NO.12-17

In The Supreme Court of the United States

MARK J. MCBURNEY, *et al.*,
Petitioners,

v.

NATHANIEL L. YOUNG, Deputy Commissioner and Director, Virginia Division of Child Support Enforcement, *et al.*,
Respondents.

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

BRIEF OF THE COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS; CONSUMER DATA INDUSTRY ASSOCIATION; CORELOGIC; LPS ANALYTICS, LLC.; REED ELSEVIER INC.; NATIONAL ASSOCIATION OF PROFESSIONAL BACKGROUND SCREENERS; THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION; NATIONAL CREDIT REPORTING ASSOCIATION; NATIONAL MULTIFAMILY RESIDENT INFORMATION COUNCIL; AND R.L. POLK & CO. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IDENTITY OF THE *AMICI*[1]

A*mici* or their members (collectively, "*amici*") aggregate, index, and supplement public record information produced and maintained by state and local governments. They make that information available to businesses, governments and individuals who use it for important commercial, public and individual purposes. The value that *amici* add distinguishes *amici's* products and services from the public records available directly from governmental agencies. These enhancements enable individuals, public authorities, businesses, news agencies and consumers to obtain vital information that cannot practically be obtained in any other way. The *amici* are:

- The **Coalition for Sensible Public Records Access** (CSPRA) is a nonprofit organization dedicated to promoting open public records access for consumers and businesses.

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[1] All parties consent to the filing of this brief, and consent to its filing has been lodged with the Clerk. No counsel for a party wrote this brief in whole or in part and neither a party nor counsel for a party has made a monetary contribution intended to fund its submission.

- The **Consumer Data Industry Association** (CDIA) represents some 200 consumer data companies that engage in credit reporting, mortgage reporting, check verification, fraud prevention, risk management, employment reporting, tenant screening and collection services. These companies rely on public records acquired under state public records laws.

- **CoreLogic** provides financial and property information, analytics and services to real estate and mortgage finance, insurance, capital markets and government customers. Its databases include over 700 million records across 40 years including detailed property records, consumer credit, tenancy, and hazard and risk location information.

- **LPS Applied Analytics, LLC,** a Delaware corporation, uses state public record information to help its customers evaluate mortgage performance, understand real estate data and marketplace behavior, analyze portfolios and accurately value property. Its offerings allow professionals throughout the United States to proactively identify risk, create mitigation strategies and properly estimate collateral value.

- **Reed Elsevier Inc.'s** LexisNexis division provides access to the public records of all fifty states. These records include property title records, liens, tax assessor records, criminal history information, and other information kept by state governments. LexisNexis uses this information to create tools that combat identity theft, screen employees and prevent fraud, and assist law enforcement.

- The **National Association of Professional Background Screeners'** (NAPBS) membership consists of over 700 employment and tenant background screening firms that search publicly available state criminal background information to provide employers and the managers of apartment buildings in every state with accurate information about the people they employ and to whom they let space.

- **The Software & Information Industry Association** (SIIA) represents approximately 600 member companies, among them publishers of software and information products, including databases, enterprise and consumer software, and other products that combine information with digital technology. Many of its members rely on access to public records.

- The **National Credit Reporting Association** (NCRA) is a national trade organization of consumer reporting agencies and associated professionals that provide products and services to credit grantors, employers, landlords and all types of general businesses. NCRA's membership includes four of five mortgage credit reporting agencies in the United States that can produce a credit report meeting Fannie Mae, Freddie Mac and HUD requirements for mortgage lending.

- The **National Multifamily Resident Information Council** (NMRIC) is a not-for-profit association of resident screening companies that rely on access to public records from all states to provide qualifying background information on people seeking housing, a significant percentage of whom have backgrounds in multiple states.

- **R.L. Polk & Co.** specializes in providing information for the automotive and related industries, and relies on information supplied by state governments under their public records laws and other statutes. It uses this information to help customers understand their market position, identify trends, build brand loyalty, and ensure consumer safety. Its CARFAX Vehicle History Reports are routinely used by millions of consumers each year, and are available on all used cars and light trucks built after 1980.

SUMMARY OF ARGUMENT

Amici are entities or associations of entities and individuals (collectively, "amici") that rely on nondiscriminatory access to public records. They supply information to homebuyers, government agencies, manufacturers, lenders, journalists, and other members of the public at large for a variety of public and commercial purposes. Virginia's Freedom of Information Act denies *amici* access to public records based on the fact that they are not citizens of the Commonwealth, while permitting unencumbered access to their in-state counterparts. *Amici* agree with the petitioner that the statute violates the Privileges and Immunities Clause. *Amici*, who are out-of-state corporations, write to emphasize the harm that Virginia's public records law inflicts on interstate commerce. Under the precedents of this court, that discrimination is unconstitutional.

First, Virginia's statute facially discriminates against interstate commerce, and must therefore advance a legitimate government interest in the absence of nondiscriminatory alternatives. The plain text of the statute directly places a burden on out-of-state public records aggregators that similar in-state businesses do not have to bear, and its bar to noncitizen access discriminates against the interstate communication of valuable commercial information. Like the drivers' information requested from the government in *Condon v. Reno*, the various types of

public record information relied upon by *amici*—including drivers' information, criminal records, real estate filings, and commercial securitizations, are also articles of interstate commerce. The state's suggestion that the market participant doctrine shields the statute from searching review is unavailing, as only the state may create these records: they are a natural monopoly. The state cannot therefore be considered a "participant" in the market—it both creates that market and regulates it. The full force of Commerce Clause scrutiny applies.

Virginia's statute cannot survive that scrutiny. The sole interest advanced by the state to support the constitutionality of its law is that it wishes to inform Virginia's citizenry. Virginia offers no credible reason why, for example, in-state credit bureaus and background screeners inform Virginia citizens, and out-of-state ones do not. None exists. If informing citizens really is the goal of the public records law, the state has a ready alternative: eliminate its citizen-based discrimination and allow every citizen access to these records.

Second, statutes like Virginia's will atomize a thriving national information ecosystem. Nondiscriminatory access to public records is both an assumption and indispensable element of the marketplace in which *amici* operate. Virginia's suggestions that companies such as *amici* hire in-state agents or send representatives to visit the state is infeasible

for small businesses, and destroys economies of scale for larger ones. The resulting gaps in valuable national databases and information services will harm many beneficial commercial and government activities, including law enforcement, criminal background screening, tax collection, fraud detection, and the provision of consumer credit.

ARGUMENT

I. VIRGINIA'S DISCRIMINATION AGAINST NONCITIZENS IS UNCONSTITUTIONAL

Section 2.2-3704 of the Virginia Freedom of Information Act (VFOIA) provides legal access to all citizens of Virginia. It denies that access to all noncitizens except (1) representatives of non-Virginia newspapers and magazines that circulate their publications in Virginia, and (2) representatives of television and radio stations that broadcast into Virginia.[2] Va. Code Ann. § 2.2-3704(A).

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[2] The statute provides:

> Except 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 The custodian may require the requester to provide his name and legal address. The custodian of such records shall take all

The Fourth Circuit has upheld Virginia's statute against challenges based on Article IV's Privileges and Immunities Clause and the Commerce Clauses of the Constitution. *McBurney v. Young,* 667 F.3d 454 (4th Cir. 2012). *Amici* agree with Petitioners' contention that VFOIA's facial discrimination against noncitizens violates the Privileges and Immunities Clause of Article IV. (*See* Pet. Br. Parts III, IV.) As petitioners explain, that Clause prohibits a state from affording access to the state's public records to its own citizens, while denying that privilege to individuals who are citizens of other states. (*See id.*)

Virginia's statute, however, applies to corporations as well as to individuals, and corporations enjoy no protection under that Clause. *Paul v. Virginia*, 75 U.S. (7 Wall.) 168, 178 (1869). A decision of this Court striking down the Virginia statute as a violation of the Privileges and Immunities Clause alone leaves states free to attempt to bar out-of-state corporations from access to Virginia public records while affording that access to Virginia corporations.

> necessary precautions for their preservation and safekeeping.

Va. Code Ann. § 2.2-3704(A). Once acquired, Virginia Public Records Act does not place restrictions on the information's dissemination.

Such discrimination against out-of-state corporations, while it may not violate Article IV's Privileges and Immunities Clause, clearly violates this Court's dormant Commerce Clause jurisprudence. *See, e.g., Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994).

II. SECTION 2.2-3704 OF VIRGINIA'S FREEDOM OF INFORMATION ACT VIOLATES THE COMMERCE CLAUSE.

The Fourth Circuit rejected petitioners' argument that Virginia's facial discrimination against out-of-state corporations violated interstate commerce on the basis of its conclusion that the statute's effect on interstate commerce was merely "incidental." *McBurney*, 667 F.3d at 469.

That conclusion was incorrect. Access to commercial aggregation and dissemination of public records by *amici* and similar companies is not "incidental" to interstate commerce: it *is* interstate commerce. VFOIA's facial discrimination against that commerce cannot survive dormant Commerce Clause scrutiny unless the discrimination can be shown by Virginia to be necessary in order to serve legitimate state interests. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977). Virginia cannot meet that standard, and has never seriously attempted to argue that it can.

A. Virginia's Statute on its Face Discriminates Against Interstate Commerce.

On its face, VFOIA requires "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys.,* 511 U.S. at 99. *See also New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 274 (1988). This Court has "generally struck down [such statutes] without further inquiry." *Granholm v. Heald*, 544 U.S. 460, 487 (2005) (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)). "Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Virginia's statute discriminates against interstate commerce in at least two important (and unconstitutional) ways.

First, and most obviously, it discriminates against out-of-state individuals and entities, like *amici*, whose business includes gathering and communicating information contained in Virginia's public records, and in favor of Virginia citizens who engage in the same business. Petitioner Hurlbert is, for example, a citizen of California. As described in the Fourth Circuit opinion, he is engaged "in the business of requesting real estate tax assessment records for his clients from state agencies across the

United States, including Virginia." *McBurney,* 667 F.3d at 460. His request was "denied on the ground that he was not a citizen of the Commonwealth." *Id.*

If a Virginia citizen engaged in the same business had requested the same records for the same client, the request would have been granted. Under VFOIA, that in-state business would acquire information directly from the state at the cost of reproduction and search. *See* Va. Code Ann. § 2.2-3704 (F); *see also id.* § 2.2-3704 (G) (describing same procedure for databases and other electronic records).[3] Unlike in-state corporations, out-of-state corpora-

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[3] This is a commonplace aspect of public records laws. *See, e.g.*, Cal. Gov't Code § 6253(b) ("payment of fees covering direct costs of duplication, or a statutory fee if applicable."); Del. Code Ann. tit. 29 § 10003(a) ("[a]ny reasonable expense"); Fla. Stat. § 119.07(1) (actual costs of duplication unless authorized by law, i.e., when extensive use of information technology resources is required); 5 Ill. Comp. Stat. 140/6 (ability to charge reproduction costs but not search fees unless the requestor is a commercial entity); N.Y. Pub. Off. § 87(1) (setting forth maximum fees and the approved calculation methods); N.C. Gen. Stat. § 132-6.2(b) (requiring public records to be made available for free or at "actual cost"); 51 Okla. Stat. tit. 51 § 24A.5.3 (only the reasonable, direct costs of copying); Tenn. Code Ann. § 10-7-507 (reasonable fee per copy to defray the production costs); Tex. Gov't Code Ann. § 552.261 ("[t]he charge for providing a copy of public information shall be an amount that reasonably includes all costs related to reproducing the public information, including costs of materials, labor, and overhead.").

tions must find some other way to access public records, and bear the cost of doing so. Small and startup businesses that cannot afford information brokers often use direct access to public records for market research and product development. In a highly competitive industry, such differences may be determinative. Indeed, *Amicus* NCRA is aware of only *one* Virginia entity that Fannie Mae and Freddie Mac recognize as meeting their underwriting standards in the production of credit reports; all of its out-of-state members must find other ways to side-step Virginia's citizenship ban.[4] Such an imposition on out-of-state commercial interests of a prohibition not imposed on in-state businesses "falls squarely within the area that the Commerce Clause puts off limits to state regulation." *Philadelphia,* 437 U.S. at 628.

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[4] *See Credit Information Providers*, Fannie Mae, https://www.fanniemae.com/content/datagrid/credit_provider/cpsortbyname.html (last visited Dec. 18, 2012) (indicating one approved entity in VA with two separate sponsors). *See generally* Fannie Mae, *Selling Guide: Fannie Mae Single Family* 438-46 (2012) (explaining the requirements, types, and accuracies that agencies must provide in credit reports), *available at* http://documents.efanniemae.com/sf/guides/ssg/sg/pdf/sel100212.pdf. Similar entities (eighty percent of which are *amicus* NCRA members) now lack legal access to public records affecting Virginia consumers, and will now have to purchase that information from Virginia firms.

The second way in which Virginia's statute discriminates against interstate commerce is its facial discrimination against the interstate communication of commercially valuable information. The release and dissemination of such information from state governments is interstate commerce. *See Condon v. Reno,* 528 U.S. 141, 148 (2000) (finding that motor vehicle information held and released by the states and regulated by the Drivers Privacy Protection Act, 18 U.S.C. §§ 2721–2725, constitutes articles of commerce). As *Condon* explains, all kinds of public records are "used by insurers, manufacturers, direct marketers, and others," *see id.,* as well as law enforcement agencies, taxing authorities, lenders, and any business that needs information from public records to operate or grow.

Commercial activities in the United States have come to depend heavily on the interstate communication of government information. *Amici*'s interstate databases and services are a predictable and desirable result of that commerce, relied on by employers, businesses, and government entities. Having made valuable public record information available, Virginia may not impose burdens on the interstate, but not the intrastate, communication of that information without a demonstrated necessity to do so. As we explain below, the burdens imposed by VFOIA on the free communication of commercially valuable information are substantial and in many respects, prohibitive.

B. Virginia's Discrimination is not Protected by the Market Participant Doctrine

In its prior filings, Virginia argued that just like "Lexis," or any other market participant, it "may refuse to deal with any particular person who wishes to gain access to the information held by those companies." (Joint Response Brief at 49, *McBurney v. Young*, 667 F.3d 454 (4th Cir. 2012) (No.11-1099) (relying on *Chance Mgmnt., Inc. v. South Dakota*, 97 F.3d 1107, 1111 (8th Cir. 1996))); *see also Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 810 (1976) ("Nothing in the purposes animating the Commerce Clause prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others")(footnotes omitted); (*see also* Cert. Opp'n Br. 25-28 (arguing that the citizen limitation is market participation and not market regulation).) The market participant doctrine, however, does not apply to Virginia's activities.

While a state may participate in a market and have its actions remain outside the realm of Commerce Clause scrutiny, that immunity does not apply when the state acts as regulator: the State may not "impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984). "The limit of the market participant doctrine

must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further." *Id.* Virginia's actions run well afield of the market participant doctrine's narrow boundaries.

First, when it compiles and releases public records, the state is not a commercial actor: the statute prohibits the state from turning a profit. Va. Code Ann. § 2.2-3704(F). Virginia does not "participate" in a market any more than a court does when it charges filing fees or recovers other administrative costs.

Second, Virginia has a natural monopoly on its public records: there can be only one document or database of record for official and legally significant facts and filings. A private party that creates its own Virginia cement plant is participating in the market; one that manufactures its own Virginia real estate deed is committing a forgery.

Third, when the state creates public records and attaches significance to them, it performs a legislative function, not a private one. The reasons for making many records public are the same as the reasons for publishing statutes—(1) to prescribe legal rights and duties; and (2) to provide people with constructive notice of their contents.

For example, the recorded real estate documents at issue in this case exist to inform third par-

ties that the person named in the deed owns Blackacre, and under what terms.[5] Under Virginia law (and the law of other states), the facts found in a recorded real estate document are presumed to be true, and subsequent purchasers are bound by those documents.[6] Constructive notice forms the assumption of the real estate recording system and other le-

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[5] *See generally* D. Barlow Burke, *Law of Title Insurance* § 5.01 [C] (3d ed. 2000 & Supp. 2004) (describing the manner and extent to which title insurance policies rely on presumptions of notice in determining coverage of public record); William Caldwell Niblack, *Abstracters of Title* 77 (1908) (describing how the United States developed a system of recording designed to impart constructive notice to "all the world.").

[6] *See, e.g., Shaheen v. County of Mathews*, 579 S.E.2d 162, 165 (Va. 2003) (holding that purchasers have constructive notice in their chain of title regarding easement providing access to public landing and road, and because they implicitly agreed to a 1959 description of the landing); *Chavis v. Gibbs,* 94 S.E.2d 195, 197 (Va. 1956) (documents in chain of title provide constructive notice); *see also, e.g.*, Cal. Civil Code § 1213 (statutory presumption of constructive notice); Ohio Rev. Code Ann. §§ 5310.02-5310.03 (providing, respectively, that recorded documents determine priority of claims and shall be conclusive proof of facts stated therein if title is acquired in good faith); *Cuthrell v. Camden Cnty.*, 118 S.E.2d 601, 604 (N.C. 1961) (describing purchaser's duty to examine title record); *Equity Bank, SSB v. Chapel of Praise A.L.D.C.M., Inc.,* No. 06-0460-CG-B, 2007 U.S. Dist. LEXIS 56086, at *13-*14 (S.D. Ala. July 31, 2007) (noting that Alabama law imparts constructive notice of real estate records to purchasers).

gal systems that incorporate publicly accessible documents. The trustee in bankruptcy is just as bound by real estate filings as are any of a multitude of creditors that may seek to thwart an avoidance. *See Tyler v. Ownit Mortg. Loan Trust (In re Carrillo)*, 431 B.R. 692, 697 (Bankr. E.D. Va. 2010) (creditors and trustee on constructive notice of filing contents).

Similarly, by adopting a notice filing system, Article 9 of the Uniform Commercial Code relies on public records to inform the public of claims made in a particular transaction. *See* Va. Code Ann. § 8-9A-502 (comment 2) (adopting system of notice filing). Article 9 assumes nondiscriminatory interstate access to public records; it would make no sense to require an out-of-state creditor to refile notice of its security interest in a new jurisdiction when a debtor relocates, and then deny other out-of-state creditors the right to access that filing. *See* Va. Code Ann. § 8-9A-316.[7] Indeed, Virginia's own courts acknowledge that the function of these filings is to protect the in-

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[7] Other provisions of the Uniform Commercial Code contain a tacit assumption that secured transactions will cross state lines. See, e.g., Va. Code Ann. § 8-9A-301 (requiring local law of jurisdiction to govern legal status of security interest except in cases of possessory interest in collateral (when law of other jurisdiction applies)); id. § 8-9A-324 (comment 4) (requiring notice to the holder of conflicting security interest in inventory no matter where that person might reside).

terests of third parties, who could be located anywhere.[8] Setting a nonresident third party's property and other rights by these documents without giving that nonresident party a right to access them offends basic notions of fairness and due process. *Cf. Bldg. Officials & Code Adm'r Int'l Inc. v. Code Tech Inc.,* 628 F.2d 730, 734-35 (1st Cir. 1980) (noting that if the law is generally available, "everyone may be considered to have constructive notice of it[.] . . . But if access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them.").

C. Nondiscriminatory Methods of Informing Virginia's Citizens Exist.

VFOIA's facial discrimination invokes the most demanding judicial review that the Commerce Clause provides. "Facial discrimination invokes the

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[8] *See, e.g., In re Holladay House, Inc.*, 387 B.R. 689, 694-695 (Bankr. E.D. Va. 2008) (describing purpose of article 9 filings) (citing *Hixon v. Credit Alliance Corp.*, 369 S.E.2d 169, 172 (Va. 1988)); *Phillips v. Ball & Hunt Enters.*, 933 F. Supp. 1290, 1295 (W.D. Va. 1996) (applying Uniform Commercial Code and finding Virginia, not Kentucky, state of perfection of filed security interest between West Virginia, Virginia, and Kentucky corporations).

strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma,* 441 U.S. 322, 337 (1979); *see also Hunt*, 432 U.S. at 353; s*ee also Limbach,* 486 U.S. at 278.

Virginia's statute cannot pass this test. The sole interest advanced by the state for discriminating against the petitioners in this case involves ensuring that its citizens are well-informed. *See* Va. Code Ann. § 2.2-3704(A). Giving non-citizens access to public records does not in any way interfere with this basic objective.

The state is not claiming (and cannot claim) that lawfully released public record information "creates contagion and other evils" that would warrant its embargo. *Philadelphia*, 437 U.S. at 629. *Amici*'s activity advances Virginia's stated interest. They obtain public record information from other states, add value to that information, make it easily searchable, and then return that information back to Virginia citizens in its enhanced form. Like their in-state counterparts, *amici* inform Virginians and citizens nationwide of matters of importance, including potential fraud, the criminal history of a potential employee or the presence of a sex offender in a given community. If the state truly wishes to advance its

stated goal, all it needs to do is what the overwhelming majority of states do: make access to public records nondiscriminatory.[9]

III. AFFIRMANCE OF THE DECISION BELOW WILL DISRUPT THE NATIONAL MARKETPLACE FOR PRODUCTS AND SERVICES THAT DEPEND ON PUBLIC RECORD INFORMATION

The business of gathering, publishing and interpreting public records has existed in some form since antebellum America, whether gathering judicial reports as state and federal courts released their opinions,[10] or through the collection of real estate title documents for the purpose of abstract prepara-

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[9] A handful of state statutes require citizenship to acquire access to public records. They are: Alabama – Ala. Code § 36-12-40; Arkansas - Ark. Code Ann. § 25-19-105; Delaware - Del. Code Ann. tit. 29, §10003; Missouri - Mo. Rev. Stat. § 109.180; New Hampshire - N.H. Rev. Stat. Ann. § 91-A:4; New Jersey – N.J. Stat. Ann. §47:1A-1; Tennessee - Tenn. Code Ann. § 10-7-503; Virginia - Va. Code Ann. § 2.2-3704(A).

[10] *See generally* Francine Biscardi, *The Historical Development of the Law Surrounding Judicial Report Publication*, 85 Law Libr. J. 531, 538-39 (1993) (summarizing the rise of the West Publishing Company and the collection of judicial decisions from state courts).

tion.[11] That activity serves a valuable purpose: "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed." *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 765 (1976). The collection, organization, and dissemination of government information by *amici* and similar entities have become essential to an informed public.

All fifty states and the District of Columbia have public records laws, and *amici* rely on those laws to ensure the comprehensiveness of their information-related services.[12] Virginia's citizen-only rule is antithetical to and disruptive of a national economic market in products and services depending on equal access to public record information, and undermines the democratization of information ac-

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[11] *Watson v. Muirhead*, 57 Pa. 161, 167-68 (1868) (describing obligations of conveyancer).

[12] *See generally Open Government Guide* (Gregg Leslie & Mark Caramanica eds., The Reporters Committee for the Freedom of the Press 6th ed. 2011), *available at* http://www.rcfp.org/open-government-guide (describing the public records laws of the fifty states and the District of Columbia).

cess that enables small information businesses to compete against larger providers.

A. Compliance with the Fourth Circuit Decision Would Be Impossible for the *Amici*.

The text of the statute makes compliance with VFOIA impossible for out-of-state entities. Virginia's inconsistency on this issue is particularly troubling. In its briefing in the Fourth Circuit, it suggests that VFOIA's citizenship restriction may be circumvented through the "minor inconvenience" of having to request a Virginian to obtain a public record.[13] (Joint Response Brief at 49, *McBurney*, 667 F.3d 454 (No.11-1099).) In its Opposition to the Petition for Certiorari, for the first time, Virginia suggested that one could comply with the statute by visiting the state in-person and personally inspecting the requested records. (*See* Cert. Opp'n Br. 23.)

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[13] Virginia claims that "[r]esponding to out-of-state FOIA requests frustrates these interests by consuming the time and resources that would otherwise be available for providing services to its own citizens." (Joint Response Brief at 41, *McBurney*, 667 F.3d 454 (No.11-1099).) *Amici* note that if all non-citizens hire a Virginia citizen to request public records, then the number of public record requests would not change: hiring a Virginia citizen does nothing to reduce the consumption of time or resources.

These suggestions are not feasible for a business in neighboring states, much less those on an opposite coast.

Even so, Virginia's suggestions are not well supported by the statute. The face of section 2.2-3704 restricts access to public records by out-of-state entities *except* for the representatives of designated media entities. The statute also requires those "representatives" to provide their legal names and addresses, suggesting that the legislature (1) intended it to apply only to individuals representing exempted entities; and (2) did not intend to exempt representatives of other kinds of businesses.

Amici are out-of-state corporations not covered by VFOIA's exemptions and cannot have "representatives" visit the state in-person to inspect the requested records. To make matters worse, Virginia's law provides no answer on how they are to become "citizens" of the state.[14] *Amici's* access to these

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[14] For example, the state might consider foreign corporations citizens if they register an agent or open an office in the way that they would be required to do if they "transacted business" in the state. *See* Va. Code Ann. § 13.1-759. Many *amici* will not be subject to this requirement, as their primary function will be to examine and deliver information across state lines. *Cf. Spector Motor Serv., Inc. v. O'Connor*, 340 U.S. 602, 607-08 (1951); see also *Tignor v. L.G. Balfour & Co.*, 62, 187 S.E. 468, 470 (Va. 1936) (cited in *Continental Props., Inc. v.*

records therefore depends entirely on the record custodian's whim. Virginia's alternative constructions of the statute still leave *amici* with the choice of acquiring information from a third party, or leaving information out of their services. Neither result is desirable.

1. The Use of Third Parties is Infeasible and Inefficient.

For the *amici*, hiring in-state actors represents more than a "minor inconvenience." (Joint Response Brief at 46-47, *McBurney*, 667 F.3d 454 (No.11-1099).) For smaller entities, requiring them to fly across the country or hire individuals in every state is impractical and unaffordable. Moreover, such a requirement threatens standard processes that enable efficient nationwide operation. National financial institutions rely on *amici* like CoreLogic to provide a complete file of public real estate information such as tax assessments, mortgage deeds,

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Ullman Co., 436 F. Supp. 538, 540 (E.D. Va. 1977)). In contrast, even if using a diversity standard, a corporation can only be a "citizen" of two states: that of incorporation and that where its "nerve center" is located, rendering compliance with even the handful of statutes like Virginia's impossible. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010).

assignments, and lien releases on properties nationwide.[15] The economies of scale in CoreLogic's standard and centralized acquisition processes permit its customers to gain access to relevant information in a timely and cost-effective manner. This rapid access minimizes the risk of a property's status changing between the initial information "snapshot" surrounding the contract of sale, and the final loan closing protecting a wide range of investors.

Requiring national entities to hire people in every state needlessly jeopardizes these standardized processes. First, the additional cost of hiring and training new employees would pass through to consumers, making the underlying transaction more expensive. *Cf. Lee v. Minner*, 458 F.3d 194, 200 (3d Cir. 2006) (rejecting state's argument that the burden of having to hire an agent is "insubstantial"). Second, the addition of an agent in every state would destroy the efficiencies and the gains in accuracy that standardized and centralized national collection of data enables. Third, any delays caused by fractured corporate citizenship requirements will lead to larger "gaps" between the period when assessment,

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[15] *See, e.g.,* Real Estate, *About Us, Data,* CoreLogic, http://www.corelogic.com/about-us/data.aspx#container-RealEstate (last visited Dec. 18, 2012); Mortgage, *About Us, Data,* CoreLogic, http://www.corelogic.com/about-us/data.aspx#container-Mortgage (last visited Dec. 18, 2012).

title, and similar information is examined, and the time at which a real estate loan closes, during which new liens or other encumbrances may appear. *See* J. Alex Heroy, *Comment, Other People's Money: How a Time Gap in Credit Reporting May Lead to Fraud,* 12 N.C. Banking Inst. 321, 323 (2008). The resulting risk will be priced into the transactions, and will result in (a) higher costs to consumers; and (b) higher risks in certain types of mortgage-backed securities and other financial instruments. In individual cases, these risks may be small, but when those risks are aggregated over large numbers of transactions, significant harm and uncertainty will result.

B. Discriminatory Access to Public Records will Create Harmful Gaps in Multistate Publications

Amici are involved in an enormous interstate market for public record information that depends on a large degree of interstate comity in order to function.[16] If that comity is destroyed by statutes

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[16] That comity is especially important given the large numbers of people who move each year. In 2008-09, for example, 6.9 million people moved from one state to another. .U.S. Census Bureau, U.S. Dep't of Commerce, P20-565 *Geographical Mobility: 2008 to 2009* 9 (2011), *available at* http:// http://www.census.gov/prod/2011pubs/p20-565.pdf Criminals are no different: in one examination of a Department of Justice program in which applicants for volunteer positions were sub-

like Virginia's, resulting gaps will appear in national collections of publicly available information. The value of, and benefits that flow, from *amici's* services will diminish dramatically if these gaps are allowed to develop. Examples of the activities that would be adversely affected include:

- **Law Enforcement.** LexisNexis databases have been used for years by the FBI, as well as state and local law enforcement offices. Access to these and similar information services "allows FBI investigative personnel to perform searches from computer workstations and eliminates the need to perform more time consuming manual searches of federal, state, and local records systems, libraries, and other information sources."[17]

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ject to background screening, it was revealed that over 40 percent of recidivists had committed a crime in a different state from the one in which they applied for a position, and over half of those with criminal histories lied about their existence when asked. S. 645, 112th Cong. § 2(10) (2012); *see also Talking Points: The Child Protection Improvements Act*, MENTOR (Sept. 2010), http://www.mentoring.org/downloads/mentoring_1279.pdf.

[17] *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 2000: Hearings on H.R. 2670/S.1217 Before Subcomm. for the Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies of the S. Comm. on Appropriations*, 106th Cong.

- **Tax Compliance.** Governments use real estate records like those at issue in this case to detect tax avoidance. For example, Delaware County, Indiana recovered $1.5 million in revenue home-

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280 (1999). LexisNexis' relationship with the FBI continues to this day, and since 9/11, the comprehensiveness and utility of these information tools have become even more critical to law enforcement authorities. "[W]e often get more accurate data from the commercial sector. In addition, the processes by which government agencies manage data often makes it difficult to acquire and needs [a] great deal of labor intensity into making it usable and accessible to other entities." Privacy Office, Dep't of Homeland Sec., Official Workshop Transcript, *Privacy and Technology Workshop: Exploring Government Use of Commercial Data for Homeland Security*, Panel One: How are Government Agencies Using Commercial Data to Aid in Homeland Security? at 9 (Sept. 8-9, 2005) (transcription commas omitted) (comments of Grace Mastalli Principal Deputy Director for the Information Sharing and Collaboration Program at DHS), *available at* http://www.au.af.mil/au/awc/awcgate/dhs/privacy_wkshop_panel1_sep05.pdf. That reliance extends to the states as well. *See* Brief of the State of Texas as *Amicus Curiae* in Support of Defendants at 2-3, *Taylor v. Acxiom Corp.*, 612 F.3d 325 (5th Cir. 2010) (Nos. 08-41083, 08-41180, 08-41232) (noting that the state "routinely uses national databases provided by private resellers to track down individuals who are delinquent in their child-support payments, as well as to help locate suspects in the course of conducting consumer protection and criminal investigations" and warning against eliminating a "valuable tool of law enforcement.").

stead exemption fraud.[18] An audit assisted by LexisNexis' electronic databases of public records revealed that owners claiming Indiana as a principal residence in fact were claiming multiple homestead exemptions across multiple states.[19]

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[18] Indiana law permits taxpayers certain deductions for their primary residence. *See* Ind. Code §§ 6-1.1-12-37(a)(1), -37(a)(2), -37(c) (describing deductions).

[19] Press Release, LexisNexis, LexisNexis and Tax Management Associates Identify Fraud and Discover Nearly $1,500,000 in New Revenue for Delaware County, Indiana (Feb. 27, 2012), *available at* http://www.lexisnexis.com/risk/newsevents/press-release.aspx?id=1330361634905478. On the federal level, LexisNexis products are used by the United States Department of Health and Human Services, and their state government analogs to detect Medicare and Medicaid fraud by matching requests for payment against licensure records and other information acquired from public records.

- **Protection from Crime.** Members of *amicus* NAPBS acquire and aggregate public records from multiple jurisdictions for the purpose of performing criminal background checks. The use of this information helps employers and others ensure a "competent, reliable workforce." *NASA v. Nelson,* 131 S. Ct. 746, 758 (2011). Those users include the federal government, which last year spent more than one billion dollars to screen more than two million employees in non-intelligence positions.[20]

- **Consumer Credit.** Many of *amicus* CDIA's members acquire public records information for the purpose of evaluating consumer credit—whether for purchasing a car, opening a business, or determining a credit card interest rate. The prudence of a lending decision can depend on knowing what real estate the borrower holds, whether the borrower faces any tax liens, or if the borrower recently declared bankruptcy.

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[20] U.S. Gov't Accountability Office, GAO-12-197, *Background Investigations: Office of Personnel Management Needs* to *Improve Transparency of Its Pricing and Seek Cost Savings* 1 (2012), *available at* http://www.gao.gov/assets/590/588947.pdf. As that report explains, many such checks have similar components, including a review of national criminal and public records databases by private entities with which the government has contracted for that purpose. *See id.* at 8, 44.

- **Product Safety.** Similarly, R.L. Polk & Co., the parent company of Carfax (www.carfax.com), provides a variety of automotive information to manufacturers and consumers that it obtains from state governments subject to the Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721 *et seq*., as well as public records laws. Carfax uses that information to provide consumers and dealers with a vehicle's accident history, alerting both customers and dealers whether they are potentially buying a "lemon." R.L. Polk & Co. also combines title information with other state records to help manufacturers notify individual consumers in the event of a safety recall.

- **Fraud Prevention.** Interstate access to public records helps prevent harm from identity theft. For example, LexisNexis's Accurint service routinely provides records-based fraud prevention tools to financial and retail institutions. When authenticating a request to transfer funds from a bank account, a financial institution will attempt to authenticate the caller's identity by asking questions developed through use of public information that a wallet thief would not know. Examples include, "Which of the following five addresses is a past home address of yours?" or "Which of the following cars did you once own?" The answers to these questions could be found in state real property records or publicly available Uniform Commercial Code filings.

The ability of governments, consumers and others to successfully engage in these activities relies on the fullness and breadth of the information that *amici* and similar entities obtain from government agencies nationwide. When information from citizens-only states is excluded, individuals can obtain employment in situations where prudence and, occasionally, a statute dictate they should not—whether as a pedophile in a day care center, or as an

embezzler in an accounting firm.[21] Law enforcement officers will waste investigation time collecting information that *amici* once regularly made available. Consumers will not be notified about the manufacturing defect in their car's brakes. Tax cheats like those identified by Indiana will escape with their ill-gotten gains intact. And businesspeople will be unable or unwilling to enter transactions because of the unavailability of desired information.

Other uses include enforcing child support obligations. For example, the Association for Children for Enforcement of Support reports that public record information provided through commercial vendors helped locate over 75 percent of the "deadbeat

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[21] *See, e.g.*, 7 U.S.C. § 2009cc-14 (barring people with fraud convictions from serving on boards of rural development companies without the written consent of the Secretary); N.Y. Tax § 480(3) (barring license to operate as director of tobacco wholesaler if convicted of certain offenses in New York or elsewhere); S.C. Code Ann. § 63-3-820 (barring appointment as guardian ad litem if convicted of fraud); Tex. Ins. Code § 801.151 *et seq*. (prohibiting licensure of insurance company if officer or board member has been convicted of fraud). Examples of this kind of statute abound. *See generally* ABA, *National Inventory of the Collateral Consequences of Conviction*, http://www.abacollateralconsequences.org / (last visited Dec. 18, 2012) (collecting state statutes that limit employment based on conviction).

parents" they sought.[22] Moreover, not all of the reasons for which amici provide access to public records are economic. A Maryland parent may wish to check Virginia criminal records to see if the day care center her child attends is employing any sex offenders or has been cited for child safety violations. A Virginia resident may wish to examine the government-issued health and safety reports of an assisted living facility in Florida before moving her parents there. A California citizen may wish to see if his employer supported a marriage-related ballot measure in Washington. And so on. All of these activities and others depend on the ability of *amici* and other similarly situated entities to access government information in states in which they are not "citizens," and all of these activities will suffer if the databases that *amici* utilize are incomplete.

Nondiscriminatory access to public records also undergirds important statutory regimes. Many *amici* compile reports on individual consumers for purposes of background screening and credit deci-

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[22] Comments of Gail H. Littlejohn, Vice President, Gov't Affairs, & Steven M. Emmert, Dir., Gov't Affairs, Reed Elsevier Inc., LEXIS-NEXIS Group (Mar. 31, 2000), *available at* http://www.sec.gov/rules/proposed/s70600/littlej1.htm; *see also Financial Information Privacy Act: Hearings on H.R. 4321 Before the H. Comm. on Banking and Financial Services*, 105th Cong.100 (1998) (statement of Robert Glass).

sions. That activity is governed by the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq*., and its state analogs.[23]

In general terms, the FCRA regulates those businesses selling consumer information for insurance underwriting, extension of credit, and determination of eligibility for employment, and sets the terms under which such information (including public record information) can be used. *See* 15 U.S.C. § 1681a (d), (f) (defining consumer report and consumer reporting agency, respectively). The entire statute, including its requirement that regulated entities have reasonable procedures designed to ensure the "maximum possible accuracy" of consumer information, see *id.* § 1681e (b), rests in large part on the assumption that consumer reporting agencies have access to state public records.[24]

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[23] *See, e.g.*, Colo. Rev. Stat. § 12-14.3-101 *et seq*.; N.J. Rev. Stat. §§ 56:11-1, -3; Vt. Stat. Ann. tit. 9 § 2480a *et seq*. Congress enacted the FCRA to develop "reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information . . . ." 15 U.S.C. § 1681(b). "Those who extend credit or insurance or who offer employment have a right to the facts they need to make sound decisions," and consumer reporting agencies (CRAs) fulfill this vital economic role. S. Rep. No. 91-517, at 2 (1969).

[24] *See, e.g.,* 15 U.S.C. §§ 1681c (a)(1)-(3) (limiting usage of public records such as bankruptcies, civil judgments, arrests,

For example, the FCRA requires regulated entities to re-investigate the disputed accuracy of a consumer report. *Id.* § 1681i (a)(1)(A). If the information is incorrect, even if a middleman supplied the information, nationwide consumer reporting agencies are required to "implement an automated system through which furnishers of information to that consumer reporting agency may report the results of a reinvestigation that finds incomplete or inaccurate information in a consumer's file to other such consumer reporting agencies." *Id.* § 1681i(a)(5)(D).

The interstate information flow on which the FCRA depends simply would not work against the Balkanized access regime contemplated by the Fourth Circuit decision. At a minimum, FCRA-required re-investigations will be considerably more difficult to perform on a nationwide or timely basis, because CRAs will be limited to acquiring information only from those states in which they enjoy "citizenship." While larger CRAs might be able to hire agents in individual states (depending on how

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convictions, and tax liens); *id.* § 1681k (a)(2 (assuming that matters of public record are "considered up to date if the public record status of the item at the time of the report is reported"); *id.* § 1681a(p)(1) (maintaining public records as part of definition of nationwide consumer reporting agency); *id.* § 1681l (maintained with respect to certain reporting activity).

such statutes are construed), the burden of re-investigation weighs more heavily on smaller entities, which may simply not report information from Virginia sources—as the petitioner has elected to do. All of these factors negatively impact consumers, who will have to wait longer to resolve pending issues in their credit history.

IV. CONCLUSION

Modern interstate commerce depends on an environment in which national public record information is available to anyone regardless of which state it comes from. VFOIA's facial discrimination against noncitizens violates the Constitution.

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

Respectfully submitted,

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