

No.12-17

In The Supreme Court of the United States

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

v.

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

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

**BRIEF OF THE COALITION FOR SENSIBLE
PUBLIC RECORDS ACCESS; CONSUMER DATA
INDUSTRY ASSOCIATION; CORELOGIC; REED
ELSEVIER INC.; NATIONAL ASSOCIATION OF
PROFESSIONAL BACKGROUND SCREENER;
THE SOFTWARE & INFORMATION INDUSTRY
ASSOCIATION; NATIONAL CREDIT REPORTING
ASSOCIATION; NATIONAL MULTIFAMILY
RESIDENT INFORMATION COUNCIL; AND POLK
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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Other Authorities

| | |
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| Comments of Gail H. Littlejohn, Vice President, Government Affairs, and Steven M. Emmert, Director, Government Affairs, Reed Elsevier Inc., LEXIS-NEXIS Group (Mar. 31, 2000), available at http://www.sec.gov/rules/proposed/s70600/littlej1.h tm | 13 |
| <i>Credit Information Providers</i> , Fannie Mae, https://www.efanniemae.com/sf/refmaterials/credit providers/index.jsp?sort=allByName (last refreshed Aug. 2, 2012) | 20 |
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Fannie Mae, *Selling Guide: Fannie Mae Single Family* 438-46 (2012) (explaining the requirements, types, and accuracies that agencies must provide in credit reports), *available at* <https://www.efanniemae.com/sf/guides/ssg/sg/pdf/sel062612.pdf>..... 20

J. Alex Heroy, *Comment, Other People’s Money: How a Time Gap in Credit Reporting May Lead to Fraud*, 12 N.C. Bank. Inst. 321, 323 (2008) 22

Mortgage, *About Us, Data*, CoreLogic, (last visited Aug. 2, 2012), <http://www.corelogic.com/about-us/data.aspx#container-Mortgage> 21

Open Government Guide, (Gregg Leslie & Mark Caramanica eds., The Reporters Committee for the Freedom of the Press 6th ed. 2011) 6

Press Release, LexisNexis, LexisNexis and Tax Management Associates Identify Fraud and Discover Nearly \$1,500,000 in New Revenue for Delaware County, Indiana (Feb. 27, 2012), *available at* <http://www.lexisnexis.com/risk/newsevents/press-release.aspx?id=1330361634905478>..... 13

The Privacy Office, Department of Homeland Security, Official Workshop Transcript, *Privacy and Technology Workshop: Exploring Government Use of Commercial Data for Homeland Security*, Panel One: How are Government Agencies Using Commercial Data to Aid in Homeland Security? at 9 (Sept. 8-9, 2005 (comments of Grace Mastalli Principal Deputy Director for the Information

Sharing and Collaboration Program at DHS),
available at
http://www.au.af.mil/au/awc/awcgate/dhs/privacy_wkshop_panel1_sep05.pdf..... 12

Real Estate, *About Us, Data*, CoreLogic, (last visited Aug. 2, 2012), <http://www.corelogic.com/about-us/data.aspx#container-RealEstate>..... 21

Talking Points: The Child Protection Improvements Act, MENTOR (Sept. 2010),
http://www.mentoring.org/downloads/mentoring_1279.pdf..... 16

U.S. Census Bureau, U.S. Dep’t of Commerce, P20-565, *Geographical Mobility: 2008 to 2009* (2011), *available at*
<http://www.census.gov/prod/2011pubs/p20-565.pdf>. 16

IDENTITY OF THE *AMICI*¹

Amici or their members (collectively, “*amici*”) compile public records for an array of important commercial and public services. Through the efforts of their employees and the implementation of digital technology, *amici* aggregate, index, and supplement public record data produced and maintained by state governments. The value that *amici* add dramatically distinguishes *amici*’s products and services from the raw information available directly from governmental agencies. These enhancements enable individuals, public authorities, businesses, news agencies and consumers to save time and money by allowing them to search through otherwise impenetrable masses of official information. The *amici* are:

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

¹ Communications indicating the intent to file this *amici curiae* brief were received by the counsel of record for all parties at least 10 days prior to the due date for this *amici curiae* brief. All parties consent to the filing of this brief. The *amici* affirm that no counsel for a party authored this brief in whole or in part and neither a party nor counsel for a party has made a monetary contribution intended to fund its submission.

- **The Consumer Data Industry Association (CDIA)** is an international trade association that represents some 200 consumer data companies that engage in credit reporting, mortgage reporting, check verification, fraud prevention, risk management, employment reporting, tenant screening and collection services. Most of them rely on public records acquired under state public records laws.
- **CoreLogic** provides financial and property information, analytics and services to business and government. It has built one of the largest and most comprehensive U.S. real estate, mortgage application, fraud, and loan performance databases. Its databases includes the records of over 787 million historical property transactions, over 93 million mortgage applications and property-specific data covering over 99% of U.S. residential properties.
- **Reed Elsevier Inc.'s LexisNexis** division provides access to the public records of all fifty states. These records include property title records, liens, tax assessor records, criminal history information, and other information kept by state governments Lexis Nexis uses this information to create tools that combat identity theft, screen employees and prevent fraud, and assist law enforcement.

- **The National Association of Professional Background Screeners'** (NAPBS) membership consists of over 700 employment and tenant background screening firms that search publicly available state criminal background information to provide employers and the managers of apartment buildings in every state with accurate information about the people they employ and to whom they let space.
- **The Software & Information Industry Association** (SIIA) represents approximately 600 member companies, among them publishers of software and information products, including databases, enterprise and consumer software, and other products that combine information with digital technology. Many of its members rely on access to public records.
- **The National Credit Reporting Association** (NCRA) is a national trade organization of consumer reporting agencies and associated professionals that provide products and services to credit grantors, employers, landlords and all types of general businesses. NCRA's membership includes four of five mortgage credit reporting agencies in the United States that can produce a credit report meeting Fannie Mae, Freddie Mac and HUD requirements for mortgage lending.

- **The National Multifamily Resident Information Council** (NMRIC) is a not-for-profit association of leading resident screening companies that rely on access to public records from all states to provide qualifying background information on residents seeking housing, a significant percentage of whom have backgrounds in multiple states.
- **Polk**, a division of R.L. Polk & Co., specializes in providing information for the automotive and related industries, and relies on information supplied by state governments under their public records laws and other statutes. Polk uses this information to help customers understand their market position, identify trends, build brand loyalty, and ensure consumer safety. Its CARFAX Vehicle History Reports are routinely used by millions of consumers each year, and are available on all used cars and light trucks model year 1981 or later.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with petitioners that access to public records under a state Public Records Act is a privilege of citizenship within the meaning of Article IV section 2 of the Constitution, and that a state needs a strong justification (which is absent in this case) for granting the privilege to state citizens while denying the privilege to citizens of other states.

Amici also agree with petitioners that the business of collecting, aggregating, indexing, and creating new services from public records is interstate commerce. A state statute that discriminates against out-of-state businesses engaged in the same pursuits as their in-state counterparts discriminates against interstate commerce in violation of the dormant commerce clause of Article I, section 8 of the Constitution.

The Fourth Circuit’s opinion licenses *every* state to discriminate against out-of-state public records requestors, and it is through that lens that the decision should be viewed. The lower court failed to appreciate that the effect of Virginia’s statute on Hurlbert and *amici*’s commercial activities and the customers they serve is more than “incidental.” *McBurney v. Young*, 667 F.3d 454, 464-65 (4th Cir. 2012). By *banning* access by out-of-state companies and individuals to public records, statutes like Virginia’s would disrupt this national information market, hamstring significant federal statutory regimes, and adversely interfere with a number of important commercial and government activities. *Amici* submit this brief to explain the adverse impact that the Fourth Circuit’s ruling will, unless it is reversed, have on the large nationwide marketplace for public-record information.

I. *Amici* Are Involved in a Robust, Competitive Interstate Information Market that Creates Important Societal Benefits.

“So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.” *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 765 (1976).

Public records are the essence of *amici*'s business and inform transactions in numerous fields of endeavor. All fifty states and the District of Columbia have public records laws, and *amici* rely on those laws for access to the public records used by their services. *See generally Open Government Guide*, (Gregg Leslie & Mark Caramanica eds., The Reporters Committee for the Freedom of the Press 6th ed. 2011), *available at* <http://www.rcfp.org/open-government-guide> (describing the public records laws of the fifty states and the District of Columbia).

Requests for and receipt of public record information under state freedom of information laws represent a daily occurrence, and the lifeblood of *amici*'s commercial activity. Like the petitioner Hurlbert, *amici* routinely collect public record information from states in which they neither reside nor have a principal place of business. They do so by

means ranging from in-person visits to clerks' offices and courthouses to remote electronic access over the Internet. *Amici* then organize, index and compile that information into paper and electronic services and publications with regional or nationwide scope. Real estate financing, credit reporting, background checks, tenant screening, and even political campaigns all rely to some degree on access to state public records of the several states. Public entities, including housing authorities, law enforcement and intelligence agencies, rely on access to state public-record information to perform their government duties.

Amici come in all shapes and sizes; some are small organizations; some are multi-billion dollar corporations. Some maintain national databases of public record information, while others make discrete requests for public records held by jurisdictions around the country—as Petitioner Hurlbert did in this case. Nonetheless, they all share two things in common: (1) nondiscriminatory access to public records nationwide is the *sine qua non* of their businesses; and (2) customers value and depend upon their publications because of their thoroughness and accuracy.

Amici's publication of public record information satisfies an essential need of modern commercial and political life. The information they provide lays the foundation for transactions in a wide variety of markets, and ensures transparency

and efficiency in those markets. *Amici's* efforts to sort, collect, and analyze public records enables sellers to determine whether a potential home buyer is qualified, an employer to determine whether a suspect has convictions in multiple jurisdictions, or an insurer to determine what the rate of insurance on a particular property should be. Many of *amici's* services are targeted at particular spheres of commercial activity.

Thus, although the market for public record information is national in scope, there is no monolithic “public records industry.” For example, many of *amicus* CDIA’s members acquire public records information for the purpose of evaluating consumer credit—whether for purchasing a car, opening a business, or determining a credit card interest rate. Those extending credit may want to know what real estate the borrower holds, whether the borrower faces any tax liens, or if he or she had recently declared bankruptcy.

The use of these records goes well beyond credit transactions. For example, *amicus* Reed Elsevier’s Accurint service routinely provides fraud prevention tools to financial and retail institutions. Thus, when authenticating an oral request to transfer funds from a bank account, a financial institution will ask questions that the thief of a wallet would probably not be able to answer, such as “Which of the following five addresses is a past home address of yours?” or “Which of the following cars did

you once own?” The answers to these questions would be found in state real property records or Uniform Commercial Code filings.

The nationwide availability of this information also helps make markets in products and services more competitive. *Amicus* SIIA’s members include “construction plan rooms” that are dedicated to assembling documents relating to construction projects. When a state decides that it wants a new school built, it will accept bids and plans. Those plans, bids, and related specifications become public records, which plan rooms around the country lawfully obtain and take to a central location to be viewed by subcontractors wishing to bid on part of the project (air conditioning, electrical work, plumbing, etc.). Thanks to digital technology, where once plan rooms had to have a physical presence in a given state, they can now offer these plans and specifications to their subscribers nationwide. A local county in Illinois can receive competitive bids on air conditioners from California, water coolers from Wisconsin, and plumbing services from New Jersey. The enhanced competition between bidders results in better pricing for these public entities, and a more efficient use of tax dollars.

Similarly, Polk, the parent company of Carfax (www.carfax.com), provides a variety of automotive information to manufacturers and consumers that it obtains from state governments subject to the Driver’s Privacy Protection Act of 1994, 18 U.S.C. §

2721 *et seq.*, as well as public records laws. Carfax uses that information to provide consumers and dealers with a vehicle's accident history, informing customers whether they are buying a potential "lemon." Polk also combines title information with other state records to help manufacturers notify individual consumers in the event of a safety recall.

Nondiscriminatory access to public records also enhances public safety. Members of *amicus* NAPBS acquire and aggregate public records for the purpose of employment background checks. Some of its members travel to a courthouse or other public records repository in a neighboring jurisdiction to obtain criminal records. A small business in one state may check databases and visit courthouses, and check other records in other states to ensure that a day care worker has not been convicted of a crime involving minors. Other NAPBS members aggregate data electronically, and match individuals to criminal records using cross-identifiers such as social security numbers, last known addresses, and other information in order to ensure that the employer receives a full picture of the applicant's relevant past.

The private sector is not alone in its reliance on public record information. The federal government relies on *amici's* state-held public records for various purposes, including law enforcement. For example, LexisNexis' databases have been used for years by the FBI:

Subscription to these [LexisNexis and other] databases allows FBI investigative personnel to perform searches from computer workstations and eliminates the need to perform more time consuming manual searches of federal, *state*, and local records systems, libraries, and other information sources. Information obtained is used to support all categories of FBI investigations, from terrorism to violent crimes, and from health care fraud to organized crime.

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 2000: Hearings on H.R. 2670/S.1217 Before Subcomm. for the Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies of the S. Comm. on Appropriations, 106th Cong. 280 (1999) (emphasis added), available at <http://www.gpo.gov/fdsys/pkg/CHRG-106shrg54206/pdf/CHRG-106shrg54206.pdf>.²

² LexisNexis' relationship with the FBI continues to this day, and since 9/11, the comprehensiveness and utility of these information tools have become even more critical to law enforcement authorities. “[W]e often get more accurate data from the commercial sector. In addition, the processes by which government agencies manage data often makes it difficult to acquire and needs [a] great deal of labor intensity

On the local level, governments use real estate records like those in this case to detect tax avoidance. Delaware County, Indiana recovered over \$1.5 million in new revenue due to homestead exemption fraud.³ An audit assisted by LexisNexis' electronic databases of public records revealed that owners claiming Indiana as a principal residence in

into making it usable and accessible to other entities.” The Privacy Office, Department of Homeland Security, Official Workshop Transcript, *Privacy and Technology Workshop: Exploring Government Use of Commercial Data for Homeland Security*, Panel One: How are Government Agencies Using Commercial Data to Aid in Homeland Security? at 9 (Sept. 8-9, 2005) (transcription commas omitted) (comments of Grace Mastalli Principal Deputy Director for the Information Sharing and Collaboration Program at DHS), *available at* http://www.au.af.mil/au/awc/awcgate/dhs/privacy_wkshop_panel11_sep05.pdf. That reliance extends to the states as well. *See* Brief of the State of Texas as *Amicus Curiae* in Support of Defendants at 2-3, *Taylor v. Axiom Corp.*, 612 F.3d 325 (5th Cir. 2010) (Nos. 08-41083, 08-41180, 08-41232) (The “[Texas] Attorney General’s Office routinely uses national databases provided by private resellers to track down individuals who are delinquent in their child-support payments, as well as to help locate suspects in the course of conducting consumer protection and criminal investigations. Plaintiffs’ theory of liability would not just drive these resellers out of business—it would eliminate a valuable tool of law enforcement.”).

³ Indiana law permits taxpayers certain deductions for their primary residence. *See* Ind. Code §§ 6-1.1-12-37(a)(1), -37(a)(2), -37(c) (describing deduction).

fact were claiming multiple homestead exemptions across multiple states.⁴

The above activities represent just a fraction of the daily uses that are made from state public records.⁵ If the Fourth Circuit's opinion is left not reviewed, data will be missing from information services that aid criminal investigators, detect fraud and government waste, screen the criminal

⁴ Press Release, LexisNexis, LexisNexis and Tax Management Associates Identify Fraud and Discover Nearly \$1,500,000 in New Revenue for Delaware County, Indiana (Feb. 27, 2012), *available at* <http://www.lexisnexis.com/risk/newsevents/press-release.aspx?id=1330361634905478>. On the federal level, LexisNexis products are used by the United States Department of Health and Human Services, and their state government analogs to detect Medicare and Medicaid fraud by matching requests for payment against licensure records and other information acquired from public records.

⁵ Other uses include enforcing child support obligations. For example, the Association for Children for Enforcement of Support reports that public record information provided through commercial vendors helped locate over 75 percent of the "deadbeat parents" they sought. Comments of Gail H. Littlejohn, Vice President, Government Affairs, and Steven M. Emmert, Director, Government Affairs, Reed Elsevier Inc., LEXIS-NEXIS Group (Mar. 31, 2000), *available at* <http://www.sec.gov/rules/proposed/s70600/littlej1.htm>; *see also Financial Information Privacy Act: Hearings on H.R. 4321 Before the H. Comm. on Banking and Financial Services*, 105th Cong. 100 (1998) (statement of Robert Glass).

background of employees, and give certainty to commercial transactions.

II. Leaving the Fourth Circuit’s Decision Unreviewed Threatens the Continued Efficacy of the National Marketplace for Public Record Information

Prior to the Fourth Circuit’s decision below, no court had upheld citizen-only access to public records, and the only federal appellate court to consider the issue struck down such state discrimination against non-citizens.⁶ *Amici* fear that those states with comparable laws will enforce them in ways that will destroy the *amici*’s national services,⁷ and other states without such statutes will be emboldened to enact parallel prohibitions or devise other restrictions that deter access to non-citizens, such as barring commercial use of public records by non-citizens or increasing fees for access to records by out-of-staters.

⁶ *E.g.*, *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006).

⁷ *E.g.*, *Jones v. City of Memphis*, No. 10-2776-STA-dkv, 2012 U.S. Dist. Lexis 51026, at *57 (W.D. Tenn. Apr. 11, 2012) (upholding citizens-only provision continued in Tenn. Code Ann. §10-7-503). It is *amici*’s understanding that in addition to Virginia and Tennessee, two other states have their own citizen-only provisions: Arkansas, Ark. Code Ann. § 25-19-105(a)(1)(A), and New Jersey, N.J. Stat. Ann. 47:1A-1.

As mentioned above, *amici* get access to information in multiple ways. Rather than make repeated requests, some *amici* may enter a monthly subscription arrangement with particular states. *See, e.g.*, Mich. Comp. Laws § 15.233 (permitting subscription access that is valid up to 6 months and is renewable). Others may simply make recurring requests for the same data on a periodic basis. Still others, depending on the nature of the information sought, may have to visit a courthouse or other repository and seek access to particular records about a particular person. Virginia’s statute thwarts all of these methods of access by non-Virginia companies.

Faced with this statutory bar, only two options remain—neither of which is feasible for the *amici*. First, a non-citizen could cease to do business in Virginia altogether—as Petitioner Hulbert elected to do—thereby creating gaps in formerly comprehensive products. In the alternative, a non-citizen could hire a Virginia “citizen” to gain access to the records. As discussed in more detail below, hiring state resident “strawmen” is impractical for many businesses, and cannot substitute for the current nondiscriminatory environment that *amici* currently enjoy.

A. Upholding Discrimination Against Non-Citizens' Access Will Diminish the Value of National Databases of Public Record Information and Inhibit the Activities of Aggregators Who Regularly Make Specific Public Record Requests

The harm that flows from citizens-only public records statutes is straightforward. For example, when information from citizens-only states is excluded, individuals will obtain employment in situations where prudence dictates they should not—whether as a pedophile in a day care center, or as an embezzler in an accounting firm.⁸ Law

⁸ Given the large numbers of people who move each year, the need for geographically comprehensive background checks cannot be overstated. In 2008-09, for example, 6.9 million people moved from one state to another. U.S. Census Bureau, U.S. Dep't of Commerce, P20-565, *Geographical Mobility: 2008 to 2009* (2011), available at <http://www.census.gov/prod/2011pubs/p20-565.pdf>. Criminals are no different: in one examination of a Department of Justice program in which applicants for volunteer positions were subject to background screening, it was revealed that 41 percent of recidivists had committed a crime in a different state from the one in which they applied for a position, and over half of those with criminal histories lied about their existence when asked. S. 645, 112th Cong. § 2(10) (2012); see also *Talking Points: The Child Protection Improvements Act*, MENTOR (Sept. 2010), http://www.mentoring.org/downloads/mentoring_1279.pdf.

enforcement officers will waste investigation time collecting information that *amici* once regularly made available. Tax cheats like those identified by Indiana will escape with their ill-gotten gains intact. And parties to potential business transactions will be unable or unwilling to close deals because of the unavailability of desired information.

Citizen-only laws will also frustrate the policy goals of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.* Congress enacted the FCRA to develop “reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information” 15 U.S.C. § 1681(b). “Those who extend credit or insurance or who offer employment have a right to the facts they need to make sound decisions,” and consumer reporting agencies (CRAs) fulfill this vital economic role. *See* S. Rep. No. 91-517, at 2 (1969).

In general terms, the FCRA regulates those businesses that sell information about consumers for specified purposes, including insurance, credit, and employment, and sets the terms under which such information (including public record information) can be used. *See* 15 U.S.C. § 1681a(d), (f) (defining consumer report and consumer reporting agency, respectively). The entire statute, including its requirement that CRAs have reasonable procedures designed to ensure the “maximum possible accuracy” of consumer information, *see id.* § 1681e(b), rests in large part on the assumption that consumer

reporting agencies have access to state public records.⁹

For example, if a consumer disputes the accuracy of information in a consumer report (such as the existence of a personal bankruptcy) the consumer reporting agency is required to re-investigate and verify the information within 30 days. *Id.* § 1681i(a)(1)(A). If the information is incorrect, even if a middleman supplied the information, those consumer reporting agencies that do nationwide reporting are required to “implement an automated system through which furnishers of information to that consumer reporting agency may report the results of a reinvestigation that finds incomplete or inaccurate information in a consumer's file to other such consumer reporting agencies.” *Id.* § 1681i(a)(5)(D).

The national system of information commerce that the FCRA envisions simply would not work against the Balkanized access regime contemplated

⁹ See, e.g., 15 U.S.C. §§ 1681c (a)(1)-(3) (limiting usage of public records such as bankruptcies, civil judgments, arrests, convictions, and tax liens); *id.* § 1681k(a)(2), (assuming that matters of public record are “considered up to date if the public record status of the item at the time of the report is reported”); *id.* § 1681a(p)(1) (maintaining public records as part of definition of nationwide consumer reporting agency); *id.* § 1681l (maintained with respect to certain reporting activity).

by the Fourth Circuit decision. At a minimum, FCRA-required re-investigations will be considerably more difficult to perform on a nationwide or timely basis, as CRAs will be limited to acquiring information in those states in which they enjoy corporate citizenship. While larger members might be able to hire agents in individual states (depending on how such statutes are construed), the burden of re-investigation weighs more heavily on smaller entities, who may simply not report information from Virginia sources, as the petitioner has elected to do. All of these factors negatively impact consumers, who will have to wait longer to resolve pending issues in their credit history.

B. For *Amici*, Obtaining Agents in Each State is an Infeasible Means of Doing Business.

The state may argue that *amici* can hire agents in each state to obtain the records for them. It is both impractical (and unnecessarily burdensome) for Virginia to expect national businesses to hire “citizen requestors” in every state.

First, as the petition correctly notes, the mere presence of the citizens-only requirement confers a material advantage to public records businesses located in Virginia over those located out-of-state. (See Pet. at 26 (citing *C & A Carbone v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994)); see also *Minner*, 458 F.3d at 200 (rejecting the burden of

having to hire an agent as “insubstantial”). For example, amicus NCRA is aware of only one Virginia entity that Fannie Mae and Freddie Mac recognize as meeting their underwriting standards in the production of credit reports.¹⁰ If the Fourth Circuit decision is not reversed, similar entities (eighty percent of which are *amicus* NCRA members) now lack access to public records affecting Virginia consumers.

Second, hiring in-state agents to acquire information threatens standard processes that enable efficient nationwide operation. National financial institutions rely on *amici* like CoreLogic to provide them with a complete file of public information such as tax assessments, mortgage deeds, assignments, and lien releases on properties

¹⁰ See, e.g., *Credit Reporting Companies and Technical Affiliates*, Freddie Mac, (last visited Aug. 2, 2012) (listing approved entities), <http://www.loanprospector.com/about/crc.html>; see also *Credit Information Providers*, Fannie Mae, (last refreshed Aug. 2, 2012) (indicating one VA approved entity with two separate sponsors), <https://www.efanniemae.com/sf/refmaterials/creditproviders/index.jsp?sort=allByName>. See generally Fannie Mae, *Selling Guide: Fannie Mae Single Family* 438-46 (2012) (explaining the requirements, types, and accuracies that agencies must provide in credit reports), available at <https://www.efanniemae.com/sf/guides/ssg/sg/pdf/sel062612.pdf>.

nationwide.¹¹ The economies of scale in CoreLogic’s standard and centralized acquisition processes permit its customers to gain access to relevant information in a timely, cost-effective fashion, and minimize the risk between the time when a snapshot of a property’s status is taken, and the status of the property when the sale or loan actually closes.

Requiring national entities to hire people in every state jeopardizes these processes, and imposes “an artificial rigidity on the economic pattern of the industry.” *Toomer v. Witsell*, 334 U.S. 385, 403-04 (1948). First, the additional cost of hiring and training new employees would pass through to consumers, making the underlying transaction more expensive. Second, the addition of more staff in each state would destroy the efficiencies in a nationwide business. Gains in accuracy that standardized and centralized national collection of data enables would be threatened. Moreover, any delays caused by fractured corporate citizenship requirements will lead to larger “gaps” between the period when assessment, title, and similar information is examined, and the time at which the loan closes,

¹¹ See, e.g., Real Estate, *About Us, Data*, CoreLogic, (last visited Aug. 2, 2012), <http://www.corelogic.com/about-us/data.aspx#container-RealEstate>; Mortgage, *About Us, Data*, CoreLogic, (last visited Aug. 2, 2012), <http://www.corelogic.com/about-us/data.aspx#container-Mortgage>.

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

C. There is No Justification for the State's Discrimination

The nature of the exemptions in the Virginia statute vitiates whatever justifications the state might claim for its enactment. Virginia's Freedom of Information Act denies public records access to all noncitizens unless they are (1) a newspaper or magazine located or circulated in the state; or (2) a television broadcaster broadcasting in or into the state. See Va. Code Ann. § 2.2-3704(A). Thus, on its face, the statute immunizes (1) in-state entities like *amici* and (2) in-state and certain out-of-state media outlets from the reach of the citizen-only bar.

Presumably, Virginia's enactment of this provision recognizes that permitting these entities to access public records and inform Virginia's public advances legitimate public interests. See *McBurney*, 667 F.3d at 459. Neither the state nor the lower

court, however, explained how in-state entities advance those interests and out-of-state entities do not. Like their in-state counterparts, *amici* also inform members of the Virginia and national public of matters of importance, including potential fraud, the criminal history of a potential employee or the presence of a sex offender in a given community—yet the statute inexplicably treats them differently.¹² The exemption’s haphazard scope illustrates the unreasonableness of the discrimination against non-

¹² For example, real estate recording statutes exist to put the world on notice that the person named in the deed in fact owns Blackacre. *See generally* D. Barlow Burke, *Law of Title Insurance* § 5.01 [C] (3d ed. 2000 & Supp. 2004) (describing the manner and extent to which title insurance policies rely on presumptions of notice in determining coverage of public record). Under Virginia law (and the law of other states), those facts found in a recorded real estate document are presumed to be true, and that presumption is as binding on nonresidents as it is on residents. *See, e.g., Cuthrell v. Camden Cnty.*, 118 S.E.2d 601, 604 (N.C. 1961) (describing purchaser’s duty to examine title record); *Equity Bank, SSB v. Chapel of Praise A.L.D.C.M., Inc.*, No. 06-0460-CG-B, 2007 U.S. Dist. LEXIS 56086, at *13-*14 (S.D. Ala. July 31, 2007) (noting that Alabama law imparts constructive notice of real estate records to purchasers); Cal. Civil Code § 1213 (statutory presumption of constructive notice); Ohio Rev. Code Ann. §§ 5310.02-5310.03 (providing, respectively, that recorded documents determine priority of claims and shall be conclusive proof of facts stated therein if title is acquired in good faith). An out of state business that publishes such information performs the same function as its in-state counterpart, and should be permitted to access public records in an identical fashion.

citizens embodied in the Virginia statute, and that distinction is not countenanced by either the Privilege and Immunities or dormant Commerce Clause.¹³

In short, no legitimate reason for Virginia's discrimination exists. By validating that discrimination, the Fourth Circuit decision has threatened an important tool of national commerce.

¹³ Cf. also *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2666 (2011) (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 speech purposes, is in reality a restriction on speech.” (quoting *L.A. Police Dep't. v. United Reporting Publ'g Corp.*, 528 U.S. 32, 42 (1999) (Scalia, J., concurring))).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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