affirming taxpayer access to the fiscal records of a municipal corporation), *with Justices of Staffordshire*, 6 Ad. & E. at 96, 101, 103, 112 Eng. Rep. at 37, 39-40 (rejecting the claim that "rate-payers of any . . . county have, as such, any right to inspect and copy the bill of charges of county officers" that "have been deposited by the clerk of the peace among the county records," reasoning that "no slight inconvenience might result from holding that, in every county, all its thousands of rate-payers, with no interest, and without fee or reward, have a right to the inspection now contended for").

It is also true that some American courts broke entirely from the English common law, appearing to adopt the rule that nearly all judicial and non-judicial records were available to anyone, whether they had a private legal interest in them or not.[5] *See City of*

[5] However, as illustrated by closer inspection of the Virginia case relied upon by petitioners and amici, *Clay v. Ballard*, 87 Va. 787, 13 S.E. 262 (1891), many cases cited as applying a common law right of public access to non-judicial records often depended

(Continued on following page)

St. Matthews v. Voice of St. Matthews, Inc., 519 S.W.2d 811, 814-15 (Ky. 1974) (concluding that "the necessity of showing an interest such as would enable a person to maintain or defend a lawsuit as a prerequisite to his right to inspect a public record to be an unwarranted impediment to the right of people generally to acquire information concerning the operation of their government" and holding that a newspaper was entitled to "all records maintained by a state, county or municipal government as evidence of the manner in which the business of that unit of government has been conducted" because "public records" sought for a "wholesome public interest"); *Burton v. Tuite*, 44 N.W. 282 (Mich. 1889) (recognizing a title abstractor's right to inspect records of tax levies by a city on real property).

It bears noting as well that cases relied upon by amici to claim that VFOIA violates the Privileges and Immunities Clause because it supposedly runs counter to a common law right, (Br. Amici Curiae Public Justice at 11; Br. of Amici Curiae Judicial

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upon a statutory right, *see Burton v. Tuite*, 44 N.W. 282 (Mich. 1889), and continued to require some cognizable interest. *See Clay*, 87 Va. at 787, 790, 794, 13 S.E. at 262-263, 265 (recognizing "that any person having an interest" in voter registration books "would have a right to inspect them" "upon general principles," citing former Va. Code § 84 as giving the right of public inspection, explaining that "[t]he case turns upon the construction of this statute," and concluding that a "legally qualified voter" in the election district that the registration books covered was entitled under the statute to inspect, and copy, those books).

Watch at 7-8), deemed citizenship limitations to be appropriate. *See, e.g.*, *Nowack v. Fuller*, 219 N.W. 749, 749, 751 (Mich. 1928) (holding that the plaintiff, "as a citizen and taxpayer has a common-law right to inspect the public records in the auditor general's office, to determine if the public money is being properly expended [by the Governor of Michigan]. It is a right that belongs to his citizenship."). Thus, to the extent that "'the right to inspect public documents . . . is well defined and understood,'" (Br. of Amici Curiae Judicial Watch at 6) (quoting *Clay*, 87 Va. at 791, 13 S.E. at 263), it was often *not* defined as petitioners and their amici understand it.[6] A review of the common law compels two conclusions. First, rights of public access were not sufficiently uniform or generous to give rise to any equal right of access which could be deemed fundamental for purposes of the Privileges and Immunities Clause. Second, Hurlbert's unlimited right of access to Virginia real estate records maintained by the clerks of the circuit courts despite being a noncitizen and nontaxpayer, *see* Va. Code Ann. § 17.1-208, and McBurney's right of access under Virginia's Government Data Collection and Dissemination Practices Act, Va. Code Ann.

[6] Amicus Public Justice claims that under the common law a requester "did not have to be a citizen" "if the requester had a business, litigation, or property interest," but offers no support for that claim, citing two cases that cite the requester's citizenship and taxpayer status to support his claim of right. *See Nowak*, 219 N.W. at 751; *Indiana ex rel. Colescott v. King*, 57 N.E. 535, 537 (Ind. 1900).

§§ 2.2-3800 through -3809, to all information and data concerning him or his case, are probably broader than any right of access to public documents recognized at common law anywhere in America at the time of the Founding.

6. States have a substantial interest in limiting their provision of services that do not involve fundamental rights to their own citizens (Pet'rs Br. at 47-54).

Petitioners advance the proposition that any distinction based upon residence is invalid unless "the state can show that non-citizens 'constitute a peculiar source of the evil at which the statute is aimed.'" (Pet'rs Br. at 47) (quoting *Toomer*, 334 U.S. at 398). And they appear to argue this whether or not a right deemed fundamental is involved. (Pet'rs Br. at 47-49). But States have an undoubted authority to direct services of a legislatively discretionary character not involving fundamental rights to their citizens as a function of their power to define and serve their political communities. *See Cabell v. Chavez-Salido*, 454 U.S. 432, 438-39 (1982) (noting that this "Court has confronted claims distinguishing between the economic and sovereign functions of government," and that "[t]his distinction has been supported by the argument that although citizenship is not a relevant ground for the distribution of economic benefits, it is a relevant ground for determining membership in the political

community”). Likewise, practices and procedures directed to the performance of state governmental functions may distinguish between citizens and noncitizens.

Despite acknowledging a shifting of the theoretical foundation for evaluating whether a claimed right was in fact a privilege or immunity, *Baldwin*, 436 U.S. at 381-83, this Court’s precedents have consistently hewed to the view that, in some circumstances, “state citizenship or residency may . . . be used by a State to distinguish among persons.” *Id.* at 383. “Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States.” *Id.*; *see Paul*, 75 U.S. (8 Wall.) at 180 (“Special privileges enjoyed by citizens in their own States are not secured in other States by this provision.”). The Court has also consistently maintained that not just any benefit is a privilege or immunity, but that “[o]nly with respect to those ‘privileges’ and ‘immunities’ bearing upon the vitality of the Nation as a single entity,” or that are “basic to the maintenance or well-being of the Union,” or “the livelihood of the Nation,” “must the State treat all [U.S.] citizens, resident and nonresident, equally.” *Baldwin*, 436 U.S. at 383, 388; *see Corfield*, 6 F. Cas. at 552 (opining that the protected rights were limited to “those privileges and immunities which are, in their nature,

fundamental"). And the protected activities have notably been commercial in nature, as "the Privileges and Immunities Clause was intended to create a national economic union." *Piper*, 470 U.S. at 279-80.

Accordingly, this Court has never held that a State's restriction on noncitizens' political rights violated the Privileges and Immunities Clause. *Baldwin*, 436 U.S. at 383 (citing, inter alia, *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (citizens-only voting) and *Kanapaux v. Ellisor*, 419 U.S. 891 (1974) (citizens-only elected officials)). Nor has it held that any of the "personal" rights enumerated in the first Eight Amendments were protected by the Privileges and Immunities Clause.[7] *See McBurney*, 667 F.3d at 462; 2 Donald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 12.7, at 335 (4th ed. 2007) ("[W]hether a right is sufficiently fundamental to be protected by the [Privileges and Immunities] clause should not be confused with a determination of whether an activity constitutes a fundamental right so as to require strict judicial scrutiny under the due process and equal protection clauses."). And even if the Privileges and Immunities Clause were thought to selectively incorporate protection for political advocacy, it would be incongruous to hold that the Privileges and Immunities Clause protects a noncitizen's right to obtain information from state

[7] Thus the contention of amici ACLU that "political advocacy" is an Article IV privilege or immunity lacks any support. *See* (Br. Amicus Curiae ACLU at 14-17.)

government on equal footing as citizens when the First Amendment does not guarantee that right to anyone, even members of the press.[8] *See Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion) ("'There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. . . . The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.'" (quoting Potter Stewart, *Or of the Press*, 26 Hastings L. J. 631, 636 (1975))).

Even where a recognized right has been burdened by non-provision of some state government service, this Court has accepted those restrictions provided the right itself is not destroyed. For a State need not "always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do." *Baldwin*, 436 U.S. at 383 (citing, *e.g.*, *Eggen*, 252 U.S. at 560-62); *see also Martinez v. Bynum*, 461 U.S. 321, 328 (1983) (holding that "[a] bona fide residence requirement . . . furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents," and thus, local public schools need not offer the same tuition rates to nonresident students as resident students); *Starns v. Malkerson*, 401 U.S.

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[8] What is more, neither of the petitioners were seeking the documents to engage in political advocacy. On the same principle, amici's contention that VFOIA violates the rights of the press are both not presented in this case and meritless if they were. *See* (Br. Amici Curiae Reporters Comm.).

985 (1971) (summarily affirming bona fide residence requirement for in-state tuition rate at state university).

Recurring to this Court's precedents regarding the Privileges and Immunities Clause's protections, it is apparent that the Fourth Circuit faithfully applied settled law. For there is no protected "privilege" to every means by which a citizen of a state may "secur[e] any number of personal, economic, and political interests." (Pet. at 15.) Rather, the recognized privileges and immunities are few and defined: "the right to travel interstate," *Shapiro v. Thompson*, 394 U.S. 618, 629-30 & n.8 (1969); to pursue "common callings within the State" free from "unreasonable burdens" not borne by residents; to "own[ ] and dispos[e] of privately held property within the State"; to "access . . . the courts of the State," *Baldwin*, 436 U.S. at 383; and to procure on substantially equal terms "the general medical care available within [a State]." *Bolton*, 410 U.S. at 200. While these rights may prove useful in "securing any number of personal, economic, and political interests," it does not follow, nor has it ever been previously suggested, that any means provided by a State to aid its citizens in the pursuit of those interests must be afforded to noncitizens. And even where the protected privilege is plainly restricted, the restriction will be invalidated only if it "is not closely related to the advancement of a substantial state interest," *Friedman*, 487 U.S. at 65, a question

neither the district court nor court of appeals had occasion to reach.

The traditional state practice of distinguishing between citizens and noncitizens in the provision of services not involving fundamental rights—and making such distinction in laws intended to govern the political functioning of the state—itself provides substantial reasons for the distinction made here. The VFOIA citizenship limitation precisely serves that interest. As a consequence, the complaint of petitioners that Virginia has failed to quantify the administrative burden of providing services to noncitizens is of no moment. (Pet'rs Br. at 49-53.) Similarly, Virginia has no burden to demonstrate a substantial relationship between ends and means. (Pet'rs Br. at 53-54). Both the district court and the Fourth Circuit followed existing law by treating the nonexistence of a fundamental right as the threshold and potentially dispositive question. *McBurney*, 667 F.3d at 467-68; *McBurney*, 780 F. Supp. 2d at 451. If those courts erred in finding that the selective provision by Virginia of the non-fundamental privilege of making FOIA requests does not violate the Privileges and Immunities Clause, nothing in existing doctrine clearly foreshadows or explains that result.

II. THE VIRGINIA FREEDOM OF INFORMATION ACT DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE (Pet'rs Br. at 24-34).

The Fourth Circuit correctly held that first-tier dormant Commerce Clause analysis is not triggered by contingent, remote or incidental effects on commerce. *McBurney*, 667 F.3d at 469 ("Any effect on commerce is incidental and unrelated to the actual language of VFOIA or its citizens-only provision."). First-tier analysis is instead triggered " 'where a state law discriminates facially, in its practical effect, or in its purpose' against interstate commerce." *Id*. at 468 (quoting *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996)); *cf. Kentucky Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008). Under the active Commerce Clause, this Court has never extended the definition of commerce beyond "use of the channels of interstate commerce" and "the instrumentalities of interstate commerce, or persons and things in interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558 (1995). It is true that the Court sustains exercises of Congressional regulatory power in active Commerce Clause cases over "activities that substantially affect interstate commerce," *id.* at 559, but that is an application of the Necessary and Proper clause. *Katzenbach v. McClung*, 379 U.S. 294, 301-02 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *see Gonzales v. Raich*, 545 U.S. 1, 34 (2006) (Scalia, J., concurring in the judgment) ("Congress's regulatory

authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."). There is also an effects component for dormant Commerce Clause analysis, but that is the second-tier analysis provided under *Pike*. Unfortunately for Hurlbert, the Fourth Circuit found that any *Pike* challenge had been procedurally defaulted for want of briefing.[9] *McBurney*, 667 F.3d at 469-70 (citing Fed. R. App. R. 28(a)(9)(A)). And, of course, Hurlbert's scant earnings (4th Cir. J.A. at 101a), and the thin evidence that similar companies exist, (*id*. at 65a), render unsustainable Hurlbert's claim that the incidental effects of VFOIA on his business result in an unreasonable burden on interstate commerce.[10]

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[9] Although petitioners claim to have given "fair notice" of a *Pike* argument in their summary of the argument in their Fourth Circuit brief (Pet'rs Br. at 52-53 n.13), a fair reading of that argument discloses only a first-tier discrimination challenge. (*McBurney*, Case No. 11-1099, Doc. 15 at 22-23 of 61). Petitioners' claim that "this Court has reached the *Pike* test in pure 'facial challenge' cases," even if true in the sense that the Court has "purported to apply the undue burden test," yet decided the question "in whole or in part on the discriminatory character of the challenged regulation," *GMC v. Tracy*, 519 U.S. 278, 298 n.12 (1997), would not justify reaching it here, where the petitioners plainly failed to make out or preserve the *Pike* claim. (Pet'rs Br. at 53 n.13.)

[10] Though it is certainly true that purveyors of data request public records and employ themselves gainfully in their sale, petitioners and amici's representations that VFOIA is

(Continued on following page)

Petitioners rely upon *Reno v. Condon*, 528 U.S. 141 (2000), for the proposition that state records are *per se* articles of commerce. (Pet'rs Br. at 26.) The actual holding in *Condon* was that Congress had the power to enact the Driver's Privacy Protection Act under the active Commerce Clause because States were engaged in traditional interstate commerce by selling certain records in the interstate market. *Condon*, 528 U.S. at 148-49, 151. Because Congress was regulating "a 'thin[g] in interstate commerce,'" the Court found it unnecessary to reach the Necessary and Proper Clause's substantial effects prong of Interstate Commerce Clause doctrine. *Id*. at 148-49.

In the present case, Virginia has not placed its documents "into the interstate stream of business." *Id.* at 148. Rather, in discharging a governmental, noncommercial function, it has made state records potentially available to certain requesters, its citizens, who might or might not put them in interstate commerce.[11] This means that if Congress sought to regulate those documents under the active Commerce Clause, the Court would have to reach the

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"disruptive of a national economic market in products and services depending on equal access to public record information," (Br. Amici Curiae of Coalition for Sensible Public Records Access at 22; Pet'rs Br. at 33-34) lack any factual support.

[11] That Virginia makes them available to media outlets as well, Va. Code Ann. § 2.2-3704(A), does not change the Commerce Clause analysis for the citizenship limitation.

effects prong. But of course, this is a dormant Commerce Clause case and effects are analyzed in that context under the procedurally defaulted *Pike* test. Not only that, but there is substantial doubt "whether *Pike* even applies to a case of this sort." *Davis*, 553 U.S. 328, 353. Respondents submit that the *Pike* test should not apply for the reasons stated in Part IV of the *Davis* opinion, *id.* at 353-56, and in Justice Scalia's concurrence. *Id*. at 359-61 (Scalia, J., concurring in part).

The fact that this case involves a governmental function, rather than commerce, carries with it other analytical consequences. First, where a State engages in "a government function," its conduct "is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors."[12] *Id*. at 341; *id*. at 357-59 (Stevens, J., concurring).

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[12] Amici's objections to application of the governmental function doctrine—because Virginia "has a natural monopoly on its public records," and, in creating the documents, is "perform[ing] a legislative function"—provide further support for excepting this uniquely governmental activity from dormant Commerce Clause scrutiny. *Cf. Davis*, 553 U.S. at 359-60 (Scalia, J., concurring in the judgment) (cautioning that "it would be no small leap from invalidating state discrimination in favor of private entities to invalidating state discrimination in favor of the State's own subdivisions performing a traditional governmental function"). (Br. Amici Curiae Coalition for Sensible Public Records Access at 15-19.)

Second, fulfilling governmental functions is not "protectionist" within the contemplation of the dormant Commerce Clause, but only "in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve." *Reeves*, 447 U.S. at 442 ("Petitioner's argument apparently also would characterize as 'protectionist' rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural improvement and business development programs. Such policies, while perhaps 'protectionist' in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State.").

Finally, because "any notion of discrimination" within the contemplation of the dormant Commerce Clause "assumes a comparison of substantially similar entities," *General Motors Corp.*, 519 U.S. at 298, distinguishing between taxpayers and voters on the one hand and noncitizens on the other in the provision of a state service does not constitute discrimination in the necessary sense of that term.

As a consequence of all of this, the Fourth Circuit correctly held that the Virginia Freedom of Information Act "simply does not fall within the type of provision to which the first[-]tier test of analyzing dormant Commerce Clause claims applies," *McBurney*, 667 F.3d at 469, and, with the *Pike* analysis

foreclosed, that petitioner Hurlbert's dormant Commerce Clause claim also fails. *Id*. at 470.

CONCLUSION

For the reasons stated above, the judgment of the Fourth Circuit should be AFFIRMED.

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January 24, 2013