No. 12-17

In The Supreme Court of the United States

MARK J. McBURNEY and ROGER W. HURLBERT,

Petitioners,

v.

NATHANIEL L. YOUNG, JR., in his Official Capacity as DEPUTY COMMISSIONER AND DIRECTOR, DIVISION OF CHILD SUPPORT ENFORCEMENT, COMMONWEALTH OF VIRGINIA, and THOMAS C. LITTLE, DIRECTOR, REAL ESTATE ASSESSMENT DIVISION, HENRICO COUNTY, VIRGINIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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August 29, 2012

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Is the statutory right to have a state official identify and produce a state's public records upon request of a state resident a privilege or immunity protected by Article IV?

Is a law authorizing state officials to provide citizens of a state the state's public records upon request, but providing no similar access to non-citizens, subject to tier-one scrutiny under this Court's dormant Commerce Clause jurisprudence?

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Virginia Attorney General Kenneth T. Cuccinelli, II, on behalf of respondents Nathaniel Young, Jr., Deputy Commissioner and Director, Division of Child Support Enforcement, Commonwealth of Virginia, and Thomas C. Little, Real Estate Assessment Division, Henrico County, Commonwealth of Virginia, submits this Brief in Opposition.[1]

INTRODUCTION

Although "[t]he Citizens of each State [are] entitled to all Privileges and Immunities of Citizens in the Several States," the United States Court of Appeals for the Fourth Circuit correctly concluded that the alleged right denied petitioners Mark J. McBurney and Roger W. Hurlbert—to have Virginia officials copy and forward Virginia public records to them—was not a privilege or immunity protected by Article IV of the United States Constitution. No Court of Appeals, or any other court it would appear, has held that a non-resident is entitled to commandeer another state's officials into providing them copies of state public documents responsive to a non-resident's request where the documents are

[1] On July 30, 2012, the Office of the Clerk of this Court requested the filing of a Brief in Opposition on or before August 29.

sought to obtain "information of a personal import." (App. at 19a.) Nor do petitioners present a plausible case for recognizing what are, in effect, a right to pre-litigation discovery against another state (McBurney) and a right to be free from residence-based limitations on a government service where that limitation incidentally burdens a non-resident's means of pursuing his economic interests (Hurlbert). Were the Court to break this new ground, and move the long-established landmarks, it would throw into confusion the States' long-established authority to confer certain "[s]pecial privileges" upon their citizens, and not others. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868). *See, e.g.*, *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 383 (1978). Moreover, the Fourth Circuit unremarkably and rightly held that a state law limiting Freedom of Information Act (FOIA) rights to the citizens of that state is not a regulation of interstate commerce at all, and, even if it were, that the Commonwealth by acting as a market participant is exempt from first-tier scrutiny under this Court's dormant Commerce Clause jurisprudence. Because no deep or mature circuit split exists and because the Fourth Circuit's decision is in harmony with the decisions of this Court, the Petition for Appeal should be denied.

STATEMENT OF THE CASE

In 1968, the General Assembly of the Commonwealth of Virginia enacted the Virginia

Freedom of Information Act. *See* 1968 Va. Acts 479. The purpose of the enactment was then, and remains, "ensur[ing] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted." Va. Code Ann. § 2.2-3700(B); *see* 1968 Va. Acts 479. For "[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government." Va. Code Ann. § 2.2-3700(B).

As adopted, the VFOIA provided that public records would be made available upon request to the "citizens of this State," as well as "representatives of newspapers published in this State," and "representatives of radio and television stations located in this State." 1968 Va. Acts 479. At no time has this right of access extended to non-residents, other than those specified. In its present form, the VFOIA provides, in pertinent part, that

> [e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying *by any citizens of the Commonwealth* during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth.

Va. Code Ann. § 2.2-3704(A) (emphasis added). The relevant portion for purposes of this petition, Virginia's citizen limitation, is mirrored by the laws of several other states. *See, e.g.*, Ark. Code Ann. 25-19-105(a)(1)(A), (a)(2)(A), (d)(1); N.H. Rev. Stat. Ann. § 91-A:4(I); Tenn. Code Ann. § 10-7-503(a)(2)(A) & (f). The Virginia law authorizes "[a] public body" to impose only "reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records," and prohibits such bodies from "impos[ing] any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body." Va. Code Ann. § 2.2-3704(F). Accordingly, a significant portion of the costs associated with provision of public records is borne by the taxpayers of the Commonwealth, not by the requesters of public records.

Petitioners have each sought certain Virginia "public records," Va. Code Ann. § 2.2-3701, that they deem useful to their personal interests. In the case of McBurney, a Rhode Island citizen, he filed two requests with Virginia's Division of Child Support Enforcement (DCSE), seeking documents relevant to his claim for child support payments. (App. at 7a, 30a.) McBurney requested "'all emails, notes, files, memos, reports, policies, and opinions'" in DCSE's custody regarding him, his son, and his former wife and "'all documents regarding his application for child support'" and how similar applications are

handled. (App. at 7a, 54a.) These requests were filed in response to DCSE's error in filing a petition for child support requested by McBurney that resulted in his not obtaining child support payments for nine months. McBurney specifically pled that the requests were made to obtain information "that would assist him in determining how his petition was processed and why the delay occurred." (App. at 7a-8a, 30a.) Although both requests were denied in part on the ground that McBurney was not a Virginia citizen, DCSE "did . . . inform McBurney that he could obtain the requested information" under another Virginia statute. (App. at 8a, 30a.) Ultimately, McBurney "acquired most of the requested information" under that statute, "over eighty requested documents." (App. at 8a, 30a, 54a.)

Petitioner Hurlbert, a citizen of California who has made a business of obtaining "real estate tax assessment records for his clients from state agencies across the United States" utilizing state FOIA laws, filed a request in June of 2008, seeking such records for certain parcels located in Henrico County, Virginia. (App. at 8a, 31a.) Although Hurlbert ultimately received the requested information, as he had on seventeen prior occasions, the Henrico County Real Estate Assessor's Office initially denied the June 2008 request on the ground that he is not a citizen of the Commonwealth. (App. at 8a, 31a.)

Petitioners filed suit under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Virginia, seeking declaratory and injunctive

relief. (App. at 8a.) The suit claimed that VFOIA's "citizens-only provision" violates the Privileges and Immunities Clause by denying "them the 'right to participate in Virginia's governmental and political processes' by barring them 'from obtaining information from Virginia's government.' " (App. at 8a-9a.) Petitioner Hurlbert also claimed that VFOIA violated the Commerce Clause's negative command by excluding him, as a non-resident, " 'from pursuing any business stemming from Virginia public records on substantially equal terms with Virginia citizens.' " (App. at 9a.)

Once it was found that McBurney and Hurlbert possessed standing to assert their claims, the parties filed cross-motions for summary judgment on the merits. *McBurney v. Cuccinelli*, 780 F. Supp. 2d 439, 453 (E.D. Va. 2011). (App. at 29a.) The district court held that the record failed to identify any fundamental right protected by the Privileges and Immunities Clause. *Id*. at 448-49. (App. at 36a-44a.) Moreover, it concluded that the law was not a "[d]iscriminatory restriction on commerce" and did not otherwise violate the dormant Commerce Clause because, "[w]hile the law may have some incidental impact on out-of-state business, [its] goal is not to favor Virginia business over non-Virginia business." *Id*. at 452-53. (App. at 47a, 49a.)

A unanimous panel of the United States Court of Appeals for the Fourth Circuit agreed. *McBurney v. Young*, 667 F.3d 454, 470 (4th Cir. 2012). (App. at 28a.) Applying this Court's "two-step inquiry" for

Privileges and Immunities claims, *id.* at 462 (citing *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988)) (App. at 12a-13a), the Court of Appeals "conclud[ed] that the [law] does not infringe on any of the Appellants' fundamental rights or privileges protected by the Privileges and Immunities Clause." *Id.* at 467. (App. at 23a.) Consequently, the Fourth Circuit did not proceed to the second step of evaluating the state interest advanced by the citizens-only provision. *Id.* (App. at 23a.) The court of appeals also rejected petitioner Hurlbert's dormant Commerce Clause claim, concluding that the district court properly applied "[t]he second tier of dormant Commerce Clause analysis[,] the *Pike* test," rather than the first tier, because the law "does not facially, or in its effect, discriminate against interstate commerce or out-of-state economic interests," but "is wholly silent as to commerce or economic interests, both in and out of Virginia." *Id.* at 468-69 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)). (App. at 25a-26a.) The court also noted that Hurlbert had not appealed and thus had "waived any challenge to" "how the [district] court undertook the *Pike* analysis." *Id.* at 469-70. (App. at 27a.)

The heart of this petition, and of the Fourth Circuit's analysis, is that court's treatment of petitioners' Privileges and Immunities claims. In holding that petitioners had failed to identify any protected privilege that was being infringed, the court of appeals recognized that "states are permitted to distinguish between residents and nonresidents so

long as those distinctions do not 'hinder the formation, the purpose, or the development of a single Union of those States'" by abridging "privileges and immunities bearing upon the vitality of the Nation as a single entity." *Id.* at 462-63 (emphasis and internal quotation marks omitted) (quoting *Baldwin*, 436 U.S. at 383). (App. at 13a-14a.) The Court observed that petitioners asserted a number of "rights," but that only two of them touched on fundamental rights as identified by this Court: "the right to access courts and the right to pursue a common calling." *Id.* at 463. (App. at 14a.) The former, asserted only by McBurney, was rejected because the right claimed "is something much different than any court access right previously recognized," because the law does not "speak[ ] to the [petitioners'] ability to file a proceeding in any court or otherwise enforce a legal right within Virginia" and the "Privileges and Immunities Clause is not a mechanism for pre-lawsuit discovery." *Id.* at 463 n.3, 467. (App. at 14a n.3, 22a-23a.)

In rejecting petitioner Hurlbert's unique Privileges and Immunities claim—that the law abridged his right to pursue a common calling in Virginia on "terms of substantial equality" with Virginia residents—the Fourth Circuit again concluded that the law just does not regulate in any sense that implicates the Privileges and Immunities Clause. *Id.* at 464-65. (App. at 16a-18a.) Nothing prohibits Hurlbert from pursuing a common calling. The court reasoned that the law "limits one method by which Hurlbert may carry out his business and

thus has an 'incidental effect' on his common calling in Virginia," but "does not implicate Hurlbert's right to pursue a common calling." *Id.* at 465. (App. at 18a.)

The Fourth Circuit held that the other alleged privileges and immunities that petitioners jointly asserted, namely the right to "'equal access to information'" along with their "'ability to pursue their economic interests on equal footing,'" are not fundamental rights protected by the Privileges and Immunities Clause at all. *Id.* at 463, 465-67 (App. at 14a, 23a.) As for the right to pursue their economic interests on equal footing, the Fourth Circuit explained that no case had identified such a "novel generic right," and held that, insofar as this right is protected by the Privileges and Immunities Clause, it is protected under the common calling and access to courts principles, neither of which were offended by the Virginia law. *Id.* at 467 (citation omitted). (App. at 23a.)

The Fourth Circuit avoided a meaningful circuit split by distinguishing *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006), observing "the specific right that Lee identified is not one previously recognized by the Supreme Court, or any other court, as an activity within the scope of the Privileges and Immunities Clause." *McBurney*, 667 F.3d at 465. (App. at 19a.) Moreover, *Lee* only recognized this right of equal access to information for non-residents seeking "'to engage in the political process with regard to matters of both national political and economic importance,'" that is, access to information sought "to advance the

interests of other citizens or the nation as a whole, or that is of political or economic importance." *Id.* (quoting *Lee*, 454 F.3d at 199). (App. at 19a.) Because petitioners, on the other hand, sought "information of [only] personal import"—McBurney to determine whether he had a legal claim against a Virginia agency and Hurlbert to fulfill his private contract for hire—the court of appeals held their claims of entitlement to information not to be embraced in "*Lee*'s rationale." *Id.* at 465-66. (App. at 19a-20a.) The Fourth Circuit also declined to read into the Privileges and Immunities Clause "a 'broad right of access to information'" that is "grounded in 'the First Amendment's guarantees of free speech and free press,'" reasoning that the two clauses protect different rights. *Id.* at 466. (App. at 20a-21a.)

Finally, the Fourth Circuit rejected the additional right petitioner McBurney appended to the "right to equal access to information" claim—"his '[right] to advocate for his interests and the interests of others similarly situated'"—for the same reasons identified for rejecting the equal access to information and equal access to courts claims and also because petitioner McBurney had plead that he was requesting information "on his own behalf" "to advance *his own* interests," not those of others. *Id*. at 463, 466-67. (App. at 14a, 21a-22a.)

SUMMARY OF ARGUMENT

The Fourth Circuit's Privileges and Immunities holdings in this case do not conflict with the holding in *Lee v. Minner*, nor with any decision of this Court. Nor is there any support in the history of the Privileges and Immunities Clause or in this Court's precedents for recognizing a positive right to have state officials provide a non-resident with that state's public records on equal terms with a resident. Recognition of such a "privilege" would cast a cloud of uncertainty over the constitutionality of all state and local government services that are tied to state or local residency-status. Finally, the Virginia law being challenged does not regulate commerce at all, but only Virginia's provision of its own government services. And even if it did, the Commonwealth of Virginia, as a participant in the market for state public records, is entitled to choose with whom and on what terms it deals.

REASONS FOR DENYING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE THIRD CIRCUIT'S DECISION IN *LEE*.

Contrary to petitioners' assertions, the Third Circuit recognized no right that the Fourth Circuit rejected, but recognized only a non-citizen's right to obtain public documents that are sought in order to engage in the political process on matters of national

political and economic importance. In *Lee v. Minner*, Lee, a writer who "regularly publishe[d] articles on [alleged predatory practices of banks and other financial services companies and on the regulation of these entities] in print media and online sources," "requested records . . . regarding Delaware's decision to join a nationwide settlement . . . resolving an investigation into [a company's] deceptive lending practices." 458 F.3d at 195-196. Lee's request was denied on the ground that he was not a citizen of Delaware, and thus not entitled under Delaware law to obtain records under its FOIA law, which, unlike Virginia's, provided no right to public records for members of the media. *Id.* at 195-96 n.1; *cf.* Va. Code Ann. § 2.2-3704(A). Lee asserted that this restriction infringed "his right to pursue his 'common calling' as a journalist and . . . his right to 'engage in the political process with regard to matters of political and economic importance.'" *Id.* at 198. The Third Circuit elected not to resolve the plaintiff's common calling claim, but instead concluded that "the right to 'engage in the political process with regard to matters of national political and economic importance' . . . is protected under the Privileges and Immunities Clause." *Id.* at 199.

The Third Circuit reasoned that "political advocacy regarding matters of national interest or interests common between the states plays an important role in furthering a 'vital national economy' and 'vindicat[ing] individual and societal rights.'" *Id.* at 200 (quoting *Tolchin v. Supreme Court of New*

Jersey, 111 F.3d 1099, 1111 (3d Cir. 1997)). And "[e]ffective advocacy and participation in the political process . . . require access to information." *Id.* The Third Circuit thus concluded that "access to public records is a right protected by the Privileges and Immunities Clause." *Id.* The Court concluded that the burden on this right was substantial "[b]ecause noncitizens are precluded from obtaining any FOIA information, at any time, for any reason," *id.* and that the "citizens-only provision" bears little—if any—relationship to" the "'substantial reason'" offered for it: "to 'define the political community and strengthen the bond between citizens and their government.'" *Id.* at 200-01 (citation omitted). Accordingly, the Third Circuit held that Delaware's citizens-only provision violates "the Privileges and Immunities Clause of Article IV." *Id.* at 201.

Petitioners' claimed rights are a far cry from those asserted in *Lee*. The Third Circuit decision involved denial to a non-resident journalist of access to public records involving a nationwide settlement with a financial institution; the Fourth Circuit decision involved denial of records relating to the child-support claims of a non-resident father considering whether to pursue claims against a state agency and of tax assessment records relating to certain Virginia parcels sought by a purveyor for-hire of land records. The public records that petitioners were denied are not related to any matter of general or national concern, but are only of private legal and economic interest to the requesters, and were not

sought to inform the public, pursue any public interest, or engage in the political process. *See McBurney*, 667 F.3d at 465-66. (App. at 21a-22a.) In sum, the Third and Fourth Circuits have not both considered a claim that the "right to 'engage in the political process with regard to matters of political and economic importance'" was denied, and thus are not, and could not be, in conflict as to its existence. *Lee*, 458 F.3d at 198. Because of the factual distinctions drawn by the Fourth Circuit, this case is not a good vehicle for considering *Lee*.

Since *Lee*, no court has given its holding that the Privileges and Immunities Clause's prohibits citizenship discrimination on matters of access to public records the broad reading urged by petitioners nor has any court relied upon its holding to strike down a state FOIA restriction. In fact, the only decision to consider *Lee* in the context of such a privileges and immunities challenge found *Lee* and *McBurney* to be in harmony. *See Jones v. City of Memphis*, No. 10-2776, ___ F. Supp. 2d ___, 2012 U.S. Dist. LEXIS 51026, at *22-23, *38; 2012 WL 1228181, at *7-8, *13 (W.D. Tenn. Apr. 11, 2012) (following *McBurney* to hold that the plaintiff had failed to allege infringement of the fundamental right identified by *Lee*). In sum, there is no reason to believe that any conflict exists between the decisions of the Third and Fourth Circuits, or that the decisions will undermine the uniform application of the Privileges and Immunities Clause. Nor is there any other reason to grant a petition for writ of certiorari.

II. THE FOURTH CIRCUIT CORRECTLY CONCLUDED THAT THERE IS NO JURISPRUDENTIAL SUPPORT FOR THE AHISTORICAL CLAIM THAT ACCESS TO STATE PUBLIC RECORDS IS A PRIVILEGE OR IMMUNITY OF STATE CITIZENSHIP.

On the merits of the privileges and immunities claims, the Fourth Circuit's decision was right as a matter of historical understanding, Supreme Court precedent, and sensible policy.

A. The Historical Record Does Not Support Petitioners' Novel Claim that Not Being Afforded, on Request, Another State's Public Records Violates Their Privileges or Immunities.

Article IV's protection of Privileges and Immunities has its source in Article IV of the Articles of Confederation. *Baldwin*, 436 U.S. at 379 & n.17. The Articles provided:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all

> the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restrictions shall be laid by any State, on the property of the United States, or either of them.

Articles of Confederation, art. IV, cl. 1. In the place of this rather perplexing provision, *see* THE FEDERALIST No. 42, at 285-86 (James Madison) (J. Cooke ed., 1961), the Constitution provides the concise statement that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1.

The agreed purpose of this provision was to remove from non-residents "'the disabilities of alienage,'" *Baldwin*, 436 U.S. at 380-81 & n.19 (quoting *Paul*, 75 U.S. (8 Wall.) at 180), a set of legal restrictions known to the common law and imposed upon foreign citizens by virtue of their foreign status. 2 William Blackstone, *Blackstone's Commentaries on the Laws of England* 371-74 (photo. reprint) (St. George Tucker ed., 1803) (listing prohibitions on ownership of real property, inherited or transmitting an inheritance, working in certain trades and imposition of special commercial taxes). The first federal case construing the rights protected by the Privileges and

Immunities Clause, *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (Case No. 3,230), described the rights protected as being "confined" to "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." *Id.* at 552. However, the provision does not require a state "to extend to the citizens of all the other states the same advantages as are secured to their own citizens" especially with regard to "regulating the use of the common property of the citizens of such state." *Id.*

Lack of access to public records upon request was not a disability of alienage under the common law, nor has the right of such access, "at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign," as neither the states nor the federal government provided citizens general access to public records until the last third of the twentieth century. *Id.*; *see* 5 U.S.C. § 552; Pub. L. No. 89-554 (Sept. 6, 1966); 1967 Ark. Acts 93; 1957 Tenn. Pub. Acts 285; 1968 Va. Acts 479; *cf.* David C. Vladeck, *Access and Dissemination of Information: Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 Tex. L. Rev. 1787, 1795-96 (2008) (describing the federal government's enactment of its own freedom of information laws in 1966 as "truly an experiment in

open government" and noting that, "[a]t the time of its passage, only two countries—Sweden and Finland—had open record laws resembling" the federal FOIA). To the extent there was a common law right to physically inspect and copy public records, *see Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 n.7 (1978), it 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.

Finally, the claimed right to have government officials identify and provide responsive public records upon request is not embraced in the list of privileges and immunities identified by Justice Washington in *Corfield*: the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal." 6 F. Cas. at 552; *see also*, *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871) (providing a similar listing of rights). Recognition of an Article IV privilege to demand public records would require the Court to take leave of any historical understanding of what counts as "fundamental" for purposes of the Privileges and Immunities Clause.

B. Petitioners' Alleged Privilege, to Commandeer Other State's Officials to Provide Public Records at or Below Cost, Is Not Sufficiently Basic to the Livelihood of the Nation or Fundamental Under This Court's Precedents.

Furthermore, the right asserted finds no support in this Court's case law. Despite acknowledging a shifting of the theoretical foundation for evaluating whether a claimed right was in fact a privilege or immunity, *Baldwin*, 436 U.S. at 382-83, this Court's precedents have consistently hewed to the view that, in some circumstances, "state citizenship or residency may . . . be used by a State to distinguish among persons." *Id.* at 383. "Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States." *Id.*; *see Paul*, 75 U.S. (8 Wall.) at 180 ("Special privileges enjoyed by citizens in their own States are not secured in other States by this provision."). The Court has also consistently maintained that not just any benefit is a privilege or immunity, but that "[o]nly 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," "must the State treat all citizens, resident and nonresident, equally." *Baldwin*, 436 U.S. at 383,

388; *see Corfield*, 6 F. Cas. at 552 (opining that the protected rights were limited to "those privileges and immunities which are, in their nature, fundamental"). And the protected activities have notably been commercial in nature, as "the Privileges and Immunities Clause was intended to create a national economic union." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279-80 (1985).

Accordingly, the Court has never held that a state's restriction on a non-citizen's political rights violated the Privileges and Immunities Clause. *Baldwin*, 436 U.S. at 383 (citing *Dunn v. Blumstein*, 405 U.S. 330 (1972) (citizens-only voting) and *Kanapaux v. Ellisor*, 419 U.S. 891 (1974) (citizens-only elected officials)). Nor has it held that any of the 'personal' rights enumerated in the first Eight Amendments were protected by the Privileges and Immunities Clause. *See* 2 Donald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 12.7, at 335 (4th ed. 2007) ("[W]hether a right is sufficiently fundamental to be protected by the [Privileges and Immunities] clause should not be confused with a determination of whether an activity constitutes a fundamental right so as to require strict judicial scrutiny under the due process and equal protection clauses."). And even if the Privileges and Immunities Clause were thought to selectively incorporate protection for political advocacy, it would be incongruous to hold that the Privileges and Immunities Clause protects a non-resident's right to obtain information from state government on equal footing as residents when the First Amendment does not guarantee that right to

anyone, even members of the press. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion) ("'There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. . . . The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.'" (quoting Potter Stewart, *Or of the Press*, 26 Hastings L. J. 631, 636 (1975))).

Even where a recognized right has been burdened by non-provision of some state government service, this Court has accepted those restrictions provided the right itself is not destroyed. For a State need not "always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do." *Baldwin*, 436 U.S. at 383 (citing, *e.g.*, *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 560-62 (1920)); *see also Martinez v. Bynum*, 461 U.S. 321, 328 (1983) (holding that "[a] bona fide residence requirement . . . furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents" and thus that local public schools need not offer the same tuition rates to non-resident students as resident students); *Starns v. Malkerson*, 401 U.S. 985 (1971) (summarily affirming bona fide residence requirement for in-state tuition rate at state university).

Recurring to this Court's precedents regarding the Privileges and Immunities Clause's protections, it is apparent that the Fourth Circuit faithfully applied settled law. For there is no protected 'privilege' to every means by which a citizen of a state may

"secur[e] any number of personal, economic, and political interests." (Pet. at 15.) Rather, the recognized privileges and immunities are few and defined: the right to travel interstate, *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969); to pursue a "common calling within the State" free from "unreasonable burdens" not borne by residents; to "own[ ] and dispos[e] of privately held property within the State"; to "access . . . the courts of the State," *Baldwin*, 436 U.S. at 383; and to procure on substantially equal terms "the general medical care available within [a State.]" *Doe v. Bolton*, 410 U.S. 179, 200 (1973). While these rights may prove useful in "securing any number of personal, economic, and political interests," it does not follow, nor has it ever been previously suggested, that any means provided by a State to aid its residents in the pursuit of those interests must be afforded to non-residents. And even where the protected privilege is plainly restricted, the restriction will be invalidated only if it "is not closely related to the advancement of a substantial state interest," *Friedman*, 487 U.S. at 65, a question neither the district court nor Fourth Circuit had occasion to reach.

Besides asserting highly abstract rights never recognized by this Court or any other, petitioners also claim that the Virginia law violates well-recognized rights, such as the right to access the courts and to pursue a common calling. However, it is plain that the Fourth Circuit properly held that these were not infringed. The right to access the courts of the State,

"to sue and defend in the courts," *Chambers v. Baltimore & Ohio Ry. Co.*, 207 U.S. 142, 148 (1907), is precisely that: the right "to institute actions," *Cole v. Cunningham*, 133 U.S. 107, 114 (1890); or "to maintain actions in the courts of the State," *Ward*, 79 U.S. (12 Wall.), 79 U.S. (12 Wall.) at 430, and to do so "upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens." *Eggen*, 252 U.S. at 562. By not providing, upon the petitioners' request, certain Virginia public records, the Commonwealth has not "close[d] the doors of the courts" to petitioners, *Chambers*, 207 U.S. at 157 (Harlan, J., dissenting), for they are free to bring a suit under the same terms applicable to citizens. Petitioners' apparent desire to use FOIA requests as a means of pre-suit discovery does not make that statute part and parcel of the Virginia court system for enforcing one's rights.

As for petitioner Hurlbert's common calling claim, even assuming that providing to clients desired state government records related to real estate is a common calling, the Virginia law is not a professional or commercial regulation at all, but "a regulation of the internal affairs of a State." *Blake v. McClung*, 172 U.S. 239, 256 (1898). Furthermore, it is unquestioned that Hurlbert is free to ply his trade *in Virginia*, personally inspecting and copying real estate records as well as buying and selling such records in Virginia. The Virginia residency limitation simply prevents

him from requiring Virginia officials to employ themselves in making profitable his business model by rendering nugatory the costs inherent in Hurlbert's decision to live elsewhere.

In sum, as was said of "Montana elk," general "[e]quality in access to [common property of a state] is not basic to the maintenance and well-being of the Union." *Baldwin*, 436 U.S. at 388. And recognition of such a novel right—to have the government provide information on request—would invite a flood of litigation as to its contours and inspire suits asserting rights to every other state-provided means of "securing any number of personal, economic, and political interests" that are presently limited to its citizenry.

C. Petitioners' Claimed Privilege Would Undermine Our Federal System and Practically Prohibit All States from Providing a Wide Variety of Services That They Currently Afford Exclusively to Their Citizens.

The benefits that States provide, be it in government loans, subsidies, or services, exclusively to their citizens to enable them to more effectively and fully pursue their legal, political, and economic interests are many. Accepting petitioners' understanding of the scope of the Privileges and Immunities protections would call into question that ability and, by virtue of each state's limited resources,

the continued availability of the benefit to anyone. Granting review would begin a lengthy process of defining a novel right without defined limits in a way that undermines interests of clarity and uniformity.

III. THE FOURTH CIRCUIT CORRECTLY CONCLUDED THAT VIRGINIA'S FOIA STATUTE DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE AND, EVEN IF IT DID, IT SURVIVES DORMANT COMMERCE CLAUSE REVIEW BECAUSE THE STATE, IN PROVIDING PUBLIC RECORDS, IS ACTING AS A MARKET PARTICIPANT.

Ignoring this Court's case law on dormant Commerce Clause review of state and local provision of governmental services, petitioners urge this Court to conclude that the Fourth Circuit erred in not applying "the 'virtually per se rule of invalidity'" to the citizenship limitation. (Pet. at 22.) Petitioners claim that the provision "discriminates against out-of-state economic interests *both* facially and in effect." (Pet. at 23.) Because the citizenship limitation is not a regulation regulating commerce at all, the Fourth Circuit correctly held that it does not run afoul of the dormant Commerce Clause. Alternatively, even if it is viewed as a regulation of commerce, the state, in limiting the right to procure Virginia public records to citizens (and members of the media) would be acting as a market participant, and thus

is utterly exempt from dormant Commerce Clause scrutiny.

The "negative implication" of the Commerce Clause, *Dep't of Revenue of Kentucky v. Davis*, 553 U.S. 328, 337 (2008), prohibits States from "erect[ing] barriers to interstate trade," *Dennis v. Higgins*, 498 U.S. 439, 446 (1991) (internal quotation marks omitted), so as to prevent "economic Balkanization," while allowing for "a degree of local autonomy." *Davis*, 553 U.S. at 338. This Court applies a "'virtually *per se* rule of invalidity'" to "'regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) and *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988), respectively); *accord Davis*, 553 U.S. at 338. Plainly discriminatory laws are upheld only if "the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming*, 502 U.S. at 454. In nearly all cases raising dormant Commerce Clause challenges, "[t]he crucial inquiry . . . must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia*, 437 U.S. at 624. That is especially so here because petitioners did not

challenge the district court's finding that the law survived *Pike* scrutiny. *See Pike*, 397 U.S. at 142.

As this Court has recently reiterated, a distinction affecting interstate commerce is only impermissible if it is "discrimination for the forbidden purpose" of economic protectionism. *Davis*, 553 U.S. at 338. And the effect of the law must be to impede the flow of interstate commerce generally, for the "Commerce Clause does not protect 'the particular structure or methods of operation' of a market," *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344 (2007) (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978)), or "particular interstate firms." *Exxon Corp.*, 437 U.S. at 127-28. The Court has repeatedly cautioned that state and local laws which, in regulating the provision of state and local government services, also incidentally burden interstate commerce do not thereby discriminate against interstate commerce. *See Davis*, 553 U.S. at 339-41 (declaring that "a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors"). An animating concern for this deferential approach is that the alternative "'would lead to unprecedented and unbounded interference by the courts with state and local government.'" *Id.* (quoting *United Haulers*, 550 U.S. at 343).

Independently, an exception to the Commerce Clause applies in favor of states acting as "market participants," not "market regulators." *Davis*, 553 U.S. at 339; *see, e.g.*, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). In such a capacity, States may "exercis[e] the right to favor its own citizens over others" in the purchase or sale of goods or services. *Hughes*, 426 U.S. at 810; *accord Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999); *see, e.g.*, *Reeves, Inc. v. Stake*, 447 U.S. 429, 430-33, 438-39 n.12, 446-47 (1980) (noting that States, when acting as market participants, "enjoy[ ] the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases" (quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940)) and holding that South Dakota's "citizens-first" policy on the sale of cement produced by a state-owned and -operated cement plant was protected from dormant Commerce Clause invalidation by the "exemption for marketplace participation" by states). Flatly, "'[w]hen a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause.'" *See Davis*, 553 U.S. at 339 (quoting *White v. Massachusetts Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 208 (1983)); *see also South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984).

The stated purpose of the Virginia law is to "ensure[ ] the people of the Commonwealth ready access to public records in the custody of a public

body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government." Va. Code Ann. § 2.2-3700(B). And the challenged section plainly is designed to further this purpose by not only allowing citizens of the Commonwealth broad access to public records created by their officials, but also to "representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth." Va. Code Ann. § 2.2-3704(A). That section is part of the Administration of State Government subtitle, the Transaction of Public Business part, and a part of the much larger Chapter entitled Virginia Freedom of Information Act, which sets out in painstaking detail the type of information available and protected from disclosure under the act and the process for obtaining that information, including provisions for judicial enforcement. *See* Va. Code Ann. § 2.2-3700 through -3714.

As the Fourth Circuit held, the plain purpose of this scheme is not to discriminatorily burden out-of-state economic interests and favor in-state economic interests, but instead "reflect[s] the essential and patently unobjectionable purpose of state government —to serve the citizens of the State." *Reeves, Inc.*, 447 U.S. at 442. Thus, even if the public records

themselves, like the drivers' information in *Reno v. Condon*, 528 U.S. 141, 148 (2000), are considered to be "article[s] of commerce," although not widely sold in commerce, the regulation at issue does not discriminate against interstate commerce as such. Rather, it merely seeks to provide Virginia citizens (and others through the media) information about their government and, at the same time, prevent state offices from becoming public information desks that occasionally serve the citizens of the Commonwealth.

CONCLUSION

For reasons stated above, the Petition for a Writ of Certiorari should be DENIED.

Respectfully submitted,

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August 29, 2012