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, Commonealth of Virginia, and THOMAS C. LITTLE, Real Estate Assessment Division, Henrico County, Commonwealth of Virginia,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR AMICI CURIAE CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON (CREW), ET AL., IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are public-interest organizations committed to government transparency and accountability. As such, they are well-positioned to attest to the benefits of broadly inclusive state freedom of information laws. Additionally, amici are knowledgeable about the harms that citizens-only provisions inflict upon non-citizen professionals dependent on access to state public records for their livelihoods, non-citizens who wish to reside and purchase property in other states, and non-citizens who wish to engage in political advocacy in states with citizens-only provisions.

Citizens for Responsibility and Ethics in Washington (CREW) is a nonprofit organization based in Washington, DC dedicated to promoting ethics and accountability in government. CREW advances its mission using a combination of research, litigation and media outreach to ensure officials act ethically and lawfully and to bring unethical conduct to the public's attention.

The Center for Media and Democracy (CMD) is a nonpartisan, non-profit investigative reporting group based in Madison, Wisconsin. CMD is committed to "citizen journalism" as an alternative to mass media, producing hundreds of original stories that promote corporate and government accountability.

The Electronic Frontier Foundation (EFF) is a non-profit, member-supported civil liberties organiza-

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[1] Counsel of record for both parties received timely notice of the intent to file this brief and letters consenting to the filing have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

tion with offices in San Francisco, California and Washington, DC that works to protect rights in the digital world. EFF actively encourages and challenges industry, government, and the courts to support free expression, privacy, and transparency in the information society. In support of its mission, EFF regularly files public records requests with state and federal agencies in order to better understand the ways law enforcement agencies use technology. In the past year, EFF has filed such requests in seven different states.

The Electronic Privacy Information Center (EPIC) is a non-profit research center located in Washington, DC. EPIC pursues numerous Freedom of Information Act cases with federal agencies and also publishes a leading FOIA manual, *Litigation Under the Federal Open Government Laws*. EPIC has litigated FOIA cases under the Virginia open records law. As a result, EPIC is intimately familiar with the freedom of information law at the heart of this lawsuit—including the citizens-only provision—and is well-suited to aid the Court in considering its constitutionality.

The National Freedom of Information Coalition (NFOIC) is a nonprofit organization that works to raise public awareness about the importance of transparency and to protect the public's right to open government. With offices at the Missouri School of Journalism, NFOIC awards grants to its affiliated state- and region-based freedom of information organizations for their work in fostering, educating, and advocating for open, transparent government. NFOIC also administers the Knight FOI Fund, a half-million-dollar perpetual legal fund to assist litigants advocating for open government in important and meritorious legal cases.

OpenTheGovernment.org is a Washington, DC-based nonpartisan coalition of journalists, consumers, good- and limited-government groups, environmentalists, librarians, labor unions, and others whose mission is to increase government transparency to improve public safety and trust, and to promote democratic accountability. OpenTheGovernment.org takes a multiprong approach to accomplishing its mission through public education, advocacy, and collaboration with government agencies to decrease secrecy.

The Project On Government Oversight (POGO) is a nonpartisan, independent investigative organization based in Washington, DC that champions good government reforms. POGO investigates corruption, misconduct, and conflicts of interest in government though freedom of information requests, interviews, and other fact-finding strategies. As a result of these investigations, POGO has found that nondisclosure of government records often is intended to hide corruption, intentional wrongdoing, or mismanagement.

The Sunlight Foundation is a nonpartisan, nonprofit organization based in Washington, DC that uses the power of the Internet to catalyze greater government openness and transparency. Sunlight is committed to improving access to government information by making it available online, and by creating new tools and websites to enable individuals and communities to better access that information and put it to use. Sunlight also engages in advocacy to require that government make data available in real time and trains thousands of journalists and citizens in using data and the web to be watchdogs.

The Washington Coalition for Open Government (WCOG), the Virginia Coalition for Open Government

(VCOG), and the Tennessee Coalition for Open Government (TCOG) are nonpartisan, non-profit coalitions dedicated to promoting and defending the right to know. VCOG has kept a log of out-of-state citizens who wished to file Virginia FOIA requests and thus is familiar with both the mechanics and detrimental impact of the citizens-only provision.

REASONS FOR GRANTING THE PETITION

Petitioners argue that the Virginia Freedom of Information Act's citizens-only provision, Va. Code. Ann. § 2.2-3704(A), violates the Privileges and Immunities Clause and the dormant Commerce Clause. U.S. Const. art. IV, § 2. Six years ago, the Third Circuit struck down as unconstitutional a citizens-only provision in Delaware's open records law. *Lee* v. *Minner*, 458 F.3d 194 (3d Cir. 2006). The court concluded that the "citizens-only provision of Delaware's Freedom of Information Act burdens noncitizens' right to 'engage in the political process with regard to matters of national political and economic importance.'" *Id.* at 198. The Fourth Circuit's decision in this case, preserving Virginia's discriminatory law, squarely conflicts with the Third Circuit's holding in *Lee*. *Amici* urge this Court to grant the Petition and make clear that the Constitution does not permit a state's open records law to discriminate against citizens of other states.

It is vital that the Court resolve this question now, because citizens-only provisions have a real, detrimental impact on noncitizens' fundamental rights. These rights include the right to pursue common callings, reside and purchase property in other states, and participate in political advocacy. As a result, noncitizens are *not* on "'the same footing with citizens of other States, so far as the advantages resulting from citizen-

ship in those States are concerned.'" *Hicklin* v. *Orbeck*, 437 U.S. 518, 524 (1978) (quoting *Paul* v. *Virginia*, 75 U.S. 168, 180 (1869)). The examples in this brief illustrate the ongoing harm that noncitizens suffer as a result of the discriminatory law.

Resolution is also necessary now because states with active citizens-only provisions—among them, Virginia, Arkansas, and Tennessee—enforce these provisions inconsistently and according to the whim of the records custodian. Inconsistent enforcement and lack of oversight in these states permit records custodians to deny out-of-state requests based on the nature of the request or the identity of the requester, undermining the goals of open records laws and compounding the harm to noncitizens.

I. VIRGINIA'S CITIZENS-ONLY PROVISION HARMS NONCITIZENS' CONSTITUTIONALLY PROTECTED RIGHTS

The Privileges and Immunities Clause prohibits a state from treating citizens of other states in a discriminatory manner. U.S. Const. art. IV, § 2. The Clause is intended to "place the citizens of each State upon the same footing with citizens of other States" with respect to fundamental rights such as pursuing an occupation, residing in a state, owning property, and engaging in political advocacy. *Baldwin* v. *Fish & Game Comm'n*, 436 U.S. 371, 380, 397 (1978) (internal quotation marks omitted); *Lee*, 458 F.3d at 200.

A state violates the Privileges and Immunities Clause when it imposes burdens on the ability of noncitizens to exercise these fundamental rights, unless there is a substantial reason for the difference in treatment and the discriminatory practice bears a substantial relationship to the state's objective. *Supreme Ct. of N.H.*

v. *Piper*, 470 U.S. 274, 284 (1985). Virginia has no substantial reason for the discriminatory treatment of noncitizens, and its discriminatory treatment bears no substantial relationship to a proper state objective.

A. Right To Pursue A Common Calling

Virginia's citizens-only provision harms noncitizens who engage in occupations that require access to state public records. States may not discriminate against "nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State." *Hicklin*, 437 U.S. at 524. Access to state public records is crucial to non-residents in a wide range of occupations, including academics and researchers such as historians, sociologists, and epidemiologists, as well as other professionals like genealogists, attorneys, land developers, architects, private investigators, journalists, and data brokers.

Virginia places non-resident members of their trades at a disadvantage to state residents. Either noncitizens are denied access to Virginia records, or they must hire a Virginia "middleman" to request the documents on their behalf, resulting in an added expense that is not borne by their Virginia counterparts. This expense, compounded across multiple requests for records, results in a discriminatory, increased cost of doing business.

Consider, for example, a genealogist in the United States hired to chart a client's family tree. Suppose the genealogist and his client reside outside of Virginia, but a large branch of the client's family resided in Virginia. Public records are the bread and butter of a genealo-

gist's trade.[2] But Virginia's resident-only requirement would impede the work of the genealogist, with the practical consequence that he would have to hire someone in state to complete the work. This discrimination funnels more business to Virginia genealogists and amounts to an impermissible advantage to Virginia trade members at the expense of noncitizens.

Epidemiology is another important example of a common calling for which access to state public records is critical. According to the National Center for Health Statistics, "[t]he practice of epidemiology, or indeed of public health, would today be inconceivable without access to vital and health records and the tabulations routinely assembled from them."[3] Doctors and medical researchers rely on birth and death certificates—state public records that are far more detailed now than in the past—for the "measurement of incidence and prevalence of disease"; for "comparison[s] of disease rates in different populations, in different parts of the same population, and in similar groups over a period of time, in order to develop hypotheses regarding the etiology of disease"; for identification of high risk groups for study or therapy; as a "starting point for 'follow-back' studies in which a series of cases with particular

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[2] Association of Professional Genealogists, *The Case for Open Public Records: A Position Paper* (Jan. 3, 2008), http://www.apgen.org/publications/press/APG-KGROW.pdf; Bentley, *The Genealogist's Address Book* (4th ed. 1998) (collecting addresses of state vital records departments).

[3] National Center for Health Statistics, *Use of Vital and Health Records in Epidemiological Research: A Report of the United States National Committee on Vital and Health Statistics* 1 (1968), *available at* http:// www.cdc.gov/nchs/data/series/sr_04/sr04_007.pdf.

characteristics (e.g. dying from a particular disease) is identified"; and as the "end point for studies in which subsets of the population are selected because of their unusual characteristics or environmental exposures and followed to identify diseases or other outcomes suspected of being related to the selected factors."[4] Such uses of public records can assist with analyzing the development of both chronic and infectious diseases.[5] Thus, for example, if an out-of-state doctor or medical researcher wanted to gather information about the development of lung cancer by smokers in Virginia, she would face an impermissible burden as compared to her in-state counterparts.[6]

Likewise, historians, sociologists, and other academic researchers rely on access to public records. As one of many examples, state and local public records

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[4] *Id.* at 1-2.

[5] *Id.*; Florida Department of Health, *Acute Disease Epidemiology Surveillance, Reporting, and Investigations* (July 2012), *available at* http://www.doh.state.fl.us/disease_ctrl/epi/Acute/systems.html; *see also* Borkowski, *Sunshine Law Helps Reporter Expose Major TB Outbreak in Florida*, The Pump Handle (July 12, 2012), *available at* http://scienceblogs.com/thepumphandle/2012/07/12/sunshine-law-helps-reporter-expose-major-tb-outbreak-in-florida/.

[6] To be sure, some of these records may be accessible at the federal level through the Census Bureau, which has data-sharing arrangements with the states, but federal aggregation efforts have been, for the most part, deemed widely ineffective. *See* Diamond et al., *Collecting And Sharing Data for Population Health: A New Paradigm*, 28 Health Affairs 454, 455-456 (2009) (analyzing the failures of large-scale data collection efforts of vital statistics). As such, access to state public records for public health purposes remains vital to the profession of epidemiology.

are integral to the study of African-American history.[7] Historical data relating to population growth, economic trends, and health conditions are uniquely reflected in state and local records. These records also bear on innumerable contemporary issues, from pollution levels to rates of teen pregnancy. A tax-policy researcher, as one example, used state and local records to compare the value of charity care provided by non-profit hospitals to the value of their property tax exemptions.[8] Novel source materials and newly unearthed facts are the currency of research professions, and state and local records are treasure troves of information. Academics and researchers from outside the state encounter greater barriers to these resources in Virginia than their in-state counterparts.

Access to public records is equally vital in other occupations. Land developers need access to documents such as title records, zoning plans, crime statistics, and school-performance data when selecting the best sites for their projects. Journalists need access to public records to break stories—especially those about govern-

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[7] *Sources on African American History*, in *Blacks in East Texas History* 12-13 (Glasrud et al. eds., 2008) ("For the post-1865 period, the records of city councils, health departments, and school boards are valuable sources for studies of topics such as education and law enforcement.").

[8] *See* Harris & Strouse, *A Cost/Benefit Analysis of Providing Tax-Exempt Status to Non-Profit Hospitals* 3, 13 (May 1997), *available at* http://ssrn.com/abstract=72252; *see also* Shapiro et al., *The Social Costs of Dangerous Products: An Emprical Investigation*, 18 Cornell J.L. & Pub. Pol'y 775, 783 (2009) (analyzing product liability case awards data gleaned from state and county public records).

ment officials. Private investigators, architects, and data brokers also require frequent access to public records.

This Court has repeatedly "found that one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Supreme Ct. of N.H.*, 470 U.S. at 280 (internal quotation marks omitted). This broad privilege protects against even incidental burdens to pursuing one's occupation. For example, this Court cited the privilege in striking down a state income tax provision that discriminatorily barred nonresidents from deducting alimony payments. *See Lunding* v. *New York Tax Appeals Tribunal*, 522 U.S. 287, 302 (1998). The Court reasoned that the state had not presented a substantial justification for the difference in tax burdens between citizen and noncitizen workers. *Id.* at 315. Likewise, in each of the above examples and in numerous others, Virginia's citizens-only provision discriminatorily burdens nonresidents who request Virginia records in pursuit of their work.

As *Lunding* illustrates, it does not matter if a discriminatory burden is imposed indirectly as opposed to directly. Yet the Fourth Circuit found otherwise, stating "[w]hile it may be true that VFOIA coincidentally limits a method by which Hurlbert conducts some of his business, it does not follow that the VFOIA impermissibly burdens his ability to pursue his common calling within the Commonwealth in a Privileges and Immunities Clause context. As the district court found, '[t]he statute's effect on Hurlbert's ability to practice his common calling is merely incidental.' We agree." *McBurney* v. *Young*, 667 F.3d 454, 465 (4th Cir. 2012) (internal citations omitted). The Fourth Circuit's distinction between direct and indirect burdens to funda-

mental rights, however, finds no support in the Privileges and Immunities case law. Instead, the key issue is "the practical effect of the provision." *Lunding*, 522 U.S. at 299. Where, as here, the law has an actual discriminatory effect on the ability of nonresidents to pursue a common calling, the State bears a substantial burden to justify that differential treatment. Indeed, a rule that depended on distinguishing between direct and indirect effects would encourage states to pass laws designed as subterfuges, where the burden on noncitizens was the true purpose of the law but was achieved indirectly to disguise that purpose—a result against which this Court has warned in a variety of constitutional contexts. *See, e.g.*, *Hunter* v. *Erickson*, 393 U.S. 385, 391 (1969) (equal protection); *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994) ("The commerce clause forbids discrimination, whether forthright or ingenious.").

The Virginia law's disparate treatment of citizens and noncitizens also runs afoul of the dormant Commerce Clause, which is analytically distinct from the Privileges and Immunities clause but addresses the same core problems. Restricting access to public records is precisely the kind of "economic barrier" that "plainly discriminates against interstate commerce," because state residents in industries or professions that rely on public records enjoy a distinct advantage over their out-of-state counterparts. *See Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951). As this Court has held, "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978). Such legislation—like the citizens-only provision at issue here—can survive only if it serves a legitimate local purpose that could not be

equally achieved by nondiscriminatory means. *See Maine* v. *Taylor*, 477 U.S. 131, 138 (1986). As the open government laws of the vast majority of states show, there is a clear "nondiscriminatory means" of providing access to public records—permitting access regardless of state citizenship and distributing the costs of access equitably among all requesters.[9]

B. Right To Reside And Purchase Property In Other States

The rights to "pass through or to reside in any other state for the purposes of trade, agriculture, professional pursuits or otherwise" and "to acquire and possess property of every kind" are two of the oldest privileges and immunities recognized under the Clause. *Blake* v. *McClung*, 172 U.S. 239, 249 (1898) (internal quotation marks omitted); *see also Hicklin*, 437 U.S. at 524, 525. Virginia's citizens-only provision infringes on

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[9] *See, e.g.*, Cal. Gov't Code § 6253; Colo. Rev. Stat. Ann. § 24-72-201; Conn. Gen. Stat. Ann. § 1-210; D.C. Code § 2-532; Fla. Stat. Ann. § 119.01; Haw. Rev. Stat. § 92F-11; Idaho Code Ann. § 9-338; Ill. Stat. ch. 5 § 140/3; Ind. Code Ann. § 5-14-3-3; Iowa Code Ann. § 22.2; Kan. Stat. Ann. § 45-218; Ky. Rev. Stat. Ann. § 61.872; La. Rev. Stat. Ann. § 44:31; Me. Rev. Stat. tit. 1, § 408; Mass. Gen. Laws Ann. ch. 66, § 10; Miss. Code. Ann. § 25-61-5; *State ex rel. Bd. of Pub. Utils. of Springfield* v. *Crow*, 592 S.W.2d 285, 289 (Mo. Ct. App. 1979); Mont. Const art. II, § 9; Neb. Rev. Stat. § 84-712; Nev. Rev. Stat. Ann. § 239.010; N.M. Stat. Ann. § 14-2-1; N.Y. Pub. Off. Law § 84; N.C. Gen. Stat. Ann. § 132-6; Ohio Rev. Code Ann. § 149.43; Or. Rev. Stat. Ann. § 192.420; 65 Pa. Stat. Ann. §§ 67.102, 67.301 *et al.*; 2012 R.I. Laws Ch. 12-448 (12-H 7555A); S.C. Code Ann. § 30-4-30; S.D. Codified Laws § 1-27-1; *City of Garland* v. *Public Util. Comm'n of Texas*, 165 S.W.3d 814, 820 (Tex. Ct. App. 2005); Utah Code Ann. § 63G-2-201; Vt. Stat. Ann. tit. 1, § 316; Wash. Rev. Code Ann. § 42.56.080; W. Va. Code Ann. § 29B-1-3; Wis. Stat. Ann. § 19.35; Wyo. Stat. Ann. § 16-4-203.

these rights in numerous ways. A few examples illustrate the harm.

When a person relocates to another state, state and local records provide key information on where to reside and purchase property. For instance, a family relocating from California to Roanoke may want to look at the city's plan documents to determine the potential land use around a new neighborhood development. A newly-minted doctor, deciding where in the United States to set up her practice, may want to review state nursing home inspection records. An out-of-state owner of a restaurant franchise may need to look at state health inspection records.

Similarly, state and local records are vitally important to out-of-state purchasers of real property. *See Hicklin*, 437 U.S. at 524. Hurlbert himself was the proprietor of a real-estate tax assessment business and needed to get Virginia records for his clients. *McBurney*, 667 F.3d at 460. More commonly, where a developer is considering a purchase of a tract of land from a municipality, the developer needs access to local zoning records, historical property sales, and other public records. Nearly all purchasers of real property must run title searches to ensure that the property is free from encumbrances. Without any substantial justification, the Virginia FOIA discriminates against these nonresidents.

These effects are exaggerated for people living close to state lines, where people often live in one state and work in another. The cities of Bristol, Virginia, and Bristol, Tennessee are good examples. They share a common downtown district, and that district's State Street also serves as the state border. Because Tennessee's open records law also limits access to its citizens,

Bristol inhabitants—on both sides of the state line—are particularly disadvantaged with respect to public records access. *See* Tenn. Code Ann. § 10-7-503(a)(2)(A).

C. Right To Participate In Political Advocacy

This Court explained in *Piper* that it "has never held that the Privileges and Immunities Clause protects only economic interests." 470 U.S. at 281 n.11. "It is discrimination … on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce." *United Bldg. & Constr. Trades Council* v. *Mayor & Council of Camden*, 465 U.S. 208, 220 (1984). The Third Circuit, reviewing this Court's Privileges and Immunities precedents, concluded that the Clause protects "political advocacy regarding matters of national interest or interests common between the states." *Lee*, 458 F.3d at 200.

State and local records bear on a variety of issues of national importance, including oversight of political leaders, campaign finance, crime, health trends, and education. Many of the undersigned *amici* have used state freedom of information laws to access information bearing on these important issues.

For example, Citizens for Responsibility and Ethics, with one office in Washington, D.C., regularly requests documents under state open records laws throughout the country to investigate potential unethical behavior by political leaders.[10] CREW has requested documents relating to a Congressional representa-

[10] *See* Citizens for Responsibility and Ethics in Washington, *Legal Filings—FOIA Requests*, http://www.citizensforethics.org/legal-filings/c/foia-requests2 (last visited Aug. 28, 2012).

tive's earmarking of millions of dollars for the Florida community college where his wife works; records relating to a concert that was scheduled at the University of Central Florida Arena that formed the basis for a complaint by CREW to the FTC alleging unfair and deceptive acts and practices; and documents relating to a Wisconsin governor's practice of sending State Troopers to follow state legislators.

The Electronic Privacy Information Center has used state records to monitor both state and federal government activities, bringing to light controversial practices of national significance. EPIC's investigation of the Virginia Fusion Intelligence Center is a case in point. The Virginia Fusion Center compiles large amounts of data about citizens from public and private sources and raises substantial privacy concerns.[11] Remarkably, in 2008, Virginia enacted legislation exempting the state Fusion Center from state open records and privacy laws.[12] After state officials made statements hinting that federal agencies promoted this legislation as a condition of federal support for the program, EPIC filed Virginia FOIA requests for pertinent correspondence between the State Police and federal authorities, including the Department of Homeland Security

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[11] *See* EPIC, *EPIC* v. *Virginia Department of State Police: Fusion Center Secrecy Bill*, http://epic.org/privacy/virginia_fusion/ (last visited Aug. 28, 2012).

[12] Citron & Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 Hastings L.J. 1441, 1465 (2011), *available at* http://www.hastingslawjournal.org/wp-content/uploads/2011/08/CitronPasquale_62-HLJ-1441.pdf

and the FBI.[13] The State Police withheld the documents, and EPIC successfully challenged the withholding in court. *Electronic Privacy Info. Ctr.* v. *Captain J. Thomas Martin et al.*, No. GV08-019225 (Va. Gen. Dist. Ct. May 8, 2008). EPIC's efforts unveiled a Memorandum of Understanding between the State Police and the FBI in which the entities committed to limit public oversight of the Center's activities.[14]

EPIC was able to rely on a Virginia-resident attorney and its own status as a media organization when it submitted its requests and thus was able to challenge the State Police's denial under state law. An out-of-state individual or group without these advantages, however, would have been denied access to this nationally significant information or would have had to hire a Virginian to act on its behalf, an obstacle to those individuals or organizations without in-state connections or sufficient funds and a significant home-field advantage for Virginia citizens.

Government records capable of shedding light on issues of national importance are often maintained at state and local levels. Closing these records off to citizens of other states jeopardizes "the vitality of the Nation as a single entity." *Baldwin*, 436 U.S. at 383. The

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[13] EPIC, Freedom of Information Act request to Virginia State Police (Feb. 12, 2008), *available at* http://epic.org/privacy/fusion/VA_FOIA021208.pdf.

[14] *Memorandum of Understanding Between the Federal Bureau of Investigation and the Virginia Fusion Center* (2008), http://epic.org/privacy/virginia_fusion/MOU.pdf ("To the extent information received as a result of this MOU is the subject of or is responsive to a request for information under the Freedom of Information Act, the Privacy Act, or a Congressional inquiry, such disclosure may only be made after consultation with the FBI.").

Virginia FOIA burdens noncitizens' right to "political advocacy" and to a resource "necessary to the ability to engage in that activity"—public records. *Lee*, 458 F.3d at 200.

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As described above, citizens-only provisions cause myriad harms. Virginia cannot justify these burdens. There is no "substantial reason for the difference in treatment" to noncitizens. *Barnard* v. *Thorstenn*, 489 U.S. 546, 552 (1989); *see also C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 392 (1994) (holding that a state discriminating against interstate commerce must show "that it has no other means to advance a legitimate local interest"). Fees can be imposed equally on all requesters to compensate for resources spent responding to requests. *See Barnard*, 489 U.S. at 556 (holding that a discriminatory attorney residency requirement was not justified by avoiding administrative burdens because "[t]here is no reason to believe that the additional moneys received from nonresident members will not be adequate to pay for any additional administrative burden."). Indeed, as stated at a meeting of the Virginia Freedom of Information Advisory Council, "[f]orty-four states do not restrict who may make FOIA requests and there has been no clamoring for changing the law in those states."[15]

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[15] Va. Freedom of Information Advisory Council, *Report to the Government and the General Assembly of Virginia* 5-6 (2010), *available at* http://leg2.state.va.us/dls/h&sdocs.nsf/6f70d2f6f7bfeb2785256ebe0069ba89/dfd23a3c0ba5fd4c8525769a007a2cef?OpenDocument.

II. INCONSISTENT ENFORCEMENT OF CITIZENS-ONLY PROVISIONS AND LACK OF OVERSIGHT COMPOUND THE HARM

States that have open records laws with citizens-only provisions do not uniformly enforce them, and the lack of clear guidelines for noncitizen requesters and records custodians compounds the harm. Noncitizens do not know what rights they have and what procedures they must follow to request records. Records custodians undermine the purpose of open records laws by deciding whether to grant a request based on its nature and source. This state of affairs magnifies the discrimination that noncitizens confront in attempting to get the same information that citizens may readily access.

Virginia agencies grant or deny noncitizen requests according to their own informal policies and whims. *See* Va. Freedom of Information Advisory Council, *supra* n.15, at 5-6. The attorneys general for Arkansas and Tennessee, which also have citizens-only provisions,[16] have likewise interpreted those laws as leaving the decision whether to grant noncitizens' requests for records to the whim of records custodians.[17] The arbitrary treatment of noncitizen requests may be magnified due to questions regarding the laws' constitutionality. *See*

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[16] *See* Ark. Code. Ann. § 25-19-105(a)(1)(A); Tenn. Code Ann. § 10-7-503(a)(2)(A).

[17] *See* Letter from Dustin McDaniel, Attorney Gen., Ark., to Billy D. Vanlandingham, Office of Pers. Mgmt., Ark. Dep't of Fin. and Admin. et al. (Feb. 10, 2012), *available at* http://ag.arkansas.gov/opinions/docs/2012-017.html; Tenn. Att'y Gen. Op. No. 01-132 (Aug. 22, 2001), *available at* http://www.tn.gov/attorneygeneral/op/2001/op/op132.pdf.

Letter from Dustin McDaniel, *supra* n.17 ("[A] custodian might reasonably decide to grant the [noncitizen's] FOIA request in light of the Third Circuit decision.").

Because the open government laws of Virginia, Arkansas, and Tennessee do not authorize noncitizen requests for records, their procedural safeguards would appear to govern only in-state requests. Such is the case in Virginia, where state and local agencies have developed their own inconsistent and arbitrary practices regarding how much to charge an out-of-state requester, how long to take in responding, and whether to honor the request at all. *See* Va. Freedom of Information Advisory Council, *supra* n.15, at 5-6. For example, some agencies "usually" honor out-of-state requests, and one processes such requests "unless the requested records are voluminous." *Id.* at 6. The Virginia Freedom of Information Advisory Council's report also notes that "state agencies do better with out-of-state requests than local agencies." *Id.*

Because the Virginia FOIA does not apply to out-of-state requests, agencies are freed from any accountability for how they handle such requests. State and local agencies need not adhere to the Virginia Supreme Court's holding, for example, that the "purpose or motivation behind a [FOIA] request is irrelevant" to the decision whether to grant it. *Associated Tax Serv., Inc.* v. *Fitzpatrick*, 372 S.E.2d 625, 629 (Va. 1988). The upshot is that out-of-state requesters may be given a lower priority, the reason for their requests may be factored into the processing, and, of course, their requests may not be processed at all. Unclear guidelines for out-of-state requesters produce inconsistent application of the state's open government law and unnecessarily burden, without justification, many who seek access to public records.

CONCLUSION

For the foregoing reasons, amici urge the Court to grant the Petition and resolve now the Circuit split regarding the constitutionality of state open records laws that, like Virginia's, have a citizens-only provision.

Respectfully submitted.

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