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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

States may not enforce policies that unfairly benefit in-state businesses at the expense of their out-of-state competitors. Nor may states inhibit the ability of citizens of other states to earn a living, exercise property rights, or enjoy equal access to public proceedings.

At issue here is a Virginia policy that discriminates in each of these respects by blocking the free flow of public information across state borders—information that is traded in a robust national market, essential to exercising important legal rights, and critical to an enormous range of activities that require data from all 50 states. Virginia's policy thus runs headlong into two constitutional commands—that "a State must accord residents and nonresidents equal treatment" on matters "bearing on the vitality of the Nation as a single entity," *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64-65 (1988), and that a state law that "discriminates against interstate commerce" is "virtually *per se* invalid," *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2009).

To be sure, discriminatory laws are sometimes warranted by important state interests. But such laws must be tested. States must justify their discrimination. Here, Virginia makes no effort to justify its discrimination or deny that its law has a distorting and anticompetitive effect on the national market for public information. Having failed below to establish that responding to noncitizens' public-record requests imposes *any* cost on the state or its taxpayers—because the state can fully recoup its actual costs—Virginia has now abandoned the one justification it put forward in the courts below. This leaves the state with the following defense: Virginia discriminates simply because it believes it can.

A. The Citizens-Only Policy Violates the Privileges and Immunities Clause.

1. Because Roger Hurlbert gathers public records for a living, and because Virginia bars him from gathering those records in Virginia while making them available to in-state businesses, Hurlbert has made out a "classic common-calling claim under the Privileges and Immunities Clause." Pet. App. 72a (Gregory, J., concurring). Virginia neither disputes that the Clause "guarantees to citizens of State A" the right to "do[] business in State B on terms of substantial equality with the citizens of that State," *Toomer v. Witsell*, 334 U.S. 385, 396 (1948), nor attempts to justify its discriminatory treatment. Nonetheless, the state asks this Court to uphold its citizens-only policy on the theory that it only "indirectly disadvantage[s]," and has an "incidental effect" on, Hurlbert's business. Va. Br. 20. That argument fails on the facts and the law.

On the facts, as demonstrated in our opening brief (at 32-34, 36-39), the effect of the citizens-only policy on Hurlbert's business is anything but indirect. The policy completely cuts off Hurlbert and other commercial data gatherers from doing business in Virginia (unless they hire Virginians to perform a task they could more efficiently perform themselves). Hurlbert makes his living exclusively by "obtain[ing] documents from real property assessment officials" on behalf of his clients. CA4 JA 47A. He cannot carry out his business in the state if the law blocks him from obtaining records from those officials. For Hurlbert and others like him, Virginia's law is not just "virtually exclusionary," *Toomer*, 334 U.S. at 397, but actually exclusionary.

On the law, Virginia claims (at 20) that discriminatory laws that "indirectly disadvantage" out-of-state busi-

nesses are "upheld as a matter of course." But the cases Virginia cites do not support that proposition—or even discuss the common-calling privilege. *Zobel v. Williams*, 457 U.S. 55 (1982), *struck down*—under the Equal Protection Clause—a law distributing Alaska's natural-resources income based on each citizen's length of residence. And *Chemung Canal Bank v. Lowery*, 93 U.S. 72 (1876), upheld a provision tolling Wisconsin's statute of limitations for locals, but did so because Wisconsin had a "valid reason for the discrimination" consistent with interstate comity—its interest in upholding other states' statutes of limitations and protecting out-of-staters from surprise. *Id.* at 77. Neither case helps the state.

As our opening brief explained (at 37-39), the relevant inquiry is not whether a state law openly discriminates against non-resident businesses but whether that is "the practical effect of the provision." *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 299 (1998); *see also Chalker v. Birmingham & Nw. Ry. Co.*, 249 U.S. 522, 526-27 (1919) ("[N]either under form of classification nor otherwise" may a state enforce laws that in their "practical operation materially abridge or impair the equality of commercial privileges secured by the federal Constitution to citizens of the several states."). In *Lunding*, the Court concluded that a Connecticut resident's right to "carry on business" in New York was impermissibly burdened under the Privileges and Immunities Clause by a New York income-tax provision that precluded nonresidents from deducting personal alimony payments. 522 U.S. at 296 (quoting *Shaffer v. Carter*, 252 U.S. 37, 56 (1920)). Although the New York law was directed at personal alimony payments generally rather than any occupation or business, the Court reasoned that it would effectively burden "the right of nonresidents to pursue their livelihood on terms of substantial equality with res-

idents" and, absent a "substantial justification," was therefore invalid. *Id.* at 302, 315.

In a footnote, Virginia dismisses *Lunding*, *Chalker*, and similar cases as involving "discriminatory taxation of nonresident businesses or workers," Va. Br. 20 n.2, without explaining why that distinction should make any difference. If anything, given state legislatures' "considerable discretion in formulating tax policy" to serve "local needs," *Lunding*, 522 U.S. at 297, this Court's scrutiny of tax laws under the Privileges and Immunities Clause is more deferential than it is for other laws. And the focus on a discriminatory law's "practical effect" is not limited to tax cases. *See Toomer*, 334 U.S. at 397. In any event, the practical effect of Virginia's exclusionary citizens-only policy on Hurlbert's right to do business is far more direct than the impact of New York's denial of personal alimony deductions in *Lunding* (which discriminated against, but did not exclude, non-resident workers).

Virginia does not deny that "[t]he vast majority" of public-records requests "are made by businesses for commercial purposes," Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 Minn. L. Rev. 1137, 1139 (2002), or that most out-of-state requests to Virginia government agencies are made by commercial requesters. *See* Pet. Br. 10, 33. Indeed, Virginia's amici admit that the citizens-only policy is used to selectively target out-of-state businesses for discriminatory treatment: whereas certain non-commercial requests are "typically" honored, "requests from out-of-state data mining companies" are categorically "denied under the citizens-only provision." Local Gov't Attorneys Br. 29-30 (describing county's enforcement policy).

2. Reciting a list of statutes, Virginia next contends (at 21-22) that "Hurlbert's property argument is mis-

placed" because certain types of property records are exempt from the state's Freedom of Information Act and available through the other statutes. But Hurlbert did not request those types of records, and his request does not involve those statutes. As Virginia admits, he requested "real estate tax assessment records from the Tax Assessor of Henrico County." Va. Br. 9. There is no dispute that Virginians—and only Virginians—have the right to access such records. *See Associated Tax Serv., Inc. v. Fitzpatrick*, 372 S.E.2d 625, 626-29 (Va. 1988) (ordering disclosure under VFOIA of the "1985 Land Books Master Record for the City of Norfolk," including information about the "assessed value of the land" and "total assessed value" for all real property in the city, as requested by a Virginia company "in the business of facilitating the payment of real estate taxes"). Nor is there any dispute that Virginia denied Hurlbert access to those records solely because he is not a Virginian. CA4 JA 47A.

Virginia likewise does not dispute that access to real estate tax assessment records—no less than access to deeds or mortgages—is inextricably intertwined with the right to transfer property. Tax assessment records are used for a variety of purposes that "facilitat[e] the transfer of title to real property, such as title searching, the issuance of title insurance, mortgage origination, and other common activities related to the sale and financing of property." Barber, *Personal Information in Government Records*, 25 St. Louis U. Pub. L. Rev. 63, 116 (2006). The FBI, for example, advises prospective homebuyers to "look into recent tax assessments of neighbor-

hood homes" to help avoid falling victim to mortgage fraud.[1]

Hurlbert's business serves these purposes. He provides his clients—like the "land/title company" that hired him here—with "copies of computer readable databases of property ownership, valuations, land tenure, and land use" to use, among other things, to verify mortgage loan applications and appraisal reports. CA4 JA 47A. Those uses are critical to mortgage financing and real estate transactions and thus "basic to the maintenance or well-being of the Union." *Baldwin*, 436 U.S. at 388. Virginia does not confront these facts. And so it does not even grapple with, let alone rebut, our argument that access to property records, including tax assessment records, is protected by the Privileges and Immunities Clause because it is a necessary corollary to "the ability to transfer property.'" *Id.* at 387.

Instead, Virginia disparages Hurlbert's position as "ahistorical," calling it the product of a "recently invented" "modern statutory creation." Va. Br. 10, 18. But that has it exactly backwards. Virginia's Freedom of Information Act is a modern creation, but the right of equal access to property records is anything but. Had Hurlbert requested copies of the *very same records* at the time of the Founding, he would have been entitled to them. A 1786 Virginia statute provided that tax assessment records "shall be subject at all times to the inspection of every person" and that "copies may be had at the charge of the person or persons desiring" the record. 12 *Hening's Statutes at Large* 247-48 (1786); *see also Kinney v.*

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[1] *See* FBI, *Mortgage Fraud: How to Avoid Becoming a Victim*, http://www.fbi.gov/news/stories/2008/august/mortgagefraud_081408.

Beverley, 12 Va. (2 Hen. & M.) 318, 330-31 (1808) (Tucker, J.) (noting tax assessors' duty to ensure that land valuations were "subject at all times to the inspection of all persons"). Likewise, as discussed in our opening brief (at 39), "any person or persons, not resident within this state" had a right to demand copies of surveyors' land records, 12 *Hening's Statutes at Large* 589-90 (1787)—a right enforceable in court, *Preston v. Brown*, 20 Va. (6 Munf.) 271 (1819).

Thus, for all of Virginia's invocation of history, it is actually the state's citizens-only restriction that is the "recently invented" approach—an approach it now shares with only Arkansas and Tennessee. If this Court were to give Virginia's discriminatory approach its blessing, however, that would invite other states to adopt similar parochial measures, thereby hindering property transfers across state lines, stifling competition among data gatherers, and introducing needless inefficiencies into the national market for public information. This Court should bring Virginia into line with the 47 states that allow open access—not pave the way for more discriminatory-access regimes.

3. Virginia next derides as "incoherent" (at 22) our argument concerning Mark McBurney's request for agency records. McBurney requested public records reflecting the general policies that Virginia employed to handle his child-support-collection case before a state agency, but Virginia refused his request based solely on state citizenship. As our opening brief showed (at 42-44), that refusal violates the venerable rule that public proceedings "must remain open" to citizens and non-citizens "on the same basis." *Miles v. Ill. Cent. R.R.*, 315 U.S. 698, 703 (1942); *see Blake v. McClung,* 172 U.S. 239, 256 (1898). It also burdens the protected right of creditors

like McBurney to collect debts on equal terms with state citizens—a right central to the Framers' concerns in both the Privileges and Immunities Clause and neighboring Full Faith and Credit Clause. *See* Pet. Br. 42-43.

Virginia does not deny that the Constitution guarantees equal access to public proceedings to citizens and non-citizens alike, whether before a court or an administrative agency. Nor does Virginia deny that equal access to such proceedings necessarily encompasses equal access to basic information about how those proceedings are conducted. Instead, Virginia's only response (at 22) appears to be that these rights are not "implicated" because McBurney managed to obtain *some* records related to his case. Va. Br. 22. But Virginia does not contest the two most relevant facts: (1) that McBurney "sought documents concerning practices and procedures of the agency" with respect to the handling of cases like his and (2) that he has been denied access to those documents solely because of his citizenship. Va. Br. 22; *see also McBurney v. Cuccinelli*, 616 F.3d 393, 403 (4th Cir. 2002) (noting that this fact is "undisputed").

The upshot of Virginia's position is that state agencies may give in-state businesses and individuals a crucial information advantage over their out-of-state adversaries in administrative proceedings—letting citizens know the rules of the game while keeping their competitors in the dark. And states could do this in all kinds of proceedings—adjudications, rulemakings, decisions to grant or deny important permits—over the full range of social and economic activity.

Nothing would stop the Arkansas Oil and Gas Commission, for example, from providing only Arkansas businesses with important information about how it decides to grant valuable oil-drilling permits. Or New York

banking regulators from ensuring that only New York investors and lawyers have special access to information about the state's regulatory climate.

If such information asymmetries were allowed to flourish, states would be able to favor in-state interests with impunity, achieving by other means the same results as old-fashioned protectionist regulation. South Carolina may not exclude Georgia shrimpers from its waters, *see Toomer*, 334 U.S. at 403, but it could make sure they don't know the ins-and-outs of the state's licensing scheme. A New Jersey city may not deny out-of-staters construction jobs, *see United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 220 (1984), but it could ensure that only locals know how to navigate the complex procurement application process. Virginia does not even attempt to defend the logic of this discriminatory regime.

4. Finally, arguing from history (at 23-31), Virginia contends that it may, consistent with the Privileges and Immunities Clause, deny citizens of other states equal access to public information without justification. But the state never grapples with what both sides agree is the applicable test: States must "treat all citizens, resident and nonresident, equally" "with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity, or that are 'basic to the maintenance or well-being of the Union,' or 'the livelihood of the Nation.'" Va. Br. 32 (quoting *Baldwin*, 436 U.S. at 383, 388). The question under this Court's cases is whether equal access to public information meets that test. Although Virginia never confronts this question, it cannot deny that the interstate movement of public-record information is "important to the national economy," *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 281

(1985), that a wide range of "essential activit[ies]" rely on publicly available data, *Baldwin*, 436 U.S. at 281, or that public records are vital to securing property and other fundamental interests.[2]

As our opening brief pointed out (at 22-23, 45), the Full Faith and Credit Clause demonstrates that the Framers saw that the movement of "public … Records" across state lines as critical to Americans' ability to secure property rights and other important interests, and "fundamental to the promotion of interstate harmony." *United Bldg.*, 465 U.S. at 218 (quoting *Baldwin*, 436 U.S. at 388). But one can hardly use a state's public records to advance his or her rights without having access in the first place. A few examples: An Indiana business that lost out on a government contract could not see the winning bid—putting it at a disadvantage compared to its Virginia-based competitor. A Maryland developer looking to buy land in Virginia could not obtain information about zoning plans, crime statistics, or past sales, but a Virginia developer could. And an Ohio journalist who does not qualify for Virginia's media exception—which applies only to traditional media "with circulation in the Commonwealth," Va. Code § 2.2-3704(A)—would be at a

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[2] Virginia also gets its history wrong. It cherry-picks a handful of cases to try to show that, at the Founding, common-law "rights of public access were not sufficiently uniform or generous." Va. Br. 30; *but see* Public Justice Br. 3-15 (showing that the right was universal, though its scope varied). But none of Virginia's cases is from the Founding Era; the earliest is an English case from 1837. Regardless, it does not matter whether the right's scope was sufficiently "uniform" or "generous" in 1789 because the Clause places citizens and non-citizens on "the same footing" with respect to protected rights, leaving the precise scope of those rights to state positive law. *Paul v. Virginia*, 75 U.S. 168, 180 (1869).

disadvantage in reporting on stories of national significance. *See* Reporters Committee Br. 3-4, 21-35.

Because public records contain important facts, "restrictions on the disclosure of government-held information can facilitate or burden the expression of potential recipients and so transgress the First Amendment." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011); *see Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 42 (1999) (Scalia, J., concurring) (suggesting that "a restriction upon access that *allows* access to the press ... but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech"). Although this is not a First Amendment case, those same burdens also run afoul of the Privileges and Immunities Clause when imposed on the basis of state citizenship because they impede the ability of non-residents to report or sell information (as in Hurlbert's case) or advocate for private interests (as in McBurney's). *See Lee v. Minner*, 458 F.3d 194, 200 (3d Cir. 2006).

The consequences of discriminatory-access regimes like Virginia's, if allowed to multiply, would be intolerable in many areas of national life. Faced with a Balkanized access regime, the credit reporting system "simply would not work"—reporting agencies would be forced to hire locals to obtain records or risk selling incomplete or inaccurate data. *See* Coalition for Sensible Public Records Br. 37-38. Landlords and employers, who depend on background checks to safeguard property and ensure a "competent, reliable workforce," *NASA v. Nelson*, 131 S. Ct. 746, 758 (2011), would be left vulnerable by the "resulting gaps." Coalition Br. 27-28, 31. And because state public records are "the primary source of the most fundamental public health information," medical research-

ers' ability to measure the "incidence and prevalence of disease[s]" would be hindered. ACLU Br. 7-8. "With respect to such basic and essential activities, interference with which would frustrate the purposes of the formation of the Union, the States must treat residents and nonresidents without unnecessary distinctions." *Baldwin*, 436 U.S. at 387.

B. The Citizens-Only Policy Violates the Dormant Commerce Clause.

Our opening brief explains (at 24-30) that a state law that "discriminates against interstate commerce," as Virginia's does, is "virtually *per se* invalid and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Davis*, 553 U.S. at 338 (internal quotation marks and citations omitted). Virginia does not attempt to satisfy that test.

1. Echoing its response to our Privileges and Immunities Clause claim, Virginia contends that this heavy burden does not apply here because its policy has only "contingent, remote or incidental effects on commerce." Va. Br. 37. Virginia's sole support for that point is its claim that "Hurlbert's scant earnings" and "the thin evidence that similar companies exist" fail to demonstrate "an unreasonable burden on interstate commerce." *Id.* at 38. But the state concedes that "purveyors of data request public records and employ themselves gainfully in their sale." *Id.* at 38 n.10. Hurlbert himself earns his living requesting such records. His personal profits for 2007, for example, were about $89,000, CA4 JA 101A—not "scant earnings" for most Americans. And several larger commercial data aggregators, such as amici CoreLogic and Reed Elsevier's LexisNexis division, have billion-dollar

annual revenues.[3] More importantly, Virginia does not deny that its policy facially discriminates against non-Virginians or that the vast majority of records requests by non-citizens come from commercial data gatherers. *See* Pet. Br. 33. The primary effect of the citizens-only restriction is thus to immunize Virginia records-retrieval businesses from out-of-state competitors like Hurlbert and the amici.[4]

In any event, petitioners are not required to make the "particularized showing of the sort [Virginia] seeks." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 581 n.15 (1997). "[T]here is no 'de minimis' defense" to discrimination against interstate commerce, *id.* (citing *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994)), because "even the smallest scale discrimination can interfere with the project of our Federal Union," *id.* at 595. Both on its face and in "practical effect," *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979), Virginia's citizens-only policy denies noncitizens the ability to pursue the records-retrieval business in Virginia on equal footing with Virginians. Nothing more is required to trigger Virginia's burden of showing that its restriction serves some legitimate state interest.

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[3] *See* CoreLogic 2011 Annual Report at 12 & 14 (more than $1 billion combined for data-analytics and mortgage-origination segments); LexisNexis Risk Solutions, http://reporting.reedelsevier.com/ar11/business-review/lexisnexis-risk-solutions/ (more than $1.4 billion).

[4] *See* Public Record Retriever Network, Membership List for 2013: Virginia, http://www.brbpublications.com/prrn/search.aspx (listing a dozen Virginia companies specializing in public records retrieval); http://www.researchandretrievals.com (website of Research and Retrieval Services, Inc., "a public records research company in the Southeastern section of Virginia" that "specialize[s] in real estate title searches," including tax assessor records).

2. Virginia's contention (at 38) that the "effects component for dormant Commerce Clause analysis" is reserved for the "second-tier analysis" under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), is mistaken. This Court has repeatedly held that the dormant Commerce Clause prohibits state laws that "discriminate[] against interstate commerce *either* on [their] face or in practical effect." *Hughes*, 441 U.S. at 336. Virginia's own brief acknowledges as much, noting that so-called "[f]irst-tier analysis is … triggered 'where a state law discriminates facially, in its practical effect, or in its purpose against interstate commerce.'" Va. Br. 37 (citation omitted).

Virginia's reliance on what it calls "the Necessary and Proper Clause's substantial effects prong of Interstate Commerce Clause doctrine," Va. Br. 39, is likewise flawed. Setting aside whether such a "prong" exists, Virginia does not deny that "[t]he 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." *Camps Newfound*, 520 U.S. at 574. This Court's holding in *Reno v. Condon*, 528 U.S. 141, 148-49 (2000)—that public records' "sale or release into the interstate stream of business" constitutes interstate commerce—thus applies with full force here.

3. Relying on *Davis*, Virginia argues that providing access to public records is a "government function" and thus that its facial discrimination against citizens of other states is not "susceptible to standard dormant Commerce Clause scrutiny." Va. Br. 40 (quoting *Davis*, 553 U.S. at 341). Virginia's characterization of its public-records law as a "*traditional* government function" is, at the very least, inconsistent with its earlier characterization of the law—for purposes of the Privileges and Immunities Clause—as a state function of recent vintage. More importantly, Virginia misunderstands the meaning of "traditional government function" as used in *Davis*. As

the Court explained there, "the enquiry about traditional governmental activity" is not aimed at the nature of the particular function, which would require the Court to "draw fine distinctions among government functions." *Davis*, 553 U.S. at 341 n.9. Rather, "[t]he point of asking whether the challenged governmental preference operate[s] to support a traditional public function" is to "identify the beneficiary" of the challenged law—that is, "to find out whether the preference [is] for the benefit of a government … or for the benefit of private interests, favored because they [are] local." *Id.*; *see also United Haulers*, 550 U.S. at 334 (upholding law requiring waste haulers to use a state-owned processing facility because the law, while favoring a state-owned facility, "treat[ed] every private business, whether in-state or out-of-state, exactly the same").

In other words, this Court distinguishes between laws favoring local *governments* from those favoring local *private* interests, and for good reason: "discrimination assumes a comparison of substantially similar entities." *Id.* at 342. Governments, unlike businesses, are "vested with the responsibility of protecting the health, safety, and welfare of [their] citizens." *Id.* "[I]t does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism." *Id.* at 343.

Unlike the laws in *Davis* and *United Haulers*, Virginia's citizens-only restriction does not favor its own interests while treating in-state and out-of-state businesses "exactly the same." Virginia is not discriminating in favor of itself—it is discriminating against *private* businesses that, like Hurlbert's, make use of public records, and it does so based solely on the requester's citizenship. The "[c]ompelling reasons" that justified a lower level of scrutiny in *United Haulers* and *Davis* are thus inapplicable here. *United Haulers*, 550 U.S. at 342. There is no

reason to assume that laws that facially discriminate in favor of local private interests, are "likely motivat[ed] by legitimate objectives." Va. Br. 40 (quoting *Davis*, 553 U.S. at 341). Indeed, Virginia has identified *no* state interest that is served by its facially discriminatory policy.[5]

Virginia's reliance on *Reeves v. Stake*, 447 U.S. 429 (1980), for the proposition that "fulfilling governmental functions is not 'protectionist,'" Va. Br. 41, is equally unavailing. As *Reeves* makes clear, a state may decide who may use its resources when it participates "freely in the free market." 447 U.S. at 437. But Virginia does not argue that it is participating "freely in the free market." In fact, it argues the opposite: that it is engaged in a traditional, noncommercial government function. The "traditional" nature of the government activity does not immunize it from dormant Commerce Clause scrutiny. There is, for example, no more "traditional public function" than the exercise of a state's taxing authority, but the Court has not hesitated to invalidate state tax schemes that favor local business interests over those of other states. *See, e.g.*, *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923).

4. Even if Virginia were correct that its citizens-only policy is entitled to only "second-tier" dormant Commerce Clause scrutiny, that scrutiny would not be based on the *Pike* balancing test, as Virginia contends. Va. Br. 37-38. That test applies only when the challenged state law is neither facially nor effectively discriminatory

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[5] Whereas *Davis* was concerned with the "unprecedented" interference involved in invalidating a "century-old taxing practice presently employed by 41 states," 553 U.S. at 342, a decision sustaining Virginia's restriction here could encourage similar restrictions, threatening the open-access regime that now prevails in 47 states. Pet. Br. 10-12.

against non-residents. *Hughes*, 441 U.S. at 336; *Pike*, 397 U.S. at 142-43. Virginia's citizens-only restriction does not "regulate[] even handedly," *id.* at 142; indeed, its facial discrimination against non-residents is the sole reason that Hurlbert was denied the property records he requested.

Rather, Virginia's plea for "second-tier" scrutiny appears to be based on the theory that, despite its facial discrimination against non-Virginians, the citizens-only policy does not expressly target commerce. Va. Br. 37-38. But, again, commercial records requests—which make up the vast majority of public-records requests—*are* interstate commerce. *Reno*, 528 U.S. at 148-49. And whatever the legislature's express intent, there is no dispute that out-of-state commerce bears the brunt of Virginia's ongoing enforcement of its citizens-only policy. *See* Pet. Br. 33. Moreover, as our opening brief explained (at 30-32), "the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 100 (1994); *see Camps Newfound*, 520 U.S. at 581 (generally applicable property-tax exemption for non-profit charities serving state residents failed first-tier scrutiny).

But even assuming that Virginia's citizens-only policy were entitled only to "second-tier" scrutiny analogous to that under *Pike*, it could not survive that scrutiny because, as discussed below, Virginia has abandoned any effort to justify its policy. Without at least *some* countervailing state burden to place on the state's side of the

scale, Virginia's citizens-only policy cannot survive any balancing test.[6]

C. Virginia Has Abandoned Its Only Justification For Its Discrimination.

Virginia does not deny that, in the lower courts, it 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. *See* Pet. Br. 47. But although Virginia had every opportunity to build a record to support that justification, it never did so. To the contrary, Virginia failed to show that responding to noncitizens' requests would impose *any* cost on the state.

That is not surprising because, as our opening brief pointed out (at 49–50), Virginia's statute allows it to charge requesters not only for the cost of duplicating and delivering records, but also for *all administrative costs* incurred in "accessing," "supplying," and "searching for" those records, and it allows the state to require payment in advance for all requests for which costs exceed $200. Va. Code § 2.2-3704(F); *see* Va. CA4 Br. 42 (conceding

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[6] Rather than attempt to satisfy even the "second-tier" analysis it advocates, Virginia contends (at 38) that we have "procedurally defaulted" any challenge under that analysis. But, as explained in our opening brief (at 52-53 n.13), this Court will engage in second-tier analysis even when a party maintains that first-tier scrutiny is required. *Gen. Motors v. Tracy*, 519 U.S. 278, 298 n.12 (1997). Virginia's only response to *Tracy*—to reiterate its waiver argument (at 38 n.9)—is a non sequitur. Moreover, we affirmatively argued below that Virginia's policy fails under any level of scrutiny. *See* CA4 Br. 13-14 ("The district court erred by relying on the *Pike* balancing test, which is reserved for evaluating evenhanded statutes. In any event, there are no countervailing legitimate concerns to justify limiting access to public records in Virginia."); *id.* at 40-42.

"that the government can recoup its copying and administrative costs"). In its brief to this Court, Virginia no longer advances its cost-based justification and argues only that it "has no burden" to do so. Va. Br. 36. The state has thus failed to establish—and has now abandoned—its only justification for its citizens-only restriction on public records access.[7]

For the first time in this litigation, Virginia's brief to this Court suggests (at 31) that some newfound "substantial interest" may justify its discriminatory policy, but it never spells out what that interest is. Here is what the state says: "The traditional state practice of distinguishing between citizens and noncitizens in the provision of services not involving fundamental rights—and making such distinction in laws intended to govern the political functioning of the state—itself provides substantial reasons for the distinction made here." Va. Br. 36.

To the extent that Virginia is asserting a new justification based on a "traditional state practice," that justification fails because, as discussed above (at 6-7), the

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[7] Virginia suggests in passing (at 2) that its taxpayers bear "a significant portion of the costs associated with the provision of public records," but cites no support for that statement. To the contrary, Virginia is authorized by statute to fully recoup its costs. The only limit is that the fees may not *exceed* the "actual cost incurred" or cover the costs of "creating or maintaining records" or "transacting the general business of the public body," Va. Code § 2.2-3704(F). But those excess costs by definition are not the costs of *responding* to requests. The state is only required to produce records already created "in the transaction of public business"—not to "create ... new record[s]" that "do[] not already exist," *id.* §§ 2.2–3701, 2.2-3704(D). The law thus merely prohibits Virginia from *profiting* from fees that go beyond full cost recovery.

state's discriminatory policy actually runs counter to traditional practice. To the extent that Virginia is asserting an interest based on "the political functioning of the state," that interest fails because "[t]here is no evidence that allowing noncitizens to directly obtain information will weaken the bond between the [state] and its citizens." *Lee*, 458 F.3d at 201. And to the extent that Virginia is asserting a new interest on the grounds that public-records access is merely "the provision of [a] service[]" funded by Virginians' tax dollars, that is just a restatement of its now abandoned administrative-burden argument. Access to a state's court system or agencies (such as those that grant fishing licenses or regulate lawyers) can just as easily be characterized as a tax-funded service. But when a state's discrimination interferes with protected rights, the state must prove, with evidence, that "moneys received from nonresident[s] will not be adequate to pay for any administrative burden." *Barnard v. Thorstenn*, 489 U.S. 546, 556 (1989); Pet. Br. 50. Even then, the "drastic" step of "total exclusion" is unwarranted where a state has the ability to "charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose." *Toomer*, 334 U.S. at 398-99.

Neither of Virginia's examples of "services" that are properly limited to residents—elections and schools (Va. Br. 33-34)—involve burdens on protected rights, and both illustrate how states can justify their policies with substantial state interests. Citizenship limitations, of course, are necessary for elections to have any meaning. *Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972). And "the proper planning and operation of the schools would suffer significantly" absent residence restrictions. *Martinez v. Bynum*, 461 U.S. 321, 329 & n.9 (1983) (factual findings concerning likelihood of fluctuating populations,

overcrowding, and resource constraints). The "deeply rooted" tradition of "local control over the operation of schools" is also an "independent justification for local residence requirements." *Id.* at 329. And there are similar "substantial reason[s] for requiring the nonresident to pay more than the resident … to enroll in the state university." *Saenz v. Roe*, 526 U.S. 489, 502 (1999) (citing *Vlandis v. Kline*, 412 U.S. 441, 445 (1973)). But here—where extending access to non-residents would not cost the state a dime, would not deplete finite resources, and would not jeopardize important local traditions or institutions—erecting a barrier to the free flow of information across state borders serves no legitimate purpose. That is particularly so because the state seeks to withhold access to public information that is available nowhere else, is essential to securing private property and other basic interests, and is critical to the nation's information economy.

In the end, Virginia's "bare assertion" of some inchoate interest in its citizens-only policy at the thirteenth hour "is certainly inadequate to survive the scrutiny invoked by [its] facial discrimination." *Hughes*, 441 U.S. at 338 n.20. "The late appearance" of Virginia's vague argument "and the total absence of any record support … give it the flavor of a *post hoc* rationalization." *Id.* Because the "burden is on the State to show that the discrimination is demonstrably justified," *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 (1992), "[t]his Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable," *Granholm v. Heald*, 544 U.S. 460, 492-93 (2005). Virginia does not even attempt to satisfy that "exacting standard." *Id.* at 493. This leaves the state with "no substantial reason for

the discrimination beyond the mere fact" that Hurlbert and McBurney "are citizens of other States." *Toomer*, 334 U.S. at 396. Discrimination, however, cannot justify discrimination.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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