NO. 12-17

IN THE

Supreme Court of the United States

MARK J. MCBURNEY and ROGER W. HURLBERT,
Petitioners,

v.

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

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Under the Privileges and Immunities Clause and the dormant Commerce Clause of the United States Constitution, may Virginia deny the petitioners the right of access to public records that it affords its own citizens, solely because the petitioners are citizens of other states?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory and Constitutional Provisions

State Attorney General Opinions

Books, Articles, and Reports

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 667 F.3d 454 and reproduced at Pet. App. 1a. The district court's decision is reported at 780 F. Supp. 2d 439 and reproduced at Pet. App. 29a.

JURISDICTION

The court of appeals entered its judgment on February 1, 2012. On April 25, 2012, Chief Justice Roberts extended the time to file a petition for a writ of certiorari to June 29, 2012. The petition was filed on that date and granted on October 5, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8 of the United States Constitution provides:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .

Article IV, Section 2 of the United States Constitution provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

The Virginia Freedom of Information Act limits the right to inspect and copy public records to "citizens of the Commonwealth," Va. Code § 2.2-3704(A), and permits the state to recoup its expenses in processing requests through "reasonable charges not to exceed its actual cost." *Id.* § 2.2-3704(F). These provisions are reproduced in full in an appendix to this brief.

STATEMENT

Public records are, and always have been, a critical part of the Nation's commerce. In the information age, they form the raw material for a robust national market. "Once scattered about the country, now public records are consolidated by private sector entities into gigantic databases." Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 Minn. L. Rev. 1137, 1139 (2002). From dusty ledgers in rural courthouses to centralized computer servers, public records from all 50 states are gathered, sold, aggregated, mined, and resold for countless purposes. They are used to transfer property, collect debts, evaluate insurance and credit risks, screen job applicants, sell products, report the news, conduct scholarly research, scrutinize government, and investigate criminal activity. It is no exaggeration to say that the free flow of this information across state lines helps constitute our Nation as one.

In this case, the state of Virginia maintains that it may make its public records available to any Virginian who asks, but withhold those records from the petitioners—solely because they are citizens of other states. Petitioner Hurlbert is a Californian who earns his living gathering real property records nationwide on behalf of his clients. Petitioner McBurney is a Rhode Islander who seeks records relating to a proceeding in which a state agency's actions directly affected his financial interests. This case thus concerns two of the oldest and most basic types of public records—real property records and records relating to public proceedings.

A. Real Property Records

The link between public records and property rights was cemented "in the early days of seventeenth-century settlement" through "one of the first and most important American [legal] innovations"—"a system for registering

and recording titles to land." Friedman, *A History of American Law* 27 (3d ed. 2005). "The essence of the system was that *the record itself* guaranteed title to the land." *Id.* (emphasis added). Under this system, "any person may place upon the public records" certain legal instruments and "thereby put the world on notice of his claim to the land." Payne, *In Search of Title*, 14 Ala. L. Rev. 11, 33 (1961). The result is that, in the United States, "virtually all such instruments are registered and the public records tend to reflect a complete history of the transactions affecting the title to land." *Id.* The system, largely unknown in England at the time of the Founding, was born out of necessity—whereas "[i]n old, traditional communities, everybody *knew* who owned the land," in colonial America, "where land was a commodity," recording was "an important tool of the volatile, broadly based land market." Friedman, *American Law*, at 27.

1. The American recording system's origins can be traced to the Jamestown settlement and the Virginia Colony. Beale, *The Origin of the System of Recording Deeds in America* 2 (1907). The first surviving legislation is a vote from 1626 that all land sales should be brought to Jamestown and enrolled in the General Court within a year. 1 Bruce, *Economic History of Virginia in the Seventeenth Century* 570 (1895). This proved ineffective, however, and in 1640, an act was passed providing that a deed or mortgage of land would be "adjudged fraudulent unless entered in some court." 1 *Hening's Statutes at Large* 227 (1640). From 1624 to the present, the task has been performed by Virginia county clerks. *Historical Records Survey, Inventory of County Archives of Virginia* 16 (1939); Porter, *County Government in Virginia: 1607-1904*, at 9 (1966).

Another critical feature of the American system—priority to the first recorded deed—was established in Massachusetts. *See* Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U. L. Rev. 281 (1941). In 1636, the Plymouth Bay Colony enacted a law "that all sales exchanges giftes mortgages leases and other Conveyances of howses and lands" must be "committed to the publick Record." 11 *Records of the Colony of New Plymouth* 12 (1855). Four years later, in 1640, Massachusetts enacted a general ordinance—providing that no land transaction would have any force "unless the same bee recorded"—that remains the same in substance today. 1 *Records of the Governor and Company of the Massachusetts Bay* 306-07 (1853). Its express purpose was not only "avoyding fraudulent conveyances," but also public disclosure—that "every man may know what estate or interest other men may have in any houses, lands or other hereditaments they are to deale in." *Id.*

Local officials' obligation to record and disclose this information was taken seriously. By 1644, town meeting clerks in Connecticut had to take the following oath: "Swear by the dredfull name of the ever living God that you will keep an entry of all grants, deeds of sale or mortgages of lands, and all marriages, births, deaths and other writings brought to you and deliver copies when required of you." Daniels, *Political Structure of Local Government in Colonial Connecticut* 65 (1978).

Founding Era courts made clear that property records were public records, open to all. *See Evans v. Jones*, 1 Yeates 172, 173 (Pa. 1792) ("[A]ny one by having recourse to the offices of the recorders, may ascertain the previous liens upon the property, which he wishes to purchase. The records are constructive notice to all mankind."); *Jackson v. McGavock*, 26 Va. 509, 538 (1827)

("The implied or presumptive notice afforded by an entry, and which *every one has a right to inspect*, must be considered sufficient notice to all interested, of the facts stated in that entry.") (emphasis added).

2. The American recording system gave rise to new industries, including title abstracting and title insurance. By the twentieth century, the "rise of commercial abstracting" had created "a business of 'enormous proportions.'" Payne, *In Search of Title*, at 37. Those in the industry "engage[d] in the business of searching for public records, making abstracts of title to real estate for the public for compensation." Niblack, *Abstracters of Title: Their Rights and Duties with Special Reference to the Inspection of Public Records* 1 (1908). Abstracts—summaries of "all of the instruments contained in the public records affecting the title to a particular piece of land"—eliminated the "labor of repeated reexamination of the same original records." Payne, *In Search of Title*, at 35.

At first, some local officials and courts were hostile to commercial abstracters' efforts to gather public records on a wide scale, resulting in hard-fought litigation and "bad feeling between officers and abstract men." Niblack, *Abstracters*, at 111-12. Resistance came from local "custodians of records who had a vested interest in fees for copies" and feared that the availability of private databases would cut into their revenue. Cross, *The People's Right to Know: Legal Access to Public Records and Proceedings* 28 (1953). Even as they conceded that "[a]ll persons have the right to inspect these records freely," some courts openly worried that allowing access to the abstracters would "aid them in their business" while "depriv[ing] the register of the emoluments of his office." *Newton v. Fisher*, 3 S.E. 822, 823-24 (N.C. 1887). Other

courts expressed scorn for anyone interested in public records for "simply private gain," *Webber v. Townley*, 5 N.W. 971, 973 (Mich. 1880), or their "own profit." *Buck & Spencer v. Collins*, 51 Ga. 391, 396-97 (1874).

Over time, however, commercial data gatherers overcame provincial resistance, as courts and legislatures came to recognize that there was "no good reason" to withhold the right to inspect and copy public records from "'any person,' even [] abstracters of titles." *Boylan v. Warren*, 18 P. 174, 177 (Kan. 1888); *Burton v. Tuite*, 44 N.W. 282 (Mich. 1889) (overruling *Webber v. Townley*). Today, data gathers routinely obtain real property records—including deeds, mortgages, land surveys, and tax assessment records—from state and local governments nationwide.

B. Records Relating to Public Proceedings

A second category of public records, those relating to public proceedings, has a longer pedigree in Anglo-American law. In England, the right to access the records of public proceedings dates to at least 1372, during the reign of King Edward III, when Parliament enacted a statute giving all subjects the right to inspect court records—a response to the King's attempts to deny his adversaries documents that could be harmful to him. 46 Edw. 3 (1372); 2 Eng. Stat. at Large 191, 196-97 (1341-1411).

In America, the right was guaranteed—both as to judicial and non-judicial records—by the first colonial bill of rights, the Massachusetts Body of Liberties of 1641, which declared that "Every inhabitant of the Country shall have free liberty to search and review any rolls, records or registers of any Court or office." art. 48. Coming just one year after the colony's recording statute (*see*

supra at 4), this right encompassed both court records and property records.

At the Founding, "every subject" had the common-law right to inspect "[s]uch documents of public proceedings as are lodged in the custody of public officers for the public use." *Rex v. The Fraternity of Hostmen in Newcastle-Upon-Tyne*, 93 Eng. Rep. 144 (K.B. 1744). These records included "books of the sessions," which "every body [had] a right to see." *Herbert v. Ashburner*, 95 Eng. Rep. 628, 628 (K.B. 1750). Books open to the public also included records of the Court of the King's Bench. As Lord Coke explained, these records were kept "in the King's Treasury. And yet not so kept but that *any subject* may for his necessary use and benefit have access thereunto, which was the ancient law of England, and so is declared by an act of Parliament." 2 *The Reports of Sir Edward Coke*, preface (1572-1617) (emphasis added).

In England, the common-law right to inspect public records also extended beyond judicial records, to other records in which a person had a "proprietary interest in the document." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (recounting history). Tenants of a manor or members of a corporation had "clearly settled" right to inspect these entities' records by virtue of their membership in them. *See Rex v. Shelley*, 3 T.R. 141, 142 (1789); *Rex v. Babb*, 3 T.R. 579, 580 (K.B. 1790) (holding that citizens could inspect the books and papers of a borough to determine the limits of a mayor's authority).

English cases also recognized the right of strangers to inspect records in circumstances that implicated their property interests or livelihood. Thus, "every man" had a right to inspect records from a "proceedings to which he [had been] a party." *Wilson v. Rogers*, 2 Str. 1242 (K.B.

1745). And those engaged in a trade had a right to access records of entities with regulatory control over that trade. In one case, for example, a brewer was granted the right to inspect and make copies of the company's books, even though he was not a member of the company, because "[b]y-laws affecting strangers interest them therein." *The Brewers Co. v. Benson* Barnes 236 (K.B. 1745); *see also Harrison v. Williams*, 3 B. & C. 162 (K.B. 1824) (granting a tanner the right to inspect bylaws that restricted practicing his trade within city limits).

This common-law right of access to public proceedings was embraced by the Founders and American courts as essential to the protection of individual rights. As James Madison wrote: "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both. … A people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W. T. Barry, August 4, 1822, in 9 *The Writings of James Madison* 103 (Hunt ed. 1910). A century ago, Virginia's highest court declared that "upon general principles, independently of any statute on the subject, any person having an interest" in public records "would have a right to inspect them." *Clay v. Ballard*, 13 S.E. 262, 263 (1891); *see also Nixon*, 435 U.S. at 597 ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents.").

C. Virginia's Citizens-Only Restriction

Virginia limits the right to inspect and copy its public records to its own citizens. The Virginia Freedom of Information Act provides that "all public records shall be open to inspection and copying by any citizens of the Commonwealth" and authorizes public record custodians

to "require the requester to provide his name and legal address" to verify the requester's Virginia citizenship. Va. Code § 2.2-3704(A).

Some, but not all, media organizations are exempted from this citizens-only restriction, which extends the right of access to "newspapers and magazines with circulation in the Commonwealth" and "radio and television stations broadcasting in or into the Commonwealth," regardless of their owners' citizenship. *Id.* All other out-of-state media—including newspapers without Virginia circulation, online publications, and independent journalists—are denied the right to access public records.

The statute allows any Virginia public body to recoup the "actual cost incurred in accessing, duplicating, supplying, or searching for the requested records" by assessing "reasonable charges." *Id.* § 2.2-3704(F). The only constraint is that the public body may not derive a profit from these fees. *Id.* To this end, the statute prohibits "extraneous, intermediary or surplus fees" and "duplication fee[s]" that "exceed the actual cost of duplication." *Id.* Agencies may also provide virtually cost-free access to records by "posting the records on a website or delivering the records through an electronic mail address provided by the requester." Va. Code § 2.2-3704(G).

The citizens-only restriction is selectively enforced. *See* Desai, *The End of Non-Citizen Exclusions in State Freedom of Information Laws?*, 58 Admin L. Rev. 235, 244 n.62 (2006). Not all Virginia agencies routinely deny out-of-state records requests. Some have "never denied" a request "based on citizenship." *Report of the Virginia Freedom of Information Act Advisory Council to the Governor and General Assembly of Virginia* (2010)

("*VFOIA Report*") at 6.[1] The Virginia State Bar "usually" honors out-of-state records requests—most of which come from commercial "data aggregators"—and the Department of Motor Vehicles "usually" does so as well, reporting that "it is not a big problem for them." *Id.* at 5-6.

Virginia's inconsistent enforcement of its citizens-only restriction stems, in part, from its recognition that "in practice, [the restriction] is easily overcome—requesters turned down for being out of state can generally find someone in Virginia to make the request for them." Desai, *Non-Citizen Exclusions*, 58 Admin. L. Rev. at 244 n.62 (quoting Lisa Wallmeyer, former Assistant Director of the Virginia Freedom of Information Advisory Council). Indeed, the state agency charged with interpreting the Act acknowledges "the likelihood of an out-of-state corporation getting a Virginia citizen to make the request for it." Advisory Opinion to John Baulis (Aug. 6, 2001).[2] Thus, although the citizens-only restriction can be sidestepped with "ease," *VFOIA Report* at 5, it often imposes an additional cost on non-Virginians, requiring them to hire an in-state proxy to obtain public records on their behalf.

Although several other states had citizens-only restrictions like Virginia's, Arkansas and Tennessee are the only two states that continue to enforce restrictions like Virginia's.[3] Seven states have repealed or replaced

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[1] http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD152010/$file/HD15.pdf.

[2] http://foiacouncil.dls.virginia.gov/ops/01/AO_37.htm.

[3] *See* Ark. Code § 25-19-105(a)(1)(A); Tenn. Code §10-7-503. A constitutional challenge to Tennessee's restriction is fully briefed and pending before the Sixth Circuit. *See Jones v. City of Memphis*, No. 12-5558 (argument currently set for January 16, 2013).

their citizens-only restrictions.[4] Three other states' statutes give "every citizen" a right to inspect records, without specifying U.S. or state citizenship; of these states, at least two take the position that this language should not be read to limit access to citizens of the state.[5] Among states that permit everyone to access their public records, there has been "no clamoring for changing the law." *VFOIA Report* at 5.

As a result, Arkansas and Tennessee are the only other states to enforce citizens-only restrictions like Virginia's. Recently, two Arkansas state agencies agreed to

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[4] California, Delaware, Florida, Georgia, New Jersey, New Mexico, and Pennsylvania have all repealed their citizens-only restrictions. *See* Cal. Gov. Code § 6253; 2012 Del. Laws Ch. 382 (S.B. 231); 1975 Fla. Laws c. 75-225, § 2 (eff. July 1, 1975); 2012 Ga. Laws, Act 605, § 2 (H.B. 397) (eff. April 17, 2012); N.J. P.L. 2001, c. 404 § 17; N.M. Stat. § 14-2-1 (eff. July 1, 2011); Pa. Cons. Stat. § 67.701 (eff. Jan. 1, 2009). Before it was repealed, Delaware's restriction was held unconstitutional under the Privileges and Immunities Clause in *Lee v. Minner*, 458 F.3d 194, 199 (3d Cir. 2006). Missouri's 1961 Public Records Law limited the right to inspect public records to "citizens of Missouri," Mo. Rev. Stat. § 109.180, but was effectively replaced by its 1973 Sunshine Law, requiring that public records be "open to the public," with no citizenship restriction, Mo. Rev. Stat. §§ 610.010-.030.

[5] Alabama, Montana, and New Hampshire give "every citizen" a right to inspect records, without specifying federal or state citizenship. *See* Ala. Code § 36-12-40; Mont. Code § 2-6-102. The attorneys general of New Hampshire and Alabama take the position that this language should not be used to restrict access to state citizens, and Georgia's attorney general took a similar position before repeal of its restriction. *See* Memorandum on New Hampshire's Right-to-Know Law, at 36 n.23 (July 15, 2009), *available at* http://www.doj.nh.gov/civil/documents/right-to-know.pdf; Ala. Op. Att'y Gen. No. 2001-107 (Mar. 1, 2001); Ga. Op. Att'y Gen. No. 93-27 (Dec. 15, 1993).

honor all future out-of-state public records requests in response to a constitutional challenge to the restriction.[6] Arkansas' attorney general continues to maintain that its citizens-only restriction is constitutional, Ark. Op. Att'y Gen. No. 2012-017 (Feb. 10, 2012), but has opined that a plan by an Arkansas county to discriminate between residents and non-residents with respect to public website access would be unconstitutional. Ark. Op. Att'y Gen. No. 2011-060 (Aug. 1, 2011). In Tennessee, where the Attorney General has likewise defended the constitutionality of the citizens-only restriction, Tenn. Op. Atty. Gen. No. 99–067 (Mar. 18, 1999), the legislature commissioned a special committee on its public records laws, which recommended eliminating the restriction. *See* 2008 Tennessee Laws Pub. Ch. 1179 (S.B. 3280); *Report of the Joint Study Committee on Open Government* § 7(a)(1) (2007).[7]

D. Factual Background

1. Roger Hurlbert is a Californian who earns his living by obtaining property records from state and local governments on behalf of his clients. CA4 J.A. 46A-47A. He most often obtains copies of computer-readable data showing property ownership, valuations, land tenure, and land use. *Id.* at 47A. Hurlbert's clients pay him to obtain these documents, usually held by county clerks, by making requests under state open-records statutes and negotiating with officials for their release. *Id.* at 47A,

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[6] *See Belth v. Daniels*, No. 4-11-cv-009-JMM (E.D. Ark. May 16, 2011), Doc. No. 16-1, https://ecf.ared.uscourts.gov/doc1/02712330164 (settlement agreement).

[7] http://web.knoxnews.com/pdf/1219open-report.pdf. A constitutional challenge to Tennessee's restriction is fully briefed and pending before the Sixth Circuit. *See Jones v. City of Memphis*, No. 12-5558 (argument currently set for January 16, 2013).

70A. Although he operates his business from California, his clients seek public documents from all over the country. *Id.* at 46A-47A.

In 2008, a client hired Hurlbert to obtain property records from the Tax Assessor of Henrico County, Virginia. *Id.* at 47A. An official from the office denied Hurlbert's request because he was not a Virginia citizen. *Id.* Hurlbert was thus forced to stop offering his retrieval services with respect to all public records in Virginia. *Id.* at 47A-48A, 66A, 70A.

2. Mark McBurney is a Rhode Islander who lived in Virginia from 1987 to 2000. *Id.* at 33A. In 2008, he requested public records from the Virginia Division of Child Support Enforcement to get to the bottom of the agency's repeated mishandling of its responsibility to enforce child support obligations owed by his former wife, a Virginian, while McBurney was living overseas. *Id.* at 35A-38A. The agency at least twice—and McBurney suspects as many as four times—filed his petitions for child support in courts that lacked jurisdiction. *Id.* 36A-37A. McBurney was unable to participate in hearings on these petitions because the agency failed to notify him of the hearing dates. *Id.* As a result, he does not know what happened at those hearings. *Id.* Ultimately, the agency's mistakes deprived McBurney of almost nine months of child support payments. *Id.* at 37A.

The agency denied McBurney's first request—seeking records in his case file, including documents pertaining to him, his son, his former wife, and his child-support application—in a letter stating: "You are not entitled to the information as you are not a Citizen of [the] Commonwealth of Virginia." *Id.* at 36a-39A. He then sent a second request, this time from a Virginia address, seeking the same records as well as any regulations, administrative guidelines, or policies relied upon by the

agency in cases where one parent is overseas. *Id.* The agency again denied the request, this time writing: "Our records indicate that you are not a citizen of the Commonwealth of Virginia" and, "[t]herefore, you are not eligible to obtain information under the Virginia Freedom of Information Act." *Id.* at 36A, 45A. Although McBurney ultimately received some documents about his case under a different statute, he has never received the general policy information he sought about how the agency handles cases like his. Pet. App. 54a. Nor has he ever received a list of withheld documents or an explanation of why they were withheld, other than the fact that he lives in Rhode Island. *Id.* at 39a.

E. Proceedings Below

1. Petitioners sued the Deputy Commissioner and Director of the Virginia Division of Child Support Enforcement, and the Director of the Henrico County Real Estate Assessor's Office, seeking declaratory and injunctive relief. They alleged that Virginia's citizens-only restriction violates the dormant Commerce Clause and the Privileges and Immunities Clause. First Am. Compl. ¶ 1. Hurlbert alleged that the restriction discriminates against interstate commerce and denies him the right to pursue a common calling by barring him from pursuing his national public records retrieval business in the Virginia market on an equal basis with Virginians. *Id.* ¶¶ 36, 41. McBurney alleged that the citizens-only restriction precluded him from, among other things, enjoying equal access to the procedures used to resolve his child-support case. *Id.* ¶¶ 34-35. Respondents moved to dismiss the suit for lack of standing, and the district court granted their motions as to both petitioners. *McBurney v. Mims*, 2009 WL 1209037 (E.D. Va. 2009).

2. The Fourth Circuit reversed, holding that both petitioners had standing. Pet. App. 64a-68a. In a concur-

rence, Judge Gregory discussed the merits, writing that Hurlbert, by alleging that Virginia had denied him information he uses in his business for profit, had made out "a classic common-calling claim under the Privileges and Immunities Clause." *Id.* at 72a.

3. On remand, the parties filed cross-motions for summary judgment. Virginia argued that the statute does not run afoul of the dormant Commerce Clause because it "does not regulate commercial activity." *Id.* at 48a. It further argued that access to public information is not a privilege that the Privileges and Immunities Clause requires the state to extend on an equal basis. *Id.* at 39a. Alternatively, Virginia contended that the citizens-only restriction was justified by a substantial state interest because responding to non-Virginians' requests would consume resources otherwise available to Virginians. *Id.* Virginia presented no evidence of the burden posed by non-citizen requests.

The district court granted the defendants' motion. It rejected their argument that Hurlbert was not engaged in a common calling because it was "undisputed that his clients pay him to request records from state governments," but concluded that any effect the statute had on his ability to perform that work in Virginia was "merely incidental." *Id.* at 38a. The court thus held that the citizens-only restriction violates neither the Privileges and Immunities Clause nor the dormant Commerce Clause, without addressing whether Virginia had any legitimate purpose for discriminating against non-citizens.

4. The Fourth Circuit affirmed. The Fourth Circuit rejected Hurlbert's dormant Commerce Clause claim on the ground that the statute does not expressly mention businesses, reasoning that the citizens-only restriction does not discriminate against interstate commerce because it is "wholly silent as to commerce or economic in-

terests" and, "[a]t most … prevents Hurlbert from using his chosen way of doing business," not "from engaging in business in the Commonwealth." *Id.* at 26a-27a (internal quotation marks omitted).

The court also rejected both Hurlbert's and McBurney's claims under the Privileges and Immunities Clause. As to McBurney, the court held that the Privileges and Immunities Clause did not encompass his right to access public records arising out of his own child-support proceeding. *Id.* at 22a. As to Hurlbert, the court reasoned that the statute on its face "addresses no business, profession, or trade" and therefore has only an "incidental effect on his common calling in Virginia." *Id.* at 17a-18a.

SUMMARY OF ARGUMENT

I. Virginia's citizens-only policy flouts the Constitution's core principle of nondiscrimination among states, embodied in the Privileges and Immunities, Full Faith and Credit, and Commerce Clauses. Through all three, the Framers sought to end the favoritism that had plagued the Articles of Confederation and instead "fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

II. Virginia's citizens-only restriction discriminates against out-of-state economic interests both facially and in effect, and is therefore "virtually per se invalid" under the Commerce Clause. *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994).

1. Virginia does not deny that its statute discriminates against non-Virginians on its face. Instead, Virginia argued below that the citizens-only restriction does not discriminate against *commerce* because it regulates only access to public records. That argument overlooks this Court's unanimous decision in *Reno v. Condon*, 528

U.S. 141, 148-49 (2000)—which held that public records released into commerce are "article[s] of commerce"—as well as the contemporary reality of the robust national market for public information.

2. Virginia's citizens-only restriction also discriminates against interstate commerce in effect, denying businesses in every other state the right to access public records that identical in-state businesses may demand. The inevitable result is to divert work to Virginians that might be carried out more efficiently by non-Virginians. Allowing restrictions like that to flourish would stifle competition, cause prices to rise, and lead to economic Balkanization—the very effects the Framers sought to avoid.

3. The court of appeals erred by focusing on whether the statute has the purpose of discriminating against commerce or expressly targets commerce. Neither has any bearing on the proper discrimination analysis as articulated by this Court. And the effects on commerce here are not merely "incidental," as the court below believed; they are direct and anticompetitive because the statute bars non-Virginia businesses from obtaining records that are freely available to Virginia businesses.

III. The Privileges and Immunities Clause "outlaw[s] classifications based on the fact of non-citizenship" absent an indication that non-citizens are "a peculiar source of evil." *Toomer*, 334 U.S. at 395. By denying non-Virginians access to public information, based solely "on the fact of non-citizenship," *id.*, Virginia violates that command in several ways.

1. Because it categorically bars non-Virginians from providing records-retrieval services in Virginia, the citizens-only restriction violates petitioner Hurlbert's right

to a common calling—a right "the clause plainly and unmistakably secures." *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870).

2. By refusing to give non-Virginians equal access to public real estate records that are indispensible to securing property rights, Virginia has failed to place non-Virginians on the "same footing" with respect to "the acquisition and enjoyment of property," *Paul v. Virginia*, 75 U.S. 168, 180 (1869), perhaps the most fundamental of rights protected by the Clause.

3. By denying petitioner McBurney's request for public records relating to his own case before a state agency—including general policies used to handle his case—Virginia violates the fundamental rule that public proceedings "must remain open" to citizens and non-citizens "on the same basis," *Miles v. Illinois Cent. R. Co.*, 315 U.S. 698, 704 (1942), and does so in a way that burdens his right to enforce debts on equal terms.

4. No state may wall itself off from the free flow of information. Because "[e]quality in access" to information itself is "basic to the maintenance or well-being of the Union," *Baldwin v. Fish & Game Comm.*, 436 U.S. 371, 388 (1978), once Virginia *chooses* to make information public, it must make that information available on equal terms to citizens and non-citizens alike. As the Full Faith and Credit Clause shows, the Framers believed that the movement of public records across state lines was "'fundamental' to the promotion of interstate harmony." *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 220 (1984)

IV. Virginia's only justification for its statute—that allowing non-Virginians access to information would reduce resources available for Virginians—fails both

Commerce and Privileges and Immunities Clause scrutiny.

1. Virginia's justification is itself discriminatory. The citizens-only restriction turns not on the *burden* posed by the request, but on the *citizenship* of the requester—an unconstitutional distinction. And the notion that public records are a resource to be conserved makes no sense because records—unlike fisheries or oil reserves—face no risk of depletion from those seeking *copies*.

2. Virginia has not demonstrated that allowing non-Virginians access imposes *any* additional cost. Virginia law authorizes the state to fully recoup its actual cost incurred through fees. There is "no reason to believe" that these fees "will not be adequate to pay for any additional administrative burden." *Barnard v. Thorstenn*, 489 U.S. 546, 556 (1989).

3. Finally, even if Virginia could show some connection between the citizenship of a requester and the burden of a request, it would not justify the "drastic" remedy of "total exclusion." *Toomer*, 334 U.S. at 398.

ARGUMENT

I. Virginia's Citizens-Only Restriction Is At Odds With the Constitution's Core Principle of Nondiscrimination Among the States.

Virginia asserts the power to deny to any citizen of another state the right to access the public records that it makes freely available to its own citizens. That state policy is at odds with a core principle of nondiscrimination—one that disfavors "distinctions, preferences, and exclusions" based on state citizenship, particularly in matters affecting commerce and economic interests—embodied in both the Privileges and Immunities Clause and the Commerce Clause. *The Federalist No. 7*, at 35-36

(Hamilton) (Lodge ed., 1888). Together with the Full Faith and Credit Clause, these clauses aim to achieve "horizontal federalism" by avoiding friction and helping "fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948); *see* Erbsen, *Horizontal Federalism*, 93 Minn. L. Rev. 493 (2008).

This Court has long recognized the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause, which "stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism." *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978) (footnote omitted). That common origin—a promise that "the free inhabitants of each [State] … shall be entitled to all *privileges and immunities* of free citizens in the several States," including "all the privileges of *trade and commerce*"—reflects the Framers' intent that the two clauses "secure and perpetuate" the same end: "mutual friendship and intercourse among the people of the different states." Articles of Confederation of 1781, art. IV, para. 1 (emphasis added). Alongside this language was a forerunner to our Full Faith and Credit Clause, which encouraged interstate comity by insisting that states honor "the records, acts and judicial proceedings of the courts and magistrates of every other State." *Id.*, para. 3.

The promise of comity went unfulfilled under the Articles of Confederation. Because the federal government lacked any effective enforcement power, Article IV was routinely flouted by the states, many of which passed laws giving "preference to their own citizens," 1 *Records of the Federal Convention of 1787*, at 317 (Farrand, ed., 1911) (Madison)—a practice "certainly adverse to the spirit of the Union," Madison, "Vices of the Political Sys-

tem of the United States," in 2 *The Writings of James Madison*, at 363. As Justice Story later recounted, "[m]easures of a commercial nature" would be "adopted in one state from a sense of its own interests" and then "often countervailed or rejected by other states from similar motives." 1 Story, *Commentaries on the Constitution of the United States* 185 (5th ed. 1891). And despite the guarantee of full faith and credit, citizens of one state could not even rely on the public records or judgments from another state to pursue debtors across state lines. *See, e.g., Phelps v. Holker*, 1 U.S. (1 Dall.) 261, 264 (Pa. 1788).

The "Constitution was adopted, among other things, to remedy those defects in the prior system." *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 431 (1870). "[A]void[ing] the tendencies toward economic Balkanization that had plagued relations" among the States was "an immediate reason for calling the Constitutional Convention." *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979)). Indeed, "[i]f there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring).

The Framers achieved this objective in several complementary ways. *First*, because the Privileges and Immunities Clause was critically important—so much so that Alexander Hamilton considered it "the basis of the Union," *The Federalist No. 80*, at 497 (Hamilton)—the Framers transplanted the core of that Clause from the Articles of Confederation to the Constitution. U.S. Const. art. IV, §2, cl. 1; *see also* 3 *Records of the Federal*

Convention, at 112 (Charles Pinckney, drafter of Privileges and Immunities Clause, stating that it was "formed exactly upon the principles of the 4th article of the present Confederation"). And to ensure "the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled," the Framers authorized the creation, in Article III, of an independent "national judiciary" with the power to hear cases between citizens of different states and thus enforce the Clause's protections. *The Federalist No. 80*, at 497 (Hamilton).

Second, the Framers adopted, immediately preceding the text of the Privileges and Immunities Clause, a broader Full Faith and Credit Clause to ensure that "the public Acts, Records, and judicial Proceedings" of each state would be honored in "every other state." U.S. Const. art. IV, § 1, cl. 1. As Justice Jackson observed, this language "include[s] nonjudicial 'public' acts and records, which the Articles had not mentioned," *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1 (1945), meaning "not only records of judicial proceedings but records of deeds, mortgages, marriages, and the like, kept in public offices," Burdick, *The Law of the American Constitution: Its Origin and Development* 476 (1922). The Clause ensured that "rights and property would belong to citizens of every state, in many other states than that in which they resided." 2 Story, *Commentaries*, at 190.

The Framers thus recognized that, if the league of states was to become a nation, citizens would need to engage in commerce, acquire property, collect debts, and enter into other acts of legal significance across state lines, and that respect for public records and judgments among the states would be essential to making that activ-

ity possible. The Privileges and Immunities Clause complements the Full Faith and Credit Clause in part because "[r]ecognition of another state's 'Acts, Records, and judicial Proceedings' would be of little consequence if the state were free to favor their own citizens over those of other states," 1 Stephens, *American Constitutional Law: Sources of Power and Restraint* 341 (5th ed. 2012), for example, by barring them from state courthouses, forbidding them from owning property, or—as in this case—barring them from the public archives. After all, one can hardly make use of another state's public records if one cannot get them in the first place.

Third, the Framers created a stand-alone Commerce Clause giving the federal government the power to regulate interstate commerce and, by negative implication, limiting the states' ability to do the same. U.S. Const. art. I, § 8, cl. 3; *see* 3 *Records of the Federal Convention*, at 478 (Madison) ("[The Commerce Clause] was intended as a negative and preventative provision against injustice among the States themselves.").

Although located in different parts of the Constitution, the Commerce and Privileges and Immunities Clauses remained closely linked. Their separation was structural: whereas the Privileges and Immunities Clause *expressly* restricts state power (by limiting discrimination based on citizenship), the Commerce Clause *impliedly* does so (by limiting discrimination against interstate commerce). *See United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 220 (1984). These mutually reinforcing provisions—one an "implied restraint," the other a "direct restraint," *id.*—give meaning to the fundamental constitutional principle of nondiscrimination on the basis of state citizenship. As we now explain, because Virginia's citizens-

only restriction on the right to access public records is fundamentally at odds with that principle, it is invalid under both clauses.[8]

II. The Citizens-Only Restriction Violates the Dormant Commerce Clause.

"Time and again," this Court has reiterated that, "in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm*, 544 U.S. at 472 (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994)). A state law that "discriminates against interstate commerce," whether on its face or in its practical effect, "is virtually *per se* invalid." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2009) (internal quotation marks omitted). In such cases, this Court has "generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

Virginia's citizens-only restriction on public records access is unconstitutional under these "well-settled principles." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 386 (1994). It discriminates against

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[8] Although some members of the Court have expressed doubts about the negative Commerce Clause, none has questioned the Privileges and Immunities Clause's nondiscrimination rule. *See, e.g.*, *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 68 (2003) (Thomas, J., dissenting); *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., dissenting) (arguing that "discrimination against citizens of other States" should be "regulated not by the Commerce Clause but by the Privileges and Immunities Clause").

out-of-state economic interests, both facially and in effect, and the state has advanced no justification for that discrimination—much less a justification that could meet a burden "so heavy that facial discrimination by itself may be a fatal defect." *See Or. Waste*, 511 U.S. at 101 (internal quotation marks omitted).

1. *Facial Discrimination.* To determine whether a law violates the dormant Commerce Clause, this Court "first ask[s] whether it discriminates on its face against interstate commerce." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). "In this context, 'discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Id.* (some internal quotation marks omitted; quoting *Or. Waste*, 511 U.S. at 99); *see Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 581 (1997) (state law affording more favorable tax treatment to camps that served mostly in-state residents "facially discriminates against interstate commerce"). Facially discriminatory state laws like Virginia's are subject to "the strictest scrutiny." *Hughes*, 441 U.S. at 337.

Virginia's citizens-only restriction provides that "all public records shall be open to inspection and copying by any citizens of the Commonwealth" and that "[a]ccess to such records shall not be denied to citizens of the Commonwealth." Va. Code § 2.2-3704(A). By expressly guaranteeing access to public records only to Virginians, while authorizing officials to withhold such access from citizens of other states, the statute facially discriminates against the economic interests of out-of-state businesses that, like Hurlbert's, wish to participate in the Virginia records-retrieval market. Hurlbert was denied access to

records solely because his letter listed "only an out-of-state return address." Dist. Ct. Doc. No. 7 at ¶ 4 (Answer). That "geographic distinction . . . patently discriminates against interstate commerce." *Or. Waste*, 511 U.S. at 100.

In today's economy, where data is collected and traded on the open market, public records are indisputably the stuff of commerce—just as much as milk, or wine, or garbage. *See Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978) ("*All* objects of interstate trade merit Commerce Clause protection.") (emphasis added). As this Court held unanimously in *Reno v. Condon*, state public records—there, public records containing drivers' information—are "article[s] of commerce" under the Commerce Clause because they are released, sold, compiled into databases, and resold for various commercial purposes. 528 U.S. 141, 148-49 (2000). In other words, because information from public records is "used in the stream of interstate commerce by various public and private entities," its "sale or release into the interstate stream of business" constitutes interstate commerce under the Commerce Clause, *id.*, in both its negative and affirmative aspects, *see Camps Newfound*, 520 U.S. at 574 ("The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation.").

Not only are public records *things* in commerce, but the *service* of gathering records for compensation is itself commerce. Virginia's position to the contrary—that "commerce" is limited to "the buying and selling of goods," CA4 Br. at 43—rests on an "outdated and mistaken concept of what constitutes interstate commerce." *Carbone*, 511 U.S. at 389. Even a century-old treatise on

the public-records business recognized that one who gathers records for pay does not merely "sell[] information," but also "acts as an agent in making the search" and performs other services "for a compensation." Niblack, *Abstracters of Title*, at 114; *see also FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 625-26 (1992) (performing a "title search," which "produces a chronological list of the public documents in the chain of title to the real property," is a "major component[] of the [title] insurance company's services").

Given the wide variety of databases compiled from public records, and their importance across all sectors of the economy, the value of information-gathering services is even more apparent today than it was a century ago. The collection, compilation, and publication of public records is a service that today "inform[s] transactions in numerous fields"—"[r]eal estate financing, credit reporting, background checks, tenant screening, and even political campaigns." Br. of Coalition for Sensible Public Records Access, *et al.* (pet. stage), at 6-7. And so, to meet the demand for their services, many businesses must make state-records requests "daily." *Id.* at 6. Virginia's experience bears that out: one state official "stated that she handles numerous out-of-state" public records requests "daily" and that "most of these requests are from data aggregators." *VFOIA Report*, at 5.

Under this Court's dormant Commerce Clause jurisprudence, it is irrelevant whether the economic activity at issue involves the offering of a service or the selling of traditional articles of commerce. *Camps Newfound*, 520 U.S. at 577 n.10; *see also Carbone*, 511 U.S. at 391 (treating the *service* of hauling and collecting waste as "the article of commerce"). What matters is whether the challenged law discriminates against businesses or individu-

als engaged in economic activity solely because they reside in a different state. The citizens-only restriction does that on its face.

2. *Discrimination in Effect.* The citizens-only restriction discriminates not only facially but in effect because it "favor[s] in-state economic interests over out-of-state interests." *Brown-Forman*, 476 U.S. at 579. The Court has long recognized that "'[i]n each case it is [the Court's] duty to determine whether the statute under attack . . . will in its practical operation work discrimination against interstate commerce.'" *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940)). The statute's practical effect must also be evaluated "by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

Virginia's citizens-only restriction harms out-of-state businesses that have economic interests in retrieving public records in Virginia. By denying businesses in every other state the right to access Virginia public records but permitting identical in-state businesses to retrieve the exact same records, the restriction effectively places out-of-state businesses, like Hurlbert's, at a decisive disadvantage compared to in-state businesses. Out-of-state businesses simply cannot participate in the market for Virginia public records without incurring added costs, such as hiring in-state proxies to retrieve the desired records, or becoming a Virginia citizen. The "economic effects" resulting from "depriv[ing] out-of-state businesses of access to a local market" are "more than

enough to bring the [law] within the purview of the Commerce Clause." *Carbone*, 511 U.S. at 389.

Carbone illustrates the point. There, the Court invalidated a flow-control ordinance requiring that all local trash be processed in the town's transfer station before leaving the municipality. *Id.* at 386. The Court explained that the local government's policy had the effect of establishing a local monopoly over the "initial processing step" of the town's garbage. *See id.* at 392. In doing so, the statute discriminated against out-of-state processing facilities and thus produced economic effects that "were interstate in reach." *Id.* at 389.

The citizens-only restriction operates in much the same way. It reserves the "initial processing step" of Virginia record retrieval to local businesses, denying out-of-state businesses primary access to the market for Virginia record retrieval just like the flow control ordinance in *Carbone* denied out-of-state haulers entry into the market for the initial processing the town's garbage. By "hoard[ing] a local resource"—public records as opposed to trash—"for the benefit of local businesses," *id.* at 392, the citizens-only restriction creates significant adverse effects on interstate commerce, as demonstrated by Hurlbert's decision to no longer do business in Virginia. CA4 J.A. 46A-47A, 66A, 70A. *See also Hicklin*, 437 U.S. at 533 ("[T]he Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of . . . a state-owned resource [that] is destined for interstate commerce.").

Toomer v. Witsell further illustrates how Virginia's citizens-only policy produces discriminatory economic effects. The law challenged there required boats licensed to trawl for shrimp in South Carolina to dock at a South Carolina port and unload, pack, and stamp their catch

before shipping or transporting it out of the state. 334 U.S. at 391. In striking down the law, this Court explained that "an inevitable concomitant of a statute requiring that work be done in South Carolina … is to divert to South Carolina employment and business which might otherwise go to Georgia; the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry." *Id.* at 403-04.

The same is true here. As in *Toomer*, Virginia's statute diverts to Virginia money (income earned from retrieving records) and jobs (for records-retrieval professionals like Hurlbert) that might otherwise go to businesses outside the state. This Court "has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984).

Moreover, these discriminatory effects would be compounded "if not one, but many or every, State adopted" a similar restriction. *Healy*, 491 U.S. at 336. Interstate commerce in the document-retrieval market would likely come to a halt as the market moved "toward economic Balkanization." *Granholm*, 544 U.S. at 472. In-state interests would reign over out-of-state interests, stifling competition, impeding the flow of public information across state lines, and causing prices for information-gathering services to rise.

3. ***Purpose.*** Rather than evaluate Virginia's discrimination, the Fourth Circuit rescued the statute from rigorous review on the theory that its *purpose* was not to erect protectionist barriers but to combat government secrecy. Pet. App. 26a. Because the statute "is wholly silent as to commerce or economic interests," the court

reasoned, it affects commerce only "incidental[ly]." *Id.* That reasoning is seriously flawed.

First, "the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory" or discriminates in its effect. *Or. Waste*, 511 U.S. at 100. "A different view"—upholding a law "simply because it professes to be a health measure," for example—"would mean that the Commerce Clause of itself imposes no limitations on state action … save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951).[9]

Second, the court of appeals wrongly focused on the statute's "silen[ce] as to commerce." True, the statute applies to commercial and non-commercial requesters alike, and some requesters seek public records for non-commercial purposes. But that fact cannot insulate Virginia's law—which expressly targets non-citizens, including out-of-state businesses, for disfavored treatment.

Two related hypotheticals show why. Suppose State A enacts a licensing scheme authorizing its citizens to fish in state waters for any purpose, but barring all non-residents from obtaining fishing licenses. The statute makes no reference to "commerce." On Virginia's logic

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[9] Even if legislative purpose were relevant to the dormant Commerce Clause inquiry, and even if the Virginia Freedom of Information Act's sole purpose were to combat government secrecy, neither fact would justify the discrimination here. The *citizens-only restriction*—not the entire statute—is challenged here, and combatting government secrecy cannot be the purpose of the citizens-only restriction because it gives fewer people access to public records and, if anything, promotes greater secrecy than would exist in its absence.

(and that of the court of appeals), a non-resident commercial fisherman could not sustain a dormant Commerce Clause challenge, because the statute is "silent as to commerce or economic interests" (though it applies to them).

Now suppose that State B has two statutes, one for commercial fishing and the other for recreational fishing. Both bar non-residents from fishing. Virginia would have to acknowledge that the commercial-fishing statute is not silent as to commerce and would therefore be subject to, and fail, dormant Commerce Clause scrutiny if challenged by a non-resident commercial fisherman.

The problem is apparent: State A's statutory scheme—a scheme that functions just like Virginia's citizens-only restriction because it governs both commercial and non-commercial actors—has the same discriminatory effect on interstate commerce as State B's. And for that reason neither could survive scrutiny under the dormant Commerce Clause.

Finally, the court of appeals was simply wrong to proclaim that the citizens-only restriction's effects on interstate commerce are only "incidental." Viewed from Hurlbert's perspective, or from the perspective of all other out-of-state commercial requesters against whom the restriction is invoked, the adverse effect on interstate commerce is direct—and absolute: Out-of-state requesters are *denied* the right to inspect and copy Virginia public records, a right enjoyed, without exception, by Virginia businesses.

Those who seek public records in Virginia could, of course, hire Virginia-based intermediaries to get the records for them. But that only underscores the problem: Virginia's policy funnels business to Virginia rec-

ords-retrieval providers for no legitimate economic purpose, drives up costs for out-of-state competitors like Hurlbert (assuming that they would be able to maintain a presence in the Virginia market at all), and increases overall costs for consumers—all at the expense of the free national market that the Framers envisioned. *See H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-38 (1949) ("This principle that our economic unit is the Nation … has as its corollary that the states are not separable economic units.").

Fair competition in the records-retrieval business, and the market for public information more generally, demands that in-state and out-of-state entities have access to information on the same terms. *See* Br. of Coalition for Sensible Public Records Access, *et al.* (pet. stage) 15, 19-22. In a market involving large streams of data and low margins, the need to hire an in-state proxy will often make access infeasible and invariably put out-of-state businesses at a competitive disadvantage. *Id.*

Moreover, the aggregate economic effects of restrictions like Virginia's would be widespread and profound. Commercial interests dominate public records requests, including out-of-state requests. *See* Coalition of Journalists for Open Government, *Frequent Filers: Businesses Make FOIA Their Business* (2006) (concluding that at least two-thirds of all public records requests are "from commercial requesters" and that "more than 12 percent" are from "professional requesters," *i.e.*, those whose business is gathering public records); *VFOIA Report*, at 5 (Virginia official stating that "most [out-of-state records] requests are from data aggregators"). For those in the information-gathering industry, "[p]ublic records are the essence of [their] business" and the "lifeblood of [their] commercial activity." Br. of Coa-

lition for Sensible Public Records Access, *et al.* (Pet. Stage), at 6.

The completeness and reliability of data on which these companies depend—and thus the value of their services—are hindered by laws that wall off entire states from the marketplace for public information. For instance, an employer cannot, in a mobile society like ours, rely on a background check that omits criminal convictions in Virginia. Nor can a lender rely on a credit report that omits—or fails to timely update—Virginia civil judgments or tax liens. *See id.* at 16-19. Out-of-state records retrieval businesses of all stripes need public records from Virginia to compete in the interstate market for information, but the citizens-only restriction makes it impossible for them to compete on an equal basis with Virginia businesses.

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Because the citizens-only restriction discriminates against out-of-state economic interests both facially and in effect, "the virtually *per se* rule of invalidity provides the proper legal standard here." *Or. Waste*, 511 U.S. at 100. Thus, to save the law, the state bears the burden of showing that it "has no other means to advance a legitimate local purpose." *United Haulers*, 550 U.S. at 338-39. Because Virginia has not come close to carrying that burden (*see infra* Part IV), the restriction is invalid under the dormant Commerce Clause.

III. The Citizens-Only Restriction Violates the Privileges and Immunities Clause.

The Constitution's Privileges and Immunities Clause, also known as the Comity 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. As its text indicates, the Clause places "the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. 168, 180 (1869).

Virginia's citizens-only restriction on the right to access public records runs afoul of that command. The Clause "outlaw[s] classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Toomer*, 334 U.S. at 398. Throughout this litigation, Virginia has made no attempt to identify *any* "peculiar source of evil" that might justify its citizens-only restriction on records access. Instead, the state has maintained that it may engage in naked discrimination against non-citizens and escape scrutiny under the Privileges and Immunities Clause. That gambit fails in several ways.

1. *Common Calling.* This Court has long recognized 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 Court of N.H. v. Piper*, 470 U.S. 274, 280 (1985) (quoting *Toomer*, 334 U.S. at 396). The right of nonresidents to "ply their trade, practice their occupation, or pursue a common calling" unhindered by state boundaries, *Hicklin*, 437 U.S. at 524, is "one of the most fundamental of those privileges protected by the Clause." *United Bldg.*, 465 U.S. at 219. This Court has struck down laws that preferred residents of a city for municipal construction jobs, *id.*, prohibited non-Alaskans from obtaining work on the Trans-Alaska oil pipeline, *Hicklin*, 437 U.S. at 524, charged Georgia fisherman much higher licensing fees for shrimping in South Caro-

lina waters, *Toomer*, 334 U.S. at 385, and charged higher licensing fees to out-of-state salespeople seeking to hawk their wares in Maryland, *Ward*, 79 U.S. at 430.

Because Hurlbert "collects and synthesizes information for a particular audience and sells it for profit," and because "Virginia will continue to deny him access to much of this information while providing it to Virginia residents," he has made out a "classic common-calling claim under the Privileges and Immunities Clause." Pet App. 72a (Gregory, J., concurring). Virginia's law cuts off his ability to gather records that originate in Virginia, and does so solely because of his citizenship. Virginia's defense—that it has no obligation to, in its words, make Hurlbert's "business model" "profitable" in light of his "decision to live elsewhere," BIO 24—makes sense only if one discards the Constitution's command that "the citizens of each State" be placed "upon the same footing with citizens of other States." *Paul*, 75 U.S. at 180.

The right to a "common calling" means simply the "right [to] engag[e] in lawful commerce, trade, or business," something that "the clause plainly and unmistakably secures." *Ward*, 79 U.S. at 430; *see also* 1 Blackstone, *Commentaries on the Laws of England* 415 (1765) (discussing the common-law right that "every man might use what trade he pleased"). Despite Virginia's suggestion to the contrary (BIO 23), Hurlbert's line of work is just as worthy of protection as that of traveling salesmen, pipeline workers, or shrimpers because the nationwide availability of public records is so "important to the national economy." *Piper*, 470 U.S. at 281. His profession has existed since the early Republic, *see, e.g., Smith v. Fisher*, 2 S.C. Eq. 275, 277 (1804) (party "employed a professional gentleman to investigate his titles, and search the records"), and is essential to a functioning real estate mar-

ket, *see Ticor Title,* 504 U.S. at 625-26 (noting that searches of public documents are central to multibillion-dollar title-insurance industry).

In *Toomer*, this Court struck down, on Privileges and Immunities grounds, a South Carolina statute requiring shrimpers to pay higher licensing fees for shrimp boats than residents. 334 U.S. at 403. Calling this scheme "virtually exclusionary," *Toomer* held that it interfered with out-of-state shrimpers' ability to pursue their common calling and was therefore invalid. *Id.* at 397, 403. Virginia's law is not just "virtually" exclusionary. It is actually—and completely—exclusionary. Whereas the South Carolina scheme imposed substantially higher costs on out-of-state citizens, Virginia's law categorically bars non-Virginians from the market. Accordingly, "it is incumbent upon the state to prove that the statute withstands heightened scrutiny." Pet. App. 72a (Gregory, J., concurring).

In the view of Virginia and the court below, however, this discrimination against out-of-state business escapes Privileges-and-Immunities-Clause scrutiny because "[o]n its face" the statute "addresses no business, profession, or trade" and its effect on Hurlbert's business is therefore "incidental." Pet. App. 17a-18a. This rationale is wrong for two reasons. *First*, as already discussed (at 32-34) with respect to the Commerce Clause, Virginia's citizens-only restriction does not impose an "incidental" burden on Hurlbert's business in Virginia. Quite the contrary—it prevents him from doing business there altogether.

Second, nothing in the history of Privileges and Immunities Clause jurisprudence suggests that a state may burden a common calling so long as it manages to avoid saying that that is what it is doing. *Toomer* involved a

commercial licensing scheme. But a hypothetical statute that categorically barred non-citizens from access to South Carolina shrimp would have been equally unconstitutional. To say, as the court of appeals did, that Virginia regulates only records, not the business of records retrieval, is like saying that the hypothetical statute regulates only fish, not commercial fishing. That is senseless formalism. *See* Pet. App. 72a (Gregory, J., concurring) ("A statute that discriminates against a nonresident's ability to access information therefore implicates the right to pursue a common calling in the Twenty-First century in much the same way that it would if it burdened an angler's ability to catch fish, or a cabby's ability to drive fares, in the Twentieth.") (citations omitted).

What matters under the Comity Clause is whether the citizens-only restriction has the "practical effect" of discriminating against out-of-state businesses like Hurlbert's. *See Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 67 (2003). The Clause condemns "laws which in their practical operation materially abridge or impair the equality of commercial privileges." *Chalker v. Birmingham & N.W. Ry.*, 249 U.S. 522, 527 (1919); *Austin v. New Hampshire*, 420 U.S. 656, 664 (1975) (putting aside "theoretical distinctions" and instead emphasizing "actual effect"). Certainly, the effect here is far more direct than in *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 302, 315 (1998), which invoked the common-calling privilege to strike down a state-income tax law that precluded non-New Yorkers from deducting alimony payments. The Court's reasoning was that the tax—although not directed at any particular occupation or business—would effectively discriminate between resident and non-resident workers. *Id.* at 315.

The "practical effect" of Virginia's law is clear: to deny noncitizens the ability to pursue the records-retrieval business in Virginia on an equal footing, and to immunize Virginia businesses from competitors like Hurlbert. Because it "interferes with [Hurlbert's] right to pursue a livelihood in a State other than his own," without substantial justification, Virginia's law "must yield." *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 386 (1978).

2. *Property.* Virginia's position that it may withhold *public real estate records* from Hurlbert—solely because he is not a Virginian—is indefensible in light of both history and precedent. Had Hurlbert requested copies of land records from a county surveyor in Virginia in 1789, there is no question that he would have been entitled to them. Virginia not only barred "any county surveyor" from "withhold[ing]" copies of land surveys from "any person," but extended this right to "*any person or persons, not resident within this state,*" provided they had paid the required copying fees or given adequate security.[10]

Thus, in *Preston v. Brown*, 20 Va. (6 Munf.) 271 (1819), the Virginia Supreme Court affirmed a jury's damages verdict against the Surveyor of Washington County, who had refused to provide the plaintiff with copies of land surveys that were "of record in the Surveyor's books," even though the plaintiff was "then and there ready to pay the fees." *Id.* at 272. The court held that it was "the official duty of the surveyor of a County, to furnish, in reasonable time, when demanded, copies of

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[10] 12 *Hening's Statutes at Large* 589-90 (1787) (emphasis added; codified in Va. Code of 1819, Ch. 86 § 69).

all surveys." *Id.* at 271. The importance of that rule, the plaintiff had argued, followed from the importance of public records in securing property rights—"the Surveyor's office," like the "offices of the Register and the Clerks are public offices, for *recording, and thereby preserving*, certain muniments of titles and rights." *Id.* at 275 (emphasis added).[11]

Since the recording system's origin in seventeenth-century Virginia and Massachusetts, access to public records has been inseparable from the "ability to transfer property"—a privilege that this Court has long held is protected under the Privileges and Immunities Clause. *Baldwin*, 436 U.S. at 387. "A public, enduring, authoritative, and transparent record of all land ownership provides a vital information infrastructure that has proven indispensible in facilitating not only mortgage finance, but virtually all forms of commerce." Peterson, *Demystifying the Mortgage Electronic Registration System's Land Title Theory,* 53 Wm. & Mary L. Rev. 111, 115 (2011). In short, "the title system, or the system for protecting ownership rights, is clearly fundamental to the operation of land markets." Miceli, *Title Systems and Land Values*, 45 J. L. & Econ. 565, 565 (2002).

In the Founding Era, as now, "title was a matter of public notoriety, founded upon public records, and upon

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[11] The Framers had direct experience with the importance of public land records. Jefferson wrote about Virginia's elaborate, publicly supervised process for securing land grants in his *Notes on the State of Virginia*, 224-226 (1787), and Washington was himself the official surveyor of Culpeper County, Virginia. *See* Washington, *Journal of My Journey Over the Mountains* (1892); *see also* Tucker, *Blackstone's Commentaries,* III.D (1803) (noting Virginia surveyors' obligation to record entries "for persons not inhabitants of the county").

transactions in the face of the world." *Lockyer v. De Hart*, 1 Halst. 450, 455 (N.J. 1798). The recording system's "plain intention" was "to give notice, through the medium of the county records, to persons about to purchase." *Jackson ex dem. Ctr. v. Campbell*, 19 Johns. 281, 283 (N.Y. 1822). The system creates a practical need to search the records—or hire someone to search—before engaging in a transaction. *Youst v. Martin*, 3 Serg. & Rawle 423, 430 (Pa. 1817) ("In consequence of this law, it is the custom of purchasers to search the records before they pay their money."). The consequences of failing to do so could be catastrophic. *Evans v. Jones*, 1 Yeates 172, 173 (Pa. 1792) ("[A]ny man may discover the incumbrances, if he will take the trouble of searching the proper offices. If he will not, he must impute the consequences to his own laches."). It was for this reason—because property rights depend in a very real sense on access to public records—that "every one has a right to inspect" them. *Jackson v. McGavock*, 26 Va. 509, 513 (1827).

It has always been clear that the Privileges and Immunities Clause protects the right to "take, hold and dispose of property, either real or personal," across state lines. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C. E.D. Pa. 1825) (opinion of Washington, J.). "[T]he first reported judicial construction of the Privileges and Immunities Clause" explained that "one of the chief motivations for the inclusion of the analogous provision in the Articles was to secure the rights of real property ownership." Upham, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 Tex. L. Rev. 1483, 1493 (2005) (discussing *Campbell v. Morris*, 3 H. & McH. 535 (Md. 1797)); Lash, *"Privileges and Immunities" As an Antebellum Term of Art*, 98 Geo. L.J. 1241, 1258-72 (2010). Access to property records, as a necessary corollary to "the ability to transfer property," is thus a right

protected by the Privileges and Immunities Clause. *Baldwin*, 436 U.S. at 387. By refusing to provide equal access to copies of property records, Virginia has refused to place non-Virginians on the "same footing" with respect to "the acquisition and enjoyment of property." *Paul*, 75 U.S. at 180, in violation of the Privileges and Immunities Clause.

3. *Public Proceedings.* Petitioner McBurney requested public records concerning another basic right protected by the Comity Clause: access to public proceedings. He requested records of *his own case* with the Virginia Division of Child Support Enforcement—before which he sought an enforcement petition after his former wife defaulted on her child-support obligations—as well as information about *the general rules or policies* that the agency uses when it processes cases like his. Virginia maintains that it may deny him this basic information about his case solely because he is not a citizen of Virginia.

If McBurney's case had been before a Virginia court, the Privileges and Immunities Clause would indisputably preclude Virginia's discrimination. The Clause "secures citizens of one state the right to resort to the courts of another, equally with the citizens of the latter state," *Mo. Pac. R. Co. v. Clarendon Boat Oar Co.*, 257 U.S. 533, 535 (1922), which means that—at a minimum—the proceedings "must remain open to such litigants on the same basis." *Miles v. Ill. Cent. R. Co.*, 315 U.S. 698, 704 (1942). Nonresidents cannot enjoy anything close to equal access to a state's proceedings if their in-state adversaries can get information—whether about the general rules of the game, or the specifics of the case—that nonresidents cannot.

An information asymmetry between adversaries based solely on state citizenship would be intolerable in any type of dispute. But it is especially pernicious here because the Framers recognized the privilege of "enforcing debts" as one of the central privileges protected by the Privileges and Immunities Clause. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 Ga. L. Rev. 1117, 1187 (2009); *see Campbell*, 3 H. & McH. at 554 ("[A]s creditors, they shall be on the same footing with the state creditor"); *Hadfield v. Jameson*, 16 Va. (2 Munf.) 53, 54 (1811) (rejecting view that only Virginia citizens could pursue certain debt-collection remedies in Virginia as inconsistent with the Privileges and Immunities Clause) (Tucker, J.)). One of Article IV's chief concerns was solving the problem of collecting debts from "negligent and evil minded debtors" who absconded across state lines. Sachs, *Full Faith and Credit in the Early Congress*, 95 Va. L. Rev. 1201, 1222 (2009) (quoting colonial statute). Indeed, one impetus for the Full Faith and Credit Clause was that records needed for interstate collection proceedings were often "stuck in another colony's archives." *Id.* But if Virginia's position prevails here, the outcome will be that the in-state *debtor* who has defaulted will enjoy a right to public records relating to the proceedings that the *creditor* (McBurney) does not, solely by virtue of state citizenship.[12]

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[12] The "non-payment of child support, particularly in interstate cases, is a widespread problem," *Kansas v. United States*, 214 F.3d 1196, 1199 (10th Cir. 2000), and can often be resolved through access to public records. *See* Calhoun, *Interstate Child Support Enforcement System: Juggernaut of Bureaucracy*, 46 Mercer L. Rev. 921, 958 (1995).

The outcome should not be different merely because McBurney's case was not before a court but before an agency that operates "through a case-by-case adjudicative system of enforcement strategies." Petersen, *Enforcing Child Support*, 11 J. Contemp. Legal Issues 441, 442 (2000). To be sure, such proceedings "were all but unheard of in the late 18th century" and the Framers "could not have anticipated the vast growth of the administrative state." *Fed. Mar. Comm'n v. S. Carolina State Ports Auth.,* 535 U.S. 743, 755 (2002). But, what Justice Jackson recognized a half-century ago is even more true now—"more values today are affected by [agency] decisions than by those of all the courts." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952).

The Privileges and Immunities Clause should not be read to allow states to bar citizens of other states from equal access to their administrative proceedings, which necessarily includes basic information about how those proceedings are conducted. A contrary rule would leave important property rights unprotected for no good reason. *See* Howell, *The Privileges and Immunities of State Citizenship* 48 (1918) (discussing property-based rationale for court access privilege). The same rationales supporting court access as a privilege of state citizenship protected by the Clause—namely, that it is "the right conservative of all other rights," including, especially, the right to private property and the enforcement of debt obligations—apply with full force to administrative proceedings. *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148-49 (1907); *cf. Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (First Amendment right to petition extends to both courts and administrative agencies); *Corfield v. Coryell*, 6 F. Cas. at 552 (court-access privilege applies to "actions of any kind").

4. *Equal Access to Information.* The right to access public information on equal terms is itself a privilege protected by the Privileges and Immunities Clause. Justice Blackmun's opinion in *Baldwin* explained that Montana could constitutionally charge non-Montanans higher license fees for purely recreational elk hunting because "[e]quality in access to Montana elk is not basic to the maintenance or well-being of the Union." 436 U.S. at 388. Public records are not elk. "Equality in access" to public information *is* "basic to the maintenance or well-being of the Union." As the Full Faith and Credit Clause demonstrates, the Framers believed that the movement of "public, Acts, Records, and Judgments" across state lines was "'fundamental' to the promotion of interstate harmony." *United Bldg.,* 465 U.S. at 218 (quoting *Baldwin*, 436 U.S. at 388). Modern public records laws carry on the longstanding "general right to inspect and copy public records and documents," *Nixon,* 435 U.S. at 597-98, recognized at both English and American common law—a right that has, "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*, 6 F. Cas. at 551; *see* Massachusetts Body of Liberties of 1641, art. 48 ("Every inhabitant of the Country shall have free liberty to search and review any rolls, records or registers of any Court or office.").

Because public records are "important to the national [information] economy," *Piper*, 470 U.S. at 281, and vital to securing property and other fundamental interests, the Constitution does not permit a single state, whatever its motives, to erect a barrier to the free flow of information across state lines. "No state is an island." *Lee v. Minner*, 458 F.3d 194, 199 (3d Cir. 2006). Actions by states have national effects. In large part because our Constitution binds the states together in a Nation,

states' actions reach outward to affect citizens of other states—from child-support proceedings and property transactions to regulatory decisions with broad social and political consequences. Public records contain facts about these and countless other matters. And "[f]acts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011). In the information age, the freedom to gather public facts nationwide is just as, if not more, "important to the 'maintenance or well-being of the Union," *Piper*, 470 U.S. at 281, as equal access to shrimping or municipal construction jobs. Accordingly, "the right of noncitizens to access to public records is a right protected by the Privileges and Immunities Clause." *Lee*, 458 F.3d at 200 (striking down Delaware's citizens-only restriction).

To be clear, petitioners are *not* asserting a freestanding "constitutional right to have access to particular government information." *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion) ("The Constitution itself is [not] a Freedom of Information Act."). Virginia could decide "not to give out [this] information at all." *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 40 (1999). But once it *chooses* to release information, Virginia must do so on terms consistent with the Constitution. *Id.*; *see Sorrell*, 131 S. Ct. at 2666 (discussing *United Reporting* opinions). And because the Constitution "outlaw[s] classifications based on the fact of non-citizenship" absent good reasons, *Toomer*, 334 U.S. at 398, Virginia may not deny access to public information "based on the fact of citizenship"—particularly where doing so interferes with non-Virginians' ability to earn a living, secure property rights, and access public proceedings on equal terms.

IV. Virginia Has Failed to Articulate, Much Less Demonstrate, Any Valid Reason for Its Discrimination.

Both at summary judgment and on appeal, Virginia has advanced only one justification for its citizens-only restriction: that the administrative costs required to give non-Virginians access to public records would reduce resources available for Virginians. The state, however, offered not a shred of evidence to support that contention. And it is factually wrong—not least because Virginia law authorizes the state to recoup its costs through fees.

Moreover, because the citizens-only restriction is so readily circumvented through in-state proxies, it does not *decrease* the burden on the state; it just *increases* the burden on non-citizens. Even if Virginia's justification had any basis in fact, it would provide no support for the citizens-only restriction because the restriction turns not on the *burden* posed by the request, but on the *citizenship* of the requester—an unconstitutional distinction.

1. *Discriminatory Justification.* A state may not use discrimination based on state citizenship as a tool to pursue any policy objective. Rather, discrimination is justified only if the state can show that non-citizens "constitute a peculiar source of the evil at which the statute is aimed." *Toomer*, 334 U.S. at 398. *Toomer* found no need to address the validity of the state's asserted interest in protecting its shrimp supply because, under the Privileges and Immunities Clause, even "valid objectives" do not justify the state's discrimination absent a "substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Id.* at 396, 398. The same is true under the Commerce Clause. Although New Jersey defended its ban on the transportation of solid waste as an environmental measure, this Court in

Philadelphia v. New Jersey considered the state's motive "not … relevant" to the constitutional question. 437 U.S. at 626. "[W]hatever New Jersey's ultimate purpose," the Court wrote, its discrimination against out-of-state articles of commerce was impermissible absent "some reason, apart from their origin, to treat them differently." *Id.* at 626-27.

As in *Toomer* and *Philadelphia*, Virginia's citizens-only restriction "frankly discriminates against nonresidents," and its justification for that discrimination has nothing to do with any harm "peculiar" to noncitizens. *Toomer*, 334 U.S. at 396-97. All requests for records—not just those from non-Virginians—impose administrative costs on state officials, and the state has made no attempt to argue, let alone prove based on actual experience, that the requests of non-citizens are peculiarly expensive or difficult to process. Rather, the interest advanced by the state rests on nothing more than its concern that providing public documents to citizens of other states would "consum[e] the time and resources that would otherwise be available" to its own citizens. CA4 Br. at 41. Virginia's only basis for singling out noncitizens is thus "the mere fact that they are citizens of other States." *Toomer*, 334 U.S. at 396. That distinction not only fails to justify the state's facial discrimination, but is itself "constitutionally unacceptable." *Zobel v. Williams*, 457 U.S. 55, 65 (1982).

Virginia argued below that allocating its administrative resources for the exclusive use of Virginians is justified because public records "are the property of the jurisdiction's citizens," which the state may legitimately "conserve … for the public's benefit." CA4 Br. 42. That argument echoes claims by states in past cases of the authority to grant "a preferred right of access" to natural

resources within their borders. *Philadelphia*, 437 U.S. at 627. This Court has long rejected such claims, holding that states may not restrict the flow of resources on the ground that "'they are needed by the people of the State.'" *Id.* (quoting *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928)); *see Missouri v. Holland*, 252 U.S. 416, 434 (1920) (Holmes, J.) ("To put the claim of the State upon title is to lean upon a slender reed."). To the contrary, "whenever such hoarding [of resources] impedes interstate commerce" or "interferes with a non-resident's right to pursue a livelihood," the state's restrictions "must yield." *Baldwin*, 436 U.S. at 385-86.

Virginia's argument here is, if anything, less compelling than those this Court has earlier rejected. Although Virginia has asserted that its official records are "the public's treasure," CA4 Br. 42, it provides only *copies* of those records to requesters. Unlike South Carolina's fisheries, *Toomer*, 334 U.S. 385, Alaska's oil reserves, *Hicklin*, 437 U.S. 518, or Montana's elk, *Baldwin*, 436 U.S. at 388, Virginia's public records face no risk of depletion by opening them to non-citizens.

2. *Lack of Evidence.* Virginia has not shown that responding to non-citizens' record requests would impose *any* cost on the state. As Virginia has acknowledged, the statute allows agencies to recoup the cost of responding to records requests by charging fees to requesters, including any "actual cost incurred in accessing, duplicating, supplying, or searching for the requested records." Va. Code § 2.2-3704(F); *see* CA4 Br. at 42 (acknowledging "that the government can recoup its copying and administrative costs"). Because the state is entitled to pass on its costs to out-of-state requesters, the citizens-only restriction "can hardly be justified on the ground that responding to requests for records from foreigners

would overwhelm limited government resources." Bonner, *Annual Survey of Virginia Law,* 33 U. Rich. L. Rev. 727, 731 (1999).

This Court in *Barnard v. Thorstenn* rejected an argument nearly identical to Virginia's argument here. 489 U.S. 546, 556 (1989). The Virgin Islands defended its residence requirement for bar admission on the ground that it did "not have the resources and personnel for adequate supervision of the ethics of a nationwide bar membership." *Id.* The Court, however, noted that because Bar members pay dues, "[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." *Id.* So, too, has Virginia failed to show that the cost of producing records for citizens of other states will pose a burden, given that it may fully recover its costs.

Virginia nevertheless argued below that the time spent responding to requests from non-Virginians—— even if fully compensated——might consume resources that otherwise could be devoted to Virginians. CA4 Br. 42. Virginia submitted no evidence on summary judgment, however, to support its speculation that records requests by non-citizens are likely to be a substantial burden on state officials, or that those officials are too thinly stretched to absorb the additional demand. To the contrary, some Virginia agencies report that they voluntarily honor out-of-state requests because they do not consider them burdensome. *See, e.g., VFOIA Report* at 6 (agency official reporting that "out-of-state requests" are "not a big problem for them"). There is thus no basis for concluding that the burden of processing out-of-state records requests would be greater than the burden of supervising out-of-state lawyers, *Barnard* 489 U.S. 546,

or processing out-of-state fishing licenses, *Toomer*, 334 U.S. 385.

That is especially true because state agencies can often provide records in ways that are virtually *cost-free*—by, for example, exercising "the option of posting the records on a website or delivering the records through an electronic mail address provided by the requester." Va. Code § 2.2-3704(G). Indeed, the real property records that Hurlbert requests "are often copies of computer readable databases." CA4 JA 47A.

There are other good reasons to doubt that Virginia's predictions will materialize. Forty-seven states and the District of Columbia have public records laws without enforcing citizens-only restrictions. *See* Br. of Citizens for Responsibility and Ethics, *et al.* (pet. stage) at 12 n.9 (citing statutes). Yet there is no evidence that those states have been unable to effectively provide services to their own citizens. And "there has been no clamoring for changing the law in those states." *VFOIA Report* at 6. Indeed, the trend among states has been to *eliminate* the remaining citizens-only restrictions from state public records laws. At least eight states that previously had such restrictions have dropped them and two others have adopted policies of non-enforcement, without evidence of harm to their ability to make access available to their citizens. *See supra* 11 n.5 and 12 n.6. Today, only Arkansas and Tennessee actively enforce restrictions like Virginia's. *See supra* 11 n.4. And of those two, Arkansas recently agreed to provide records to citizens of other states in response to a constitutional challenge, and Tennessee (which is also defending a constitutional challenge) has pending legislation to extend the right of records access to non-citizens. *Id.*

Virginia's failure of proof is fatal to its argument. A state's burden in justifying facial discrimination against citizens of other states requires more than a state's speculation about possible harm, as under rational-basis review. Rather, Virginia must prove that allowing citizens of other states the same privileges it grants its own citizens would *actually* (not hypothetically) harm a substantial state interest. *See Toomer*, 334 U.S. at 385. This Court has routinely struck down discriminatory state laws when states have failed to produce such evidence. *See, e.g., Piper*, 470 U.S. at 285 (rejecting state's proffered justification, that non-resident attorneys would be less familiar with local rules, as unsupported by evidence); *Hicklin*, 437 U.S. at 526 (holding the Alaska Hire statute unconstitutional where "no showing was made on [the] record that nonresidents were responsible for an Alaska job shortage"); *Toomer*, 334 U.S. at 398 (finding greater costs insufficient to justify discrimination where "[n]othing in the record indicates . . . that the cost of enforcing the laws against [non-citizens] is appreciably greater, or that any substantial amount of the State's general funds is devoted to shrimp conservation"). And, as discussed above (at 24), the state faces an even heavier burden under the dormant Commerce Clause, which subjects facially discrimination laws to a "virtually per se rule of invalidity." *Philadelphia*, 437 U.S. at 624.[13]

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[13] The court below rejected the virtual per se rule in favor of the *Pike v. Bruce Church* balancing test, which asks if the burden on commerce is "clearly excessive in relation to the putative local benefits." 397 U.S. 137, 142 (1970). But it declined to apply even that test because, in its view, petitioners "waived any challenge to that component of the district court's analysis." Pet. App. 27a. The court was wrong on both counts. *First*, *Pike* applies only when a statute "regulates even-handedly to effectuate a legitimate local public interest."

(continued …)

In the absence of any evidence, Virginia's "bald assertion" that non-resident FOIA requests would overwhelm state agencies and interfere with their ability to operate cannot justify the state's policy of discrimination. *Mullaney v. Anderson*, 342 U.S. 415, 418 (1952).

3. *Less Restrictive Means.* Even if Virginia could demonstrate that records requests by non-citizens would impose a substantial administrative burden, that would not justify the decision to single out non-citizens for differential treatment. The purported goal of avoiding administrative burdens has nothing to do with the requesters' citizenship.

To justify facial discrimination under the Privileges and Immunities Clause, a state must prove that the challenged law bears a "substantial relationship to the State's objective." *Piper* at 284. Similarly, the dormant Commerce Clause requires the state to "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone*, 511 U.S. at 392. Virginia's discrimination here bears *no* relationship—substantial or otherwise—to its purported objective. The state imposes *no* limit on requests by citizens, no matter how burdensome, but claims that it is free to exclude *all* out-of-state requesters even when their re-

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Id. Virginia's law is not even-handed. And discrimination is not a legitimate interest. *Second*, petitioners made both those points below and argued, alternatively, that the statute fails under *Pike* because there are "no countervailing legitimate concerns to justify limiting access to public records," CA4 Br. 13-14, "fair[] notice" of our position. *Nelson v. Adams*, 529 U.S. 460, 469 (2000). In any event, this Court has reached the *Pike* test in pure "facial challenge" cases. *See Gen. Motors v. Tracy,* 519 U.S. 278, 298 n.12 (1997). Because Virginia has yet to identify *any* "legitimate concerns," its restriction would fail even under *Pike.*

quests would impose no burden. *See Toomer*, 334 U.S. at 385 (contrasting South Carolina's restriction on non-citizens with its lack of similar limits for citizens).

Even if Virginia could show some connection between the citizenship of a requester and the burden of a request, it would not justify the "drastic" remedy of "total exclusion." *Toomer*, 334 U.S. at 398. Whenever possible, a state must seek to "achieve its legitimate goals without unnecessarily discriminating against nonresidents." *Id.* at 284 n.17. If Virginia could demonstrate that out-of-state requests posed a peculiar burden, that would justify at most imposing limits on *burdensome* requests or allowing itself more time to respond to such requests. Alternatively, Virginia could address any additional costs associated by charging those costs to the requester, as the statute already authorizes. This Court has consistently endorsed such a strategy, at least where the fees clearly reflect the actual costs attributable to non-citizens. *See Mullaney*, 342 U.S. at 418; *Piper*, 470 U.S. at 287. But Virginia's decision to *totally* exclude citizens of other states, regardless of burden, does "not bear a reasonable relationship to the high degree of discrimination practiced upon citizens of other States," *Toomer*, 334 U.S. at 284, and for that reason alone is unconstitutional.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

Virginia Code § 2.2-3704 provides in relevant part:

Public records to be open to inspection; procedure for requesting records and responding to request; charges; transfer of records for storage, etc.

A. 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 necessary precautions for their preservation and safekeeping.

* * *

F. A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. The public body may also make a reasonable charge for the cost incurred in supplying records produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public

body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than 50 acres. All charges for the supplying of requested records shall be estimated in advance at the request of the citizen.

G. Public records maintained by a public body in an electronic data processing system, computer database, or any other structured collection of data shall be made available to a requester at a reasonable cost, not to exceed the actual cost in accordance with subsection F. When electronic or other databases are combined or contain exempt and nonexempt records, the public body may provide access to the exempt records if not otherwise prohibited by law, but shall provide access to the nonexempt records as provided by this chapter.

Public bodies shall produce nonexempt records maintained in an electronic database in any tangible medium identified by the requester, including, where the public body has the capability, the option of posting the records on a website or delivering the records through an electronic mail address provided by the requester, if that medium is used by the public body in the regular course of business. No public body shall be required to produce records from an electronic database in a format not regularly used by the public body. However, the public body shall make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and public body, including the payment of reasonable costs. The excision of exempt fields of information from a database or the conversion of data from one available format to another shall not be deemed the creation, preparation or compilation of a new public record.

H. In any case where a public body determines in advance that charges for producing the requested records are likely to exceed $200, the public body may, before continuing to process the request, require the requester to agree to payment of a deposit not to exceed the amount of the advance determination. The deposit shall be credited toward the final cost of supplying the requested records. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the requester.

I. Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.