No. 12-17

IN THE
Supreme Court of the United States

MARK J. MCBURNEY AND ROGER W. HURLBERT,

Petitioners,

v.

NATHANIEL YOUNG, JR., AND THOMAS C. LITTLE,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
Fourth Circuit

BRIEF OF PUBLIC JUSTICE, P.C., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Is it unconstitutional for a state to preclude citizens of other states from enjoying the same right of access to public records that the state affords its own citizens?

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INTEREST OF AMICUS

Public Justice, P.C., is national public interest law firm dedicated to pursuing justice for the victims of corporate, governmental, and other abuses. Public Justice specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and powerless.

As part of its Project ACCESS, Public Justice regularly seeks to unseal court records to expose and provide public access to evidence of corporate and governmental wrongdoing—particularly abuses concerning serious risks to public safety. Access to public records, including judicial records, is an important tool in protecting consumer and civil rights. Because of Public Justice's extensive experience litigating access to court records, it has significant expertise in the common-law and constitutional right of access to public records.[1]

SUMMARY OF ARGUMENT

Petitioners Mark McBurney and Roger Hurlbert sought access to public records under Virginia's

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[1] This brief is filed under Petitioners' blanket consent filed with the Court, and Respondents' written consent to the filing of this brief. No person other than *amicus* Public Justice or its counsel authored or provided financial support for this brief. Leah Nicholls, counsel of record for Public Justice, previously represented the Petitioners, Mark McBurney and Roger Hurlbert, and her name appears on the Petition. While the Petition in this case was pending, Ms. Nicholls changed firms, and she no longer represents Petitioners in this or any other matter.

Freedom of Information Act, and each was denied access to the public records he requested solely because he was not a citizen of Virginia. Pet. App. 8a. Denying access to public records on the basis of state citizenship violates the anti-discrimination principles of the Privileges and Immunities Clause of Article IV of the United States Constitution.

The Privileges and Immunities Clause prohibits states from discriminating on the basis of state citizenship if the discrimination burdens a right protected by the Clause. Rights are protected by the Clause if they are "basic to the maintenance or well-being of the Union." *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 388 (1978). Rights that this Court has recognized as protected include the right to pursue a common calling, own property, access courts, equal tax treatment, travel, and receive medical treatment.[2]

When the Privileges and Immunities Clause was drafted, the common-law right to access public records was a well-established, basic right. The common-law right, particularly in the eighteenth century, was primarily grounded in protecting private property and legal rights. The central rights that have been recognized as protected by the Clause are based on those same interests: protecting

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[2] *Saenz v. Rose*, 526 U.S. 489, 501 (1999) (travel); *United Bldg. & Constr. Trades Council of Camden Cnty. & Vicinity v. Mayor & Council of Camden*, 465 U.S. 208, 219 (1984) (common calling); *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) (tax treatment); *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (medical treatment); *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 562 (1920) (access to courts); *Blake v. McClung*, 172 U.S. 239, 254 (1898) (own property).

property and legal rights. Because access to public records was well established at the time the Constitution was drafted and because it is motivated by the same concerns as the rights this Court has recognized as protected by the Clause, access to public records is basic to the maintenance of the Union and protected by the Privileges and Immunities Clause.

ARGUMENT

I. THE COMMON-LAW RIGHT OF ACCESS TO PUBLIC RECORDS WAS WELL ESTABLISHED AT THE TIME THE CONSTITUTION WAS DRAFTED AND WAS RECOGNIZED BY EARLY AMERICAN COURTS.

Freedom of information statutes are a relatively modern phenomenon, but, as detailed below, the right to access public records has existed at common law since at least the fourteenth century. Thus, the common-law right was in force at the time the Privileges and Immunities Clause was drafted. The interests served by that right, as understood by English and American courts of the eighteenth and nineteenth centuries, are the same as the interests served by other rights protected by the Clause—protecting the property and business rights that are basic to maintaining a unified a nation.

The most limited iteration of the common-law right to access public records involved a person showing that he or she had a legitimate interest in the information sought—idle curiosity was insufficient. Typically, a requester was able to establish an interest by establishing a need to use the record for pending or possible litigation or for a

property- or business-related interest. Some courts, especially American courts, also acknowledged that, if a requester could not show a litigation or business interest in the information contained in the public record, the interest a taxpayer citizen had in the proper expenditures of public money or the operation of government also was a sufficient interest. There was no indication, however, that the requester needed to be a citizen of the jurisdiction that held the public record if the requester otherwise had a legitimate interest in the record.

Because the history, structure, and rationale of the common-law right to access public documents are the same as—and overlap—the central rights this Court has explicitly recognized as protected by the Privilege and Immunities Clause, the right to access records is equally basic to the maintenance of the Union and protected by the Privileges and Immunities Clause.

A. English Common Law

Although the exact scope of the English right to access public records was unsettled at the time the Constitution was drafted, it was agreed that, at a minimum, an individual with a property or litigation interest in a public record was entitled to inspect it. Some American courts have described the English rule as only permitting access to public records that the requester might use as evidence in pending or future litigation, but, often, English courts permitted access to public records in the absence of litigation. *See, e.g.*, *Ferry v. Williams*, 41 N.J.L. 332, 334 (N.J. 1879) (describing English common law as requiring the requester to be seeking evidence for use in litigation); *Herbert v. Ashburner*, (1750) 95 Eng. Rep.

628; 1 Wils. K.B. 297 (records' relevance to litigation irrelevant).

The right to access public records in England dates to at least 1372, when, by ordinance, the English Parliament opened court records to inspection even if the records would ultimately be used against the King. 46 Edw. 3 (1372); 2 Eng. Stat. at Large 191, 196-97 (1341-1411); *see also* 1 Simon Greenleaf, A Treatise on the Law of Evidence § 471, at 522 (12th ed. 1866). English legal commentators of the seventeenth and eighteenth centuries disagreed as to whether and to what extent the 1372 ordinance required that the person seeking to inspect records have an interest in them. Lord Coke believed that no interest was required, but Sir Michael Foster interpreted the ordinance to restrict inspection rights to requesters seeking evidence for use in pending litigation to which they were parties. 2 E. Coke Reports pt. 3, Preface at vi-vii (1572-1617); M. Foster, A Report of Some Proceedings on the Commission of Oyer 229 (1762).

1. By the mid-1700s, English common law allowed access to all types of public records under varying conditions. With regard to records of public proceedings, "every subject ha[d] a right to inspect without shewing in his affidavit whether they relate directly to the point in question or not" so long as the disclosure of the information in the record did not violate public policy. *Rex v. Fraternity of Hostmen in Newcastle-upon-Tyne*, (1745) 93 Eng. Rep. 1144 (K.B.) 1144; 2 Str. 1223, 1223. In some cases, this right to inspect public records was tied to the interest a taxpayer had in the proper use of the taxes he had paid. *Rex v. Guardians of Great Faringdon*, (1829) 9 B. & C. 541. In others, it was tied to an

elected official's right to review the voter rolls. *Schuldam v. Bunniss*, (1774) 1 Cowp. 192, 197. But some courts did not require any connection; everyone had the right to inspect the records of public proceedings even if he or she could not demonstrate any particular interest in them. For example, in *Herbert v. Ashburner*, a litigant sought to review the session books of a local municipal corporation—the contemporary equivalent of city government—in the course of litigation over whether certain lands had been incorporated by the town. 95 Eng. Rep. at 628; 1 Wils. K.B. at 297. The other side objected, arguing that the session books might contain information unrelated to the issue in the litigation. *Id.* The court held that the session books were "public books which every body has a right to see"; it was irrelevant whether the requester had any particular interest in the records, litigation-related or otherwise. *Id.*

Although nothing in the *Herbert* decision tied access to public records to local citizenship, and the opinion does not indicate whether the record-seeker was a member of the municipality, other English cases tie access to the records of municipal corporations to membership in the corporation—members of the corporation were those who could vote in the corporation's political elections but were not necessarily local residents. For example, an individual looking to inspect the municipal corporation's account books during a customs dispute could not do so because he was not a member of the corporation. *Mayor of Exeter v. Coleman*, (1754) Barnes 238 (K.B.). Outside of litigation, members of the municipal corporation had at least some access to all the municipal records by virtue of their membership. *See Rex v. Babb*, (1790) 3 T.R. 579

(K.B.) 580 ("[I]t may be admitted that in certain cases the members of a corporation may be permitted to inspect all papers relating to the corporation." (Lord Kenyon, C.J.)); *see also* 1 John F. Dillon, The Law of Municipal Corporations § 240, at 354 (2d ed. 1873) ("Every *corporator has a right to inspect* all the records, books, and other documents of the corporation, upon all proper occasions[.]" (emphasis in original)).

In addition to membership, a business or litigation interest was also independently sufficient to establish a right to access the records of a municipal corporation. In the context of access to records in the course of litigation, as one judge put it, "I see no difference between the application of a stranger and a corporator." *Babb*, 3 T.R. at 581 (Ashhurst, J.). Further, non-members had access to records that concerned laws that had an impact on their business interests, despite their lack of membership in the municipal corporation. *Harrison v. Williams*, (1824) 3 B. & C. 162 (K.B.); *see also Brewers Co. v. Benson*, (1753) Barnes 236 (K.B.) (non-member of non-municipal corporation could inspect corporate records when the records affected the requester's business).

2. If government proceedings—including some judicial proceedings—were not public, individuals could inspect the records if the records were part of litigation brought by or against the requester. Some courts held that it was sufficient for the requester to have been a party to the proceedings to access the records. *Rex v. Brangan*, (1742) 168 Eng. Rep. 116 (Old Bailey) (holding that every prisoner has a right to a copy of his felony indictment to use for whatever purpose); *see also Wilson v. Rogers*, (1745) 2 Str. 1242

(K.B.) ("[E]very man has a right to look into the proceedings to which he is a party."); *Jackson v. Wickes*, (1816) 2 Marsh. 354 (permitting a defendant a day to inspect the court record in his case). Other courts, however, further required that the requester need the record as evidence in litigation. *See, e.g.*, *Fraternity of Hostmen*, 93 Eng. Rep. at 1146, 2 Str. at 1223 ("[E]very person has a right to a copy of those proceedings of limited jurisdictions which are had against himself, where it is necessary in a suit instituted either by or against him.").

3. Similarly, real property records were accessible to those with an interest in the property. In eighteenth-century England, manor records served as real property records and were equivalent to the types of public records—real property tax assessment records—that petitioner Hurlbert seeks from Henrico County here. Manor records included the rolls of copyhold courts, which kept records of all real property transactions. *See* Black's Law Dictionary 360 (8th ed. 2004). "The tenants of a manor are the only persons who have a right to inspect the court-rolls." *Roe v. Aylmar*, (1753) Barnes 236 (K.B.). English courts were divided, however, over whether a manor tenant had an absolute right to inspect records of that manor—which would have necessarily included the real property records of the requesting tenant—or whether the requesting tenant also had to show a particular need or interest in the records. For example, in *Rex v. Shelley*, the court held that it was "clearly settled, that where the tenant of a manor demands leave to inspect the court rolls and it is refused him, the Court will grant a mandamus to compel it." (1789) 3 T.R. 141, 142; *see also Hobson v. Parker*, (1753) Barnes 237 (K.B.) (freeholders, as well

as tenants, have the right to inspect manor court rolls). A later court, however, rejected such a broad reading of *Shelley*, deciding that unless "there was some cause depending, the tenant had no right to call for an inspection of the court rolls." *Rex v. Allgood*, (1798) 7 T.R. 746, 746. In the later case, the court reconciled the holding in *Shelley* by noting that in *Shelley*, there had, in fact, been an underlying cause or proceeding. *Id.* There appears to be no dispute that when a property owner needed access to property records to protect his property rights, however, the owner had the right to inspect the records. *See Folkard v. Hemet*, (1776) 2 Black. W. 1061 (K.B.) 1061-62.

Access to government records to establish property interests extended beyond real property registered in the manor rolls. For example, a lessee of public market space in London was permitted to inspect government records setting out the boundaries of the market to solve a dispute over the extent of the leased area. *Warriner v. Giles*, (1733) 2 Str. 954 (K.B.) 954-55. The court reasoned that the records outlining the market boundaries were comparable to "court rolls, which are not considered as evidence of the lord, but in the nature of publick books." *Id.* at 955. Similarly, an officer's widow was permitted to inspect the books of the commissioners of the army. *Moody v. Thurston*, (1719) 1 Str. 304 (K.B.). Since the widow would have lacked full civil and political rights—and it seems farfetched that there was a general right to inspect military papers—it is likely that her purpose in inspecting the books of the commissioner was to determine her right to compensation for her husband's death.

In sum, although eighteenth century English

common law was not uniform with regard to the right to access public records, by 1788, when the Privileges and Immunities Clause was ratified, English courts had long recognized a common-law right of access to public records driven by the need for individuals to protect their property interests. Indeed, access to public records often depended most heavily on the extent to which the requester had an interest in the record; citizenship or membership, meanwhile, was sometimes sufficient but rarely necessary.

B. American Common Law

Nineteenth- and early twentieth-century America continued the tradition of access to public records, with American courts leaning heavily on English common law in recognizing such a right. *See, e.g.*, *Ferry*, 41 N.J.L. at 334-39 (describing English cases in detail); *Clay v. Ballard*, 13 S.E. 262, 264 (Va. 1891) (citing Greenleaf §§ 471 and 478 and relying on that treatise's description of English common law). Modern courts continue to recognize the rich common-law history of access to public records and acknowledge that that right predates the drafting of the Constitution. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-73 (1980); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-98 (1978); *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1332-33 (D.C. Cir. 1985); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066-67, 1068-69 (3d Cir. 1984).

Although all early American courts recognized a common-law right to access public records, as among the English courts, the scope of the right was not

uniform. Like the English courts, American courts often required a requester to have some legitimate interest in the records sought—satisfying "idle curiosity" or creating "public scandal" were insufficient reasons. *Cormack v. Wolcott*, 15 P. 245, 247 (Kan. 1887); *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811, 815 (Ky. 1974); *In re Caswell*, 29 A. 259, 259 (R.I. 1893); *see* M.C. Dransfield, Annotation, *Restricting Access to Judicial Records*, 175 A.L.R. 1260, § 2 (1948). Many courts considered citizenship and taxpayer status to be sufficient, but not necessary interests; courts only reached the question if the requester did not have another business or property interest in the records. Likewise, if the requester had a business, litigation, or property interest, he or she did not have to be a citizen. *See, e.g.*, *State v. King*, 57 N.E. 535, 537-38 (Ind. 1900); *Nowack v. Fuller*, 219 N.W. 749, 751 (Mich. 1928). American courts generally rejected what they viewed as the English requirement that the requester need the records for a litigation purpose. *See Nixon*, 435 U.S. at 597 (collecting cases).

Some jurisdictions codified access to all or some types of public records—access to judicial dockets and judgments of the federal courts, for example, was guaranteed by statute. Act Aug. 12, 1848, ch. 166, 9 Stat. 292 (listing federal court records open to inspection); Act Aug. 1, 1888, ch. 729, 25 Stat. 357 (same); *State v. Grimes*, 84 P. 1061, 1062 (Nev. 1906) (describing Nevada public records law). Other jurisdictions relied exclusively on the common-law right to access public records, but even where a statute was in place, courts generally assumed that, unless the statute provided otherwise, the legislature

intended to codify the common-law right to access public records. *See, e.g.*, *Clay*, 13 S.E. at 264. Thus, whether or not there was a statute, early American courts—including Virginia courts—unanimously recognized a common-law right to inspect public records that flowed from English common law. *See, e.g.*, *id.* at 263 (following common law in interpreting Virginia's access to public records statute).

1. For example, American courts were unanimous that individuals with an interest in particular real property had a common-law right to inspect government-held records about that property. *See, e.g.*, *Cormack*, 15 P. at 246; *Webber v. Townley*, 5 N.W. 971, 972 (Mich. 1880); *Grimes*, 84 P. at 1063-73 (surveying cases); *see also* P.M. Dwyer, Annotation, *Right of Abstractor or Insurer of Title to Inspect or Make Copies of Public Records*, 80 A.L.R. 760, part XI (1932). The purpose of the common-law rule was to protect the investment of the potential purchaser: "Caveat emptor being the rule with us in the absence of a special agreement, it is just and essential to the protection of persons intending to purchase or take encumbrances that they be allowed the right of inspection." *Grimes*, 84 P. at 1073; *see also Cormack*, 15 P. at 246. That rule and rationale dates to the English common-law right of tenants to inspect the manor rolls, which, as explained above (at 8-9), similarly contained recorded property rights to which property-holders needed access to protect their property rights.

Though it was well established that an individual with an interest in particular property had a right to inspect property records about that property, there was some debate as to whether title abstractors who—like petitioner Hurlbert—sought to copy the

complete set of title records for commercial gain, could do so. *See* Dwyer, 80 A.L.R. 760, part II. The primary argument against access for title abstractors was the same one made by Respondents here: A "large expense would be incurred . . . and much time consumed" by government officials responding to such requests. *Cormack*, 15 P. at 246-47; Fourth Cir. Young Br. 41-42 (Apr. 18, 2011). Early cases parroted the English rule—that an interest in the property is required—and accepted the argument that large public records requests unduly burden officials' time. Later cases, however, held that the increasing complexity of American land titles and the corresponding need for increased publication and dissemination of property titles justified departing from the English common-law rule and expanding the scope of access to public records to permit commercial abstractors to collect and publish general title information. *See, e.g.*, *Shelby Cnty. v. Memphis Abstract Co.*, 203 S.W. 339, 340 (Tenn. 1918); *see also* Dwyer, 80 A.L.R. 760, part II (collecting cases). Since the early twentieth century, the general rule has been that title abstractors have a right to inspect real property records without a specific interest in a particular piece of property. *Id.*

2. Similarly, courts unanimously acknowledged the well-established common-law right to inspect judicial records. At the turn of the twentieth century, however, they disagreed as to whether an interest in the specific record was required. *See, e.g.*, *Ex parte Uppercu*, 239 U.S. 435, 439 (1915); *Ex parte Drawbaugh*, 2 App. D.C. 404, 406 (1894); *Caswell*, 29 A. at 259. Some of the earliest federal cases about access to judicial records involved patent records. *See Drawbaugh*, 2 App. D.C. at 404; *Sloan Filter Co. v.*

El Paso Reduction Co., 117 F. 504, 507 (C.C.D. Colo. 1902) (No. 3,746). In that context, an interest in viewing a competitor's patent litigation records was a sufficient interest to justify fulfilling the request. *Id.* In other words, at least in some instances, access to court records was driven by business interests.

Courts eventually lifted any requirement that the requester have a particular interest in the court records sought. The modern justification for the common-law right to access judicial records focuses on the importance of safeguarding "integrity, quality, and respect in our judicial system" and that public access to judicial records "permits the public to keep a watchful eye on the workings of public agencies." *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) (internal quotation marks and citations omitted); *see Richmond Newspapers*, 448 U.S. at 571-72.

3. Today, access to most government records is guaranteed by statute, and the statutory right to access records is typically more expansive than under traditional common law in that it does not require the requester to have an interest in the record requested. *See U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 14 (1988) (explaining that "no one need show a particular need for information in order to qualify for disclosure under the [federal] FOIA"); *Associated Tax Serv., Inc. v. Fitzpatrick*, 372 S.E.2d 625, 629 (Va. 1988) ("[T]he purpose or motivation behind a request is irrelevant" under Virginia's Freedom of Information Act.). Nevertheless, at least at the federal level, in enacting the country's principal open records law, lawmakers saw themselves as simply codifying an important right that would have been familiar to the drafters of the

Constitution. *See, e.g.*, 112 Cong. Rec. 13,007 (1966) (statement of Rep. Benjamin Rosenthal); *id.* (statement of Rep. John Ross).

* * *

When the Privileges and Immunities Clause was ratified, the common-law right to access public records was well established. Though English and American courts varied on the scope of that right, there was never a question that the right existed. And the original rationale for that right lay, not in heady notions of political participation, but simply in ensuring that individuals had the ability to protect their property and business interests. It is protecting those interests that this Court has considered to be basic to the maintenance of the Union.

II. THE RIGHT TO ACCESS PUBLIC RECORDS IS PROTECTED BY THE PRIVILEGES AND IMMUNITIES CLAUSE.

The Privilege and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. The Clause prohibits states from discriminating against citizens of other states—it "place[s] the citizens of each State upon the same footing with citizens of other States." *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) (quoting *Paul v. Virginia*, 75 U.S. 168, 180 (1868)). A state's discriminatory practice is unconstitutional under the Clause if it burdens a privilege or immunity protected by the Clause. Here, no one, including Respondents, disputes that, in limiting the right to access state and local records to citizens of Virginia, Virginia's Freedom of Information Act discriminates against out-of-staters.

The only question is whether access to public records is a right protected by the Clause. The long-standing common-law right to access public records, which was well established when the Clause was ratified, is exactly the type of privilege or immunity the Clause was designed to protect.[3]

A privilege or immunity is protected by the Clause if it is "basic to the maintenance or well-being of the Union." *Baldwin*, 436 U.S. at 388. Rights protected are those "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." *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230) (Washington, Circuit Justice).

Corfield, the earliest articulation of what privileges and immunities are protected by the Clause, listed as examples the rights to travel, conduct trade and other professional pursuits, access courts, own property, and be taxed equally. *Id.* at 552. In practice, the rights that have been recognized since *Corfield* are largely those described in that case. *See, e.g.*, *Austin*, 420 U.S. at 662 (right to equal tax treatment); *Toomer v. Witsell*, 334 U.S. 385, 396 (1948) (right to practice common calling); *Canadian*

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[3] To be clear, *amicus* is not arguing that the Constitution guarantees access to public records. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion) (no constitutional right to government information). Rather, the Privileges and Immunities Clause requires that, if a state chooses to offer access to public records—or offer any other right protected by the Clause—it must treat state citizens and noncitizens equally in doing so.

Northern, 252 U.S. at 200 (right to access state courts); *Blake*, 172 U.S. at 254 (right to ownership and disposition of property); *see also Ward v. Maryland*, 79 U.S. 418, 430 (1870) (summarizing established rights as including engaging in business, acquiring personal and real property, accessing state courts, and being equally taxed). Many of the established rights—practicing a common calling, owning property, accessing courts, paying taxes—are based on the protection of business, litigation, or property interests.

Thus, the ability to protect those business, litigation, and property interests across state lines is what this Court has considered to be sufficiently basic to national unity to be protected by the Privileges and Immunities Clause. Because the right to access public records, particularly as it was understood at the time the Clause was ratified, is also driven by the need to protect business, litigation, and property interests, it, too, is basic to national unity and protected by the Clause.

1. As explained above, the core rationale for access to public records under the common law was to protect the property, litigation, and business interests of the requester—exactly the interests reflected in the rights identified in *Corfield*. At common law, tenants and property owners (or potential owners) could access title records to ascertain their property rights or to use that information to protect their rights in a dispute.

Access to property records is inextricably intertwined with the right to own property itself; without access to title records, an owner would be unable to determine the scope of his or her

ownership: "Without [property] records there would soon be that uncertainty in the title to real estate that would render it almost valueless, or involve its owners in endless litigation to protect it." *Cormack*, 15 P. at 246. Indeed, the right to own property and access public records about it is so well established that Virginia admitted below that "if a non-resident wished to run a title search to determine whether to purchase a piece of property, refusing to permit that non-resident to search the [property] records would constitute a violation of the Clause." Fourth Cir. Mims Br. 46 (Oct. 21, 2009).

As Virginia and the common-law English and American courts recognized, access to public property records is essential to—and part of—the right to property ownership, a right that indisputably protected by the Clause. *Baldwin*, 436 U.S. at 383 (property ownership protected by the Clause); *Blake*, 172 U.S. at 254 (same); *Ward*, 79 U.S. at 430 (same). In addition, the right to access property records was well established at common law at the time the Clause was drafted and has "at all times, been enjoyed by the citizens of the several states . . . , from the time of their becoming free, independent, and sovereign." *Corfield*, 6 F. Cas. at 551. Since access to property records is part and parcel of the right to ownership and was a well-established right when the Privileges and Immunities Clause was ratified, access to public real property records is basic to the well-being of the Union and protected by the Clause.

2. The Virginia Freedom of Information Act, the statute under which Petitioners requested and were denied access to public records, does not apply to court records. *See* Va. Code Ann. § 2.2-3704(B)(1) (Freedom of Information Act only applies to state

agencies subject to that chapter). Nevertheless, the right to access state-court records illustrates why access to other types of public records is so important.

Under English common law at the time of the Founding, individuals had access to judicial records in which they had interests, either because the requester was a party to the underlying action or because the requester needed the record to protect his or her interests, for example, to use as evidence in another action. *See supra* at 7-8. Similarly, in the United States, in the nineteenth and early twentieth centuries, some courts required that the requester have a specific interest in the court record sought. *See supra* at 13-14.

The same rationale applied to the right to appear in state courts in the United States—that an out-of-stater needed to be able to protect his or her economic rights. And the right to appear in state courts is a right indisputably protected by the Clause. *Baldwin*, 436 U.S. at 383; *Canadian Northern*, 252 U.S. at 562; *Ward*, 79 U.S. at 430. As *Canadian Northern* explained, "the constitutional requirement [in the Privileges and Immunities Clause] is satisfied if the nonresident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the *enforcing of any rights he may have*." 252 U.S. at 562 (emphasis added). Because the interests protected by access to court records are the same as the interests protected by access to state courts, access to state court records, too, are basic to national unity and protected by the Privileges and Immunities Clause.

As more rights are adjudicated outside the courts,

the rationale for access to court records also applies to public records—beyond just property records—generated outside of litigation. As Justice Jackson observed sixty years ago, "[t]he rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts . . . . They have become a veritable fourth branch of the Government . . . ." *Fed. Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting); *see also Mistretta v. United States*, 488 U.S. 361, 372 (1989) (discussing the increasing need for Congress to delegate power to agencies); *see generally* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994).

Though Justice Jackson was referring to the federal administrative state, at the state level as well, an increasing number of rights are adjudicated by executive agencies acting in a "quasi-judicial" capacity. *See Minn. Ctr. for Envtl. Advocacy v. Metro. Council*, 587 N.W.2d 838, 841-42 (Minn. 1999) (discussing the definition of "quasi-judicial" for purposes of judicial review of state agency action); David E. Shipley, *The Status of Administrative Agencies Under the Georgia Constitution*, 40 Ga. L. Rev. 1109, 1113 (2006) (discussing the predominant role of state agency adjudications). To the extent state agencies are determining individuals' rights, the same traditional common-law rationales apply to the access to agency records as they did to court records at the time of the Founding. Because state agencies increasingly possess records that individuals need to protect their interests, access to those records, too, is basic to national unity and

protected by the Privileges and Immunities Clause.

Common-law access to court records is so well established—both today and as it was at the time the Privileges and Immunities Clause was ratified—that it is hard to imagine a state being able to place restrictions on it. For example, just as Virginia cannot prohibit noncitizens from accessing public property records because access to the records is key to the right of ownership itself, Virginia could not pass a statute stating that only citizens of Virginia could access Virginia state court records for similar reasons. This is obvious, at least in part, because Virginia courts may have issued judgments or other documents that affect an out-of-stater's economic or other rights. Indeed, that is petitioner McBurney's predicament. A Virginia state agency's action resulted in McBurney losing his economic right to child support, but he was denied access to the agency's policies and procedures that led to that loss because he is not a citizen of Virginia. Today, as state agencies determine an increasing number of rights, the same rationale applies to state executive branch documents generally—not just traditional real property records—and access to them, too, should be protected by the Privileges and Immunities Clause.

3. Article IV's Full Faith and Credit Clause, which sits right next to the Privileges and Immunities Clause, lends credence to the argument that the Founders assumed that individuals had access to the public records of other states and that they saw access to those records as vital to national unity. The Full Faith and Credit Clause provides, in part, that "Full faith and credit shall be given in each state to the public acts, records, and judicial

proceedings of every other state." U.S. Const. art. IV, § 1. The Full Faith and Credit Clause sought, among other things, to prevent individuals from evading state-court judgments by moving across state lines. Shawn Gebhardt, *Full Faith and Credit for Status Records: A Reconsideration of* Gardiner, 97 Cal. L. Rev. 1419, 1429 (2009). Before the Constitution, under the Articles of Confederation, unless a state passed a law specifically addressing the issue, state governments were powerless to enforce—or even accept as evidence—judgments that had been issued by courts elsewhere. Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 Va. L. Rev. 1201, 1221-26 (2009) (discussing pre-Constitution state laws). Like granting access to real property and court records generally, the purpose was to protect the property of the person in the first state, the person who had won a money judgment.

The logical predicate of the Full Faith and Credit Clause is that someone in the second state must have access to the court (and other) records of the first state. Otherwise, there would be no "records" to give full faith and credit to. Thus, the Full Faith and Credit Clause demonstrates that the drafters of the Constitution believed, first, that an individual could access government records, second, that an individual could access the government records of a state of which he or she was not a citizen, and, third, that interstate access to public records was vital to national unity. In sum, the Full Faith and Credit Clause underscores the conclusion that the Founders would understand that access to public records is a right protected by the Privileges and Immunities Clause.

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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