No. 12-17

In The Supreme Court of the United States

MARK J. MCBURNEY and ROGER W. HURLBERT,

Petitioners,

v.

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

Respondents.

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

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Institute for Justice (IJ) is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. IJ accomplishes its mission by engaging in litigation and advocacy designed to preserve the fundamental constitutional rights of all Americans. Such activities would be impossible without the ability to obtain public documents from state and local governments across the country. Because access to governmental documents plays such an indispensable part of the fulfillment of IJ's mission, IJ has filed *amicus curiae* briefs in state courts when state and local governments have attempted to withhold documents from public scrutiny. *See Freedom Found. v. Gregoire*, No. 86384-9 (Wash. argued Sept. 20, 2012); *City of Balt. Dev. Corp. v. Carmel Realty Assocs.*, 910 A. 2d 406 (Md. 2006). IJ also directly litigates open public records issues. In addition to its litigation activities, IJ regularly conducts original research on matters central to its mission of promoting individual liberty, including research on the

[1] Counsel for the parties in this case did not author this brief in whole or in part. The parties in this case consented to the filing of the *amicus curiae* briefs in support of their respective positions and letters memorializing such consent have been filed with the clerk. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

effects of campaign finance laws, eminent domain abuse, barriers to economic activity, and asset forfeiture. The ability to obtain, analyze and discuss the governmental activities and their impacts on the constitutional rights of Americans is largely dependent on the ability to obtain documents memorializing the government's performance of its duties. IJ therefore has a significant interest in preserving the ability to access public records.

SUMMARY OF THE ARGUMENT

One of the foremost principles that has sustained us as a Union, rather than a mere league of states, is that a state is forbidden from creating distinctions among residents and nonresidents when such distinctions "hinder the formation, the purpose, or the development of a single Union. . . ." *United Bldg. & Constr. Trades Council v. City of Camden*, 465 U.S. 208, 218 (1984) (citations and quotation marks omitted). For those "privileges" and "immunities" "bearing upon the vitality of the Nation as a single entity," a state is required to "treat all citizens, resident and nonresident, equally." *Baldwin v. Mont. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978). In this case, the Commonwealth of Virginia maintains that it may withhold documents regarding the performance of its government functions from all but Virginia residents. The question before the Court, therefore, is whether

the ability of nonresidents to obtain information regarding the Commonwealth's activities "bear[s] upon the vitality of the Nation as a single entity."[2]

There is little question that it does. If the federal Constitution is to be uniformly applied across the country, states cannot shield their activities from those who live outside the state but who have clients or interests protected by the federal Constitution within that state. As this Court has recognized, out-of-state attorneys or law firms may often times be the only individuals or entities available to vindicate federal rights. This role is especially pronounced in public interest litigation, where clients are often unable to pay, or even find, local counsel willing to challenge the economic and political establishments of the communities in which they live. For IJ and other

[2] Of course, even if the ability of nonresidents to obtain government documents is protected by the Privileges and Immunities Clause, that does not end the constitutional inquiry. Virginia's law can still survive if the Commonwealth can demonstrate that it possesses a "substantial reason" for the difference in its treatment of Virginians and non-Virginians and its discrimination against nonresidents bears a substantial relationship to the Commonwealth's objective. *See United Bldg. & Constr. Trades Council*, 465 U.S. at 222. Virginia has made little effort to do either, however. IJ thus confines its analysis to whether the ability to obtain public records is protected by the Clause, as that question appears determinative. IJ concurs with Petitioners, however, that the Virginia statute fails the test for violations of the Privileges and Immunities Clause. IJ also agrees with Petitioners that this law violates the Dormant Commerce Clause.

public interest law firms, being able to access public records allows these firms to determine whether state and local governments are violating the civil rights of in-state residents and whether such a violation should be the subject of litigation.

The importance of public records is not limited to litigation, however. For organizations that research public policy issues and publish their findings, the ability to obtain public documents permits them to engage in comparative analysis regarding state and local governments and communicate effectively about how governments perform across the country. The ability of researchers and advocacy groups to obtain such records thus promotes discussion of national trends and the broader applicability of local remedies for societal problems. If states can block access to public records, it will become increasingly difficult for lawmakers and citizens to make intelligent policy decisions – even ones with a national impact – on a national scale.

Finally, for those instances where the courts have determined that the political process should be the main avenue for the protection of rights, the ability of out-of-state residents to obtain public records is critical. Quite simply, the abuse of constitutional rights of nonresidents is unlikely to go unchecked by the state political process given that those who are disadvantaged are, by definition, disenfranchised as well. Public scrutiny of the performance of government functions is thus essential if nonresidents who

own property, make investments, or have family ties to a state are to determine whether the government's interaction with them is done within constitutional boundaries.

ARGUMENT

I. The Purpose Of the Privileges And Immunities Clause Is To Prohibit Discrimination By One State Against Residents Of The Several States

The very purpose of the Privileges and Immunities Clause is to prevent the kind of discrimination against, and barriers to, nonresidents that Virginia has erected in its law limiting access to public records to only Virginia residents. Such discrimination in favor of in-state interests was well known to the Framers and is precisely the kind of parochial disadvantage that motivated them to adopt the Privileges and Immunities Clause.

"During the preconstitutional period, the practice of some States denying to outlanders the treatment that its citizens demanded for themselves was widespread," and such "discriminations . . . were by no means eradicated during the short life of the Confederation." *Austin v. N.H.*, 420 U.S. 656, 660 (1975). At the Constitutional Convention, James Madison (of Virginia) decried the problem of states discriminating against residents of sister states and therefore insisted that the Constitution provide robust protection

of citizens' privileges in interstate transactions. The new charter, he explained, must prevent the kind of "trespasses of the States on each other." 1 *Records of the Federal Convention of 1787* 317 (M. Farrand ed. 1911). Madison complained specifically of the "Acts of Virga. & Maryland which give a preference to their own citizens in cases where the Citizens (of other states) are entitled to equality of privileges by the Articles of Confederation," a complaint one can only view as ironic in light of the position taken by Virginia in the instant proceeding. *United Bldg. & Constr. Trades*, 465 U.S. at 225 (Blackmun, J., dissenting) (quoting 1 *Records of the Federal Convention of 1787* 317 (M. Farrand ed. 1911)). He and the other Framers recognized that if the new Nation was to thrive and prosper, such "trespasses" must end.

It was out of this concern that the Privileges and Immunities Clause was born. Its "primary purpose," this Court has emphasized, "was to help fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). It did so by "plac[ing] the citizens of each State upon the same footing with citizens of other States – reliev[ing] them from the disabilities of alienage in other States" and "inhibit[ing] discriminating legislation against them by other States." *Paul v. Va.*, 75 U.S. 168, 180 (1868), *overruled on other grounds by U.S. v. Se. Underwriters Ass'n*, 322 U.S. 553 (1944).

So critical to the success of the Republic was the Privileges and Immunities Clause that Alexander

Hamilton, in urging ratification, called it "the basis of the Union" – a guarantee that "equality of privileges and immunities" would remain "inviolable" for citizens of all states, in all states. *The Federalist No. 80* (Alexander Hamilton).

> Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

Paul, 75 U.S. at 180.

Thus, the Privileges and Immunities Clause "was always understood as having but one design and meaning, *viz*., to secure to the citizens of every State, within every other, the privileges and immunities . . . accorded in each to its own citizens. It was intended to guard against a State discriminating in favor of its own citizens." *Lemmon v. People*, 20 N.Y. 562, 626-27 (1860). "[N]o provision in the Constitution has tended so strongly to constitute the citizens of the United States one people at this," *Paul*, 75 U.S. at 180, and the Clause has therefore rightly been called the "palladium of equal fundamental civil rights for all citizens." Cong. Globe, 39th Cong., 1st Sess. 1836 (1866) (statement of Rep. Lawrence).

II. The Right To Obtain Government Documents Falls Within The Purview Of The Privileges And Immunities Clause Because It Is Fundamental To The Promotion Of The Vitality Of The Nation

The Commonwealth purports to support the general principle of non-discrimination against out-of-staters, but nonetheless argues that access to government documents is simply not a "privilege and immunity." It claims that it can therefore distinguish among Virginians and all others in allowing access to such records. *See* Resp'ts' Br. Opposing Pet. Cert. 15. However, it is clear that the ability to access public documents is a privilege the Commonwealth cannot extend to only its citizens without extending it to all other Americans.

A. The Ability To Access Public Records Is Essential To The Uniform Enforcement Of Civil Rights

State and local officials often violate the civil rights of in-state residents and these residents may only be able to obtain out-of-state counsel. Similarly, out-of-state residents may enter into a state and interact with government officials. In both instances, the ability of Americans to determine whether local officials have treated them in a manner consistent with the federal Constitution may depend on someone from out-of-state obtaining public records regarding the performance of governmental responsibilities.

The ability to obtain public records thus becomes an important prerequisite for the effective enforcement of the Fourteenth Amendment and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

In that regard, this Court recognized in *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 281 (1985), that "[o]ut-of-state lawyers may – and often do – represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights." This conclusion is particularly true for public interest firms who represent the interests of the poor, marginalized, or politically powerless against the political and economic establishments of their home state. Under Virginia's law, however, the ability of out-of-state public interest attorneys to effectively represent their clients would be severely hampered by the fact that these attorneys could not obtain public records from the Commonwealth. The inability to obtain public records could therefore mean that serious violations of fundamental federal rights would go without a remedy.

IJ's own experiences demonstrate this important point. For instance, IJ obtained public records from the City of National City, California, regarding that municipality's attempts to redevelopment the property upon which IJ's client – a nonprofit boxing gym dedicated to providing a safe place for at-risk youths – sat. With IJ's assistance, the Community Youth

Athletic Center (CYAC) was able to successfully challenge National City's efforts by demonstrating, among other things, that National City had violated CYAC's right to due process under the Fifth and Fourteenth Amendments. Without the ability of CYAC's attorneys to obtain public records, however, this vital part of this community could have been lost. In other words, had the CYAC been located in Virginia and represented by an out-of-state firm, the ability of the CYAC's lawyers to vindicate the gym's rights would have been severely compromised.[3]

Similarly, IJ attempted to determine whether Georgia law enforcement agencies had complied with a state law that mandates such agencies publicly report annual forfeiture proceeds and expenditures. IJ found that many Georgia law enforcement agencies completely ignored this obligation. *See* Erin Norman & Anthony Sanders, *Forfeiting Accountability:*

[3] Virginia may argue that residents can still obtain documents and that, in circumstances like the case involving the CYAC, IJ could have found an in-state resident to make the requests. This is an inadequate alternative for a number of reasons. First, in preparing for litigation, time is often of the essence. Locating an in-state resident to essentially act as a sock puppet for an out-of-state attorney can needlessly delay the vindication of important federal rights. Moreover, if the in-state resident is unsophisticated and unable to challenge unjustified or unsupportable denials of public records, the out-of-state attorney will soon need to come to the fore regardless. Finally, if using an in-state proxy is such a simple solution, it is difficult to understand why Virginia needs this restriction in the first place.

Georgia Law Enforcement's Hidden Civil Forfeiture Funds (March 2011), *available at* www.ij.org/images/pdf_folder/other_pubs/forfeitingaccountabilityfinal.pdf. As a result of the information uncovered through the use of public records requests, concerned Georgia citizens sued leading law enforcement agencies in Georgia to force them to disclose the property they had seized, as well as the purposes to which they devoted such property. *See Van Meter v. Turner,* No. 2011CV198536 (Fulton Cnty. Sup. Ct. 2011). The case concluded when all three agencies admitted to violating Georgia law in not reporting forfeiture proceeds and expenditures, and agreeing to follow the law in the future.[4]

These two examples demonstrate that public interest law is an inherently interstate activity. From the out-of-state attorneys willing to represent civil rights advocates in the 1950's and 1960's to the attorneys of today who litigate various less dangerous but nonetheless crucial issues outside their home states, public interest lawyers have played an essential role in promoting and realizing the uniform enforcement of federal rights across the country. Viewed

[4] Conversely, an attorney's ability to obtain public records regarding a law that appears to be constitutionally problematic on its face may demonstrate that state and local officials are enforcing the law in a constitutional manner. In such instances, the ability to obtain records deters unnecessary and wasteful litigation.

in this context, Virginia's restriction should be seen for what it is – a petty and unnecessary attempt to make it difficult to oversee the Commonwealth's activities and hold it accountable. Such a parochial and paternalistic approach hardly contributes to "interstate harmony."

B. The Ability To Obtain Public Records Is Vital To Informed Analysis Of Governmental Activities Across The Country

Public records are not only used for litigation, of course. They also provide valuable information for researchers, social scientists, policy advocates, and think tanks wishing to analyze state and local government in comparative perspective. The inability to obtain public records decreases the amount of information available and can lead to incomplete or erroneous conclusions about some of the most significant public policy issues of the day.

Again, IJ's own experience bears this out. IJ uses public records requests in its original research and has successfully brought a number of neglected issues to the forefront of national debate. For instance, IJ used public records to uncover the abuse of asset forfeiture in Texas, which resulted in a state lawsuit. It has uncovered the existence of similar problems in Arizona. *See* Scott Bullock & Dick M. Carpenter II, Ph.D., *Forfeiting Justice: How Texas Police and Prosecutors Cash In On Seized Property* (November

2010), *available at* www.ij.org/pdf_folder/other_pubs/forfeitingjusticefinal.pdf; Tim Keller, Diana Simpson & Dick M. Carpenter II, Ph.D., *Arizona's Profit Incentive in Civil Forfeiture: Dangerous for law enforcement: Dangerous for Arizonans* (December 2012), *available at* www.ij.org/images/pdf_folder/private_property/forfeiture/az-forfeiture-report.pdf. As a result of IJ's ability to obtain such records, it was able to promote a national discussion of this often-overlooked topic.

IJ has also used public records to uncover similar abuses of government power regarding the extensive use of eminent domain for private purposes. *See* Dana Berliner, *Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain* (April 2003), *available at* www.castlecoalition.org/pdf/report/ED_report.pdf. This effort resulted in increased attention to "private takings" and IJ's eminent domain study was cited by Justice O'Connor in her dissent in *Kelo v. New London*, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting). After that decision, IJ's study became a key component of the national movement to reform eminent domain laws.

In both instances, the ability to investigate and publicize government abuses was entirely dependent on the ability of IJ, an out-of-state organization, to obtain public records. In that regard, it is clear that in order to understand national trends in public policy and governmental actions, a researcher must compare what one state is doing against other states.

Without the ability to obtain public records, however, there can be huge gaps in the data if states withhold their public documents from researchers, think tanks, public policy experts, and universities. If states are indeed the "laboratories of democracy," *see New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), then laws like Virginia's lock the laboratory doors and hide the formulas. This protectionist scheme thus works against the "maintenance or well-being of the Union." *Baldwin*, 436 U.S. at 388.

C. It Is Vitally Important To Interstate Harmony For Out-Of-State Residents To Be Able To Monitor The Activities Of Political Entities Who May Affect Their Interests But To Which They Do Not Belong

In addition, the ability of nonresidents to obtain public documents is also essential when the courts have concluded that the political process is the primary means for protecting one's interests.

For instance, in *Kelo*, this Court held that the taking at issue was constitutional because it was done pursuant to "a 'carefully considered' development plan." *Kelo*, 545 U.S. at 478. This Court noted that New London had followed the requisite statutory procedural requirements, held hearings, and conducted neighborhood meetings. In light of this governmental activity, the Court held that there was no

evidence of illegitimate purpose in the case and that the plan was not adopted to benefit a particular class of identifiable individuals. In contrast, the Court warned that the "one-to-one transfer of property, executed outside the confines of an integrated development plan" was not presented in that case and suggested that such a transfer "would certainly raise a suspicion that a private purpose was afoot." *Id*. at 487. Justice Kennedy, in particular, strongly implied that the plan's viability under the U.S. Constitution depended largely on the extensive evidence demonstrating New London's compliance with "elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes." *Id*. at 493 (Kennedy, J., concurring). The existence of a thorough and open process was therefore key to the Court's conclusion that New London's plan followed the dictates of the federal Constitution.

Kelo, of course, concerned Connecticut residents,[5] but property owners are not always residents of the states in which they own property. An individual may own a vacation home, business, or second home in a state in which they do not primarily reside. In such instances, Virginia[6] argues that it and other states

[5] IJ represented Ms. Kelo and the other homeowners in her challenge to New London's attempt to condemn her home.

[6] The scenario IJ lays out here – the condemnation of an out-of-state resident's land for a private purpose – is now forbidden by the Virginia Constitution. Va. Const. art. I, § 11 (amended 2012). This amendment, in and of itself, demonstrates how interconnected Virginia is with the rest of the country as

(Continued on following page)

and municipal governments may act without the ability of the property owner to determine whether a proposed exercise of eminent domain falls outside of constitutional boundaries. In other words, when it deals with the property of out-of-state individuals and entities, states like Virginia essentially claim they can dispense with the thorough and open planning process this Court found was so critical to the constitutionality of the New London project. In such instances, these governments have taken from out-of-state property owners one of their last defenses to an unconstitutional condemnation: the ability to collect information about whether the project is undertaken for a private purpose. They are left to the mercies of a

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the passage or failure of an initiative is a political signal of extensive significance in this country. One need only look to the national ramifications of Howard Jarvis's taxpayer's revolt in California that resulted in Proposition 13 to understand that the impact of the success or failure of an initiative does not stop at the border of a state. Proposition 13 was described as "a political earthquake whose jolt was felt not just in Sacramento but all across the nation, including Washington D.C. . . . Within five years of Proposition 13's passage, nearly half the states strapped a similar straightjacket on politicians' tax-raising capabilities." Stephen Moore, *Proposition 13 Then, Now and Forever*, *available at* http://www.cato.org/pub_display.php?pub_id=5682 (July 30, 1998). The passage of gay marriage initiatives in Maine and Washington and initiatives legalizing the possession of certain amounts of marijuana in Colorado and Washington could have similar ramifications nationwide. Nonetheless, if these states were to adopt Virginia's approach to public records, the ability of a resident of another state facing a "political earthquake" would not be able to obtain the most basic information regarding the state government where the first rumbles were felt.

political system to which they do not belong and in which they may not participate.[7]

CONCLUSION

The ability of Americans to obtain the public records of states in which they do not reside bears directly and significantly on the vitality of the Nation as a single entity. For this reason, the decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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[7] Moreover, as noted above, public records led to significant reform by in-state residents, assisted by national advocacy groups like IJ. The ability to obtain public records played a critical role in eminent domain reform, as it has in other areas of law and public policy. It is precisely this kind of informed public policy discussion that such protectionist laws retard.