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

PETITIONERS' REPLY

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PETITIONERS' REPLY

Virginia does not deny that the question presented is important to the many businesses and individuals who obtain, sell, buy, and use public records nationwide. Nor does Virginia make any effort to justify its facial discrimination against out-of-state residents or deny that this discrimination has a distorting and anticompetitive effect on the national market for public information. That its restrictions make out-of-state businesses less "profitable" than their Virginia counterparts, in the Commonwealth's view, is simply the "cost[] inherent in [the] decision to live elsewhere." BIO 24. That statement speaks for itself.

Virginia opposes review on two grounds. It denies the existence of the circuit split and contends that its discrimination falls wholly beyond the reach of the Privileges and Immunities and dormant Commerce Clauses. Both contentions lack merit, and neither should stand in the way of this Court's review.

I. Virginia Fails to Explain Away the Split.

Virginia's effort to downplay the circuit split consists largely of distinguishing the Third Circuit's decision on its facts. But Virginia ignores the key point emphasized in the petition: The Third Circuit held that the citizens-only restriction of the Delaware Freedom of Information Act—a restriction identical to Virginia's—is facially unconstitutional and *cannot be enforced in any circumstances*. *Lee v. Minner*, 458 F.3d 194, 200-201 (3d Cir. 2006). The court thus affirmed "an order permanently enjoining Delaware's Attorney General from 'refusing to honor or respond to [FOIA] requests … on the basis of the requestor's residency or citizenship' and directing the Attorney General to 'process and evaluate FOIA requests from nonresidents or noncitizens in the same

manner in which FOIA requests from citizens of Delaware are processed and evaluated.'" *Id.* at 197 (quoting injunction); *id.* at 195, 202 (affirming order).

One way of testing whether a circuit split exists is to ask whether the courts in different circuits would be compelled to reach different results on the same facts. Virginia does not deny that its statute is indistinguishable from the Delaware statute invalidated in *Lee*. If this case could be filed in the Third Circuit, there is no question that the citizens-only restriction would be held unconstitutional and unenforceable under *Lee*. The Fourth Circuit, by contrast, squarely rejected the same constitutional challenge on the merits. Pet. App. 21a (holding that "[a]ccess to a state's records simply does not 'bear[] upon the vitality of the Nation as a single entity' such that VFOIA's citizens-only provision implicates the Privielges and Immunities Clause"). It therefore did not "avoid[] a meaningful circuit split," as Virginia contends. BIO 9. Indeed, in a recent case challenging the citizens-only restriction of the Arkansas Freedom of Information Act, the Eighth Circuit acknowledged that the Third and Fourth Circuits have reached diametrically opposite conclusions on the question presented here. *See Aamodt v. City of Norfork, Ark.*, --- F.3d ---, 2012 WL 2369109, at *2 (8th Cir. June 25, 2012) (describing conflicting decisions). This is a true circuit split—and an undeniably important one.

Given this incompatibility, Virginia's attempt to distinguish the cases on their facts fails. Virginia points out that *Lee* involved a journalist seeking records relating to Delaware's participation in a settlement with a financial institution, while this case involves non-journalists seeking child-support and tax assessment records. That is a distinction without a difference. The Third Circuit con-

cluded that "access to public records is a right protected by the Privileges and Immunities Clause" and that Delaware's statute burdened that right because "noncitizens are precluded from obtaining any FOIA information, at any time, for any reason." *Lee*, 458 F.3d at 200. By its own terms, that holding does not turn on the nature of the records sought or the identity of the requester.

Nor can the Third Circuit's holding be limited by the court's rationale that a right of access is essential to political advocacy on a national level. Seizing on that rationale, Virginia contends that *Lee* extends "only" to "public documents that are sought in order to engage in the political process on matters of national political or economic importance." BIO 11-12. The opinion, however, reflects no limitation based on the political purpose for which public records are sought, and it is hard to imagine how such a limitation could be administered in practice because FOIA requesters need not (and do not) state their purpose in seeking records. Moreover, a restriction of that kind would raise constitutional problems of its own. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011) (discussing opinions in *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999)). In any event, if the Third Circuit had intended such a limitation, its decision to invalidate the Delaware statute on its face and affirm the permanent injunction would make no sense.

This Court "reviews judgments, not opinions." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Here, the judgments of two circuits squarely conflict, that conflict has serious practical consequences, and only this Court can resolve it.

II. Virginia's Arguments on the Merits Only Underscore the Need for this Court's Review.

Turning to the merits, Virginia seeks to defend the Fourth Circuit's decision on historical grounds. Peppering its brief with citations to the Articles of Confederation, the Federalist Papers, and Blackstone, Virginia contends that a proper "historical understanding" of the Privileges and Immunities Clause forecloses a constitutional challenge to the citizens-only restriction. BIO 15-18. Petitioners of course disagree, as did the Third Circuit. If the Court grants the petition, there will be time enough to fully explore the relevant historical record. For present purposes, what matters is that the parties' disagreement over foundational principles underscores the need for guidance in an area of constitutional law that "has not often been the subject of litigation before this Court." *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 395 (1978).

The right of access to public records, Virginia contends, falls outside the Privileges and Immunities Clause because it is of recent vintage and "is not embraced in the list of privileges and immunities identified by Justice Washington in *Corfield* [*v. Coryell*, 6 F. Cas. 546, 552 (C.C. E.D. Pa. 1825)]." BIO 18. That argument is hard to square with the acknowledgment a few pages later that the Clause also protects the right "to procure on substantially equal terms 'the general medical care available within a State'"—a right nowhere on Justice Washington's list. BIO 22 (quoting *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (alteration omitted)). In truth, it has long been clear that *Corfield* does not define the Clause's limits. *See Baldwin*, 436 U.S. at 380-82 (recounting history). Seventy years ago, Justice Roberts explained that the Court had moved past Justice Washington's view that

the Clause covered only "a group of rights which, according to the jurisprudence of the day, were classed as 'natural rights.'" *Hague v. CIO*, 307 U.S. 496, 511 (1939). Instead, the Court came to recognize that the Clause embodies a more general rule of nondiscrimination extending to rights that bear upon the Nation as a single entity. *Id.; see Austin v. New Hampshire*, 420 U.S. 656, 660-661 (1975) (describing the Clause as establishing "a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment").

But Virginia's argument is wrong even on its own terms. The Commonwealth ignores the argument that petitioner Hurlbert's right to access real estate records is particularly well-grounded in history. *See* Pet. 16. On even the most cramped account, the Privileges and Immunities Clause protects the right "to take, hold and dispose of property, either real or personal." *Corfield*, 6 F. Cas. at 552. Other rights—like the right to court access—were protected by the Clause *because* they helped safeguard the right to property. Pet. 16. The link between property ownership and public records was recognized "in the early days of seventeenth-century settlement" and gave rise to "one of the first and most important American [legal] innovations"—"a system for registering and recording titles to land." Lawrence M. Friedman, *A History of American Law* 27 (3d ed. 2005); *see also* George L. Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U. L. Rev. 281 (1941). This system—the "essence" of which "was that the record itself guaranteed title to the land"—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, *History of American Law* 27. Today, the right of access to public records is no less an "important tool" of property ownership than it was 370 years ago.

Virginia does acknowledge that the common law has long recognized a right to access public records (*see* Pet. 15; Br. of Judicial Watch 6-9), but contends that the right "is not being denied here, as McBurney can obtain the information he seeks on the internet and Hurlbert is free to travel to Henrico County and examine and copy any tax assessment records." BIO 18. There is no evidence in the record to support the proposition that McBurney could obtain all the information he seeks on the internet, and Virginia cites none. To the contrary, the Fourth Circuit fully explored his standing in an earlier appeal and found it "undisputed" that he was denied access to general policy information that he requested. *McBurney v. Cuccinelli*, 616 F.3d 393, 402 (4th Cir. 2010). As to Hurlbert, this statement is at odds with the language of the citizens-only provision, which provides that "all public records shall be open to inspection and copying *by any citizen of the Commonwealth*." Va. Code Ann. § 2.2-3704(A) (emphasis added). Thus, by the terms of the statute, Hurlbert could be turned away in person by the Henrico County Real Estate Assessor's Office for the exact same reason that it has previously denied his record requests: because he is not a citizen of Virginia.

In any event, Virginia's narrow conception of the historical right of access misses the point. 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.* 15; 19-22. In a market involving large

streams of data and low margins, the need to make an in-person visit or hire an in-state proxy will often make access infeasible. *Id.* To be clear, petitioners have not asserted a freestanding constitutional right to obtain public records or to access public records in a particular form. The question here is whether Virginia, once it chooses to permit access in a particular manner, may *discriminate* against citizens of other states in extending that access, particularly where doing so interferes with non-Virginians' ability to make a living. Virginia's response—that it has no obligation to make Hurlbert's business model "profitable" in light of his "decision to live elsewhere"—cannot be reconciled with the Constitution's objective of "plac[ing] the citizens of each State upon the same footing with citizens of other States." *Paul v. Virginia*, 75 U.S. 168, 180 (1869).

Virginia next attempts to redefine the right in question as a "privilege … to commandeer other state's officials to provide public records at or below cost." BIO 19 (capitalization omitted). In fact, Virginia is entitled to impose "reasonable charges" on records requesters and may recoup its costs entirely; the only restriction is that it may not profit by "exceed[ing] its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records." Va. Code Ann. § 2.2-3704(F). There is therefore no basis in the statute (or in the record below) for Virginia's statement that "a significant portion of the costs associated with the provision of public records is borne by the taxpayers of the Commonwealth, not by the requesters of public records." BIO 4; *see also id.* 24 (suggesting that petitioners' position will strap "limited resources"). Because Virginia authorizes full recoupment of actual costs, "[r]estricting the right of access provided by FOIA to Virginia citizens … can hardly be justified on the ground that responding to requests

for records from foreigners would overwhelm limited government resources." Charles Bonner *et al.*, *Annual Survey of Virginia Law: Administrative Procedure*, 33 U. Rich. L. Rev. 727, 731 (1999).

Along similar lines, Virginia claims that invalidating its citizens-only restriction and adopting the Third Circuit's approach would open the door to endless burdens on "each state's limited resources," leading states to "practically prohibit" a "wide variety of services." BIO 24. Virginia, however, provides no example of a single service that would be burdened as a result. If the Third Circuit's approach had such sweeping consequences, one would have expected them to have materialized after *Lee*.

Finally, echoing the Fourth Circuit, Virginia claims that the dormant Commerce Clause is not implicated here because the challenged statute "does not regulate commerce at all." BIO 11. As the petition explains, however, that assertion cannot be reconciled with this Court's decision in *Reno v. Condon*, 528 U.S. 141, 148 (2000), which held that public records released into the market are "article[s] of commerce" under the Commerce Clause. The brief in opposition offers no response to *Reno*.

Virginia further argues that it is exempt from the dormant Commerce Clause because it is "acting as a market participant." BIO 2, 28-30. But the market-participant exception applies only when a state is competing in the market as if it were a private actor. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 277 (1988). It does not apply where, as here, the state is "acting in its distinctive governmental capacity." *Id.* Here, Virginia provides documents to requesters that are not otherwise available in the private marketplace: The state has sole

access to the documents and the sole capacity to make them available to the public. Under these circumstances—when private companies do not and cannot compete with the state—the state's function is governmental and the market-participant doctrine is inapplicable.

III. The Question Presented Is Undeniably Important, Has Substantial Practical Effects, and Can Only Be Resolved by this Court.

Virginia makes no attempt to deny the national importance of the question presented. The closest it comes is its claim that "public records" are "not widely sold in commerce." BIO at 30. But that unsupported assertion flies in the face of the four amicus briefs in support of certiorari, which detail the practical effects of the decision below for the diverse array of businesses, organizations, and individuals that participate in the robust national market for public information. Nor does Virginia make any effort to justify or explain the purpose of its decision to discriminate against out-of-state residents—discrimination that diverges from the laws of the majority of states but that has a disproportionately large impact on the national market for public information.

As the brief of the amici data industry groups explains, the collection, compilation, and publication of public records "inform transactions in numerous fields"—including "[r]eal estate financing, credit reporting, background checks, [and] tenant screening," to name a few. Br. of Coalition for Sensible Public Records Access, *et al.*, at 6-7. For companies in these fields, "[p]ublic records are the essence of [their] business" and the "lifeblood of [their] commercial activity." *Id.* at 6. The completeness and reliability of data on which these companies depend—and thus the value of their services—are seriously impacted by laws that wall off entire states from the marketplace for public information. An employ-

er, for example, cannot confidently rely on a background check that omits criminal convictions in Virginia, and a lender cannot rely on a credit report that omits Virginia civil judgments and tax liens. *See id.* at 16-19.

Moreover, as the briefs of the amici media organizations and transparency groups explain, the impact of Virginia's citizens-only provision is not just economic—it also hampers the ability of non-citizens to report on national issues and engage in political advocacy. *See* Br. of Am. Soc. of News Editors, *et al.*; Br. of Citizens for Responsibility and Ethics in Washington, *et al.*; Br. of Judicial Watch. State public records, for example, were important in shedding light on the federal government's handling of the national housing meltdown. *See* Br. of Judicial Watch at 10-12; *see also* Br. of Am. Soc. of News Editors at 7-10 (listing other examples). And although Virginia's citizen-only law provides an exception for "representatives of newspapers and magazines with circulation in the Commonwealth," Va. Code Ann. § 2.2-3704(A), that exception provides no protection for many prominent news organizations that distribute their publications electronically. *See* Br. of Am. Soc. of News Editors at 16.

These problems are made substantially worse by the fact that Virginia is not the only state to restrict non-citizens' access to public records. Aside from the Delaware statute held unconstitutional in *Lee* and the Virginia statute upheld here, at least six other states impose such restrictions. *See* Br. of American Society of News Editors, *et al.*, at 10 & n.9. If the Fourth Circuit's approach to the question presented is allowed to flourish, nothing will stop other states from following suit, thus replacing the national market for public-records information with exactly the sort of Balkanized, state-by-state market that the Privileges and Immunities Clause and dormant Commerce Clause are designed to prevent.

CONCLUSION

For the foregoing reasons, and for the reasons given in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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