Record No. 11-1099

In the United States Court of Appeals
for the Fourth Circuit

MARK J. MCBURNEY and ROGER W. HURLBERT,

Plaintiffs-Appellants,

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

JOINT RESPONSE BRIEF

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April 18, 2011

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Nos. 11-1099 Caption: Mark J. McBurney v. Nathaniel L. Young, Jr.

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(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES X NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

I certify that on April 18, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Stephen R. McCullough April 18, 2011
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INTRODUCTION

The Virginia Freedom of Information Act ("FOIA") was designed to inform and educate Virginians about the operations of their government. Therefore, the State limited the scope of its application to Virginia citizens. In attacking this limitation on disclosure, the plaintiffs seek to expand the sweep of the Privileges and Immunities Clause and the Commerce Clause far beyond what is justified either by their historical purposes or by the jurisprudence of the United States Supreme Court. Neither Clause applies or is infringed by Virginia's limitation on FOIA disclosures to its own citizens.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331, to entertain a complaint under 42 U.S.C. § 1983. This Court has appellate jurisdiction to review the final order of the district court under 28 U.S.C. § 1291.

The district court entered a final order on January 21, 2011, dismissing the lawsuit. J.A. 103. The plaintiffs noted their appeal on February 1, 2011. J.A. 123-124. The appeal is timely.

STATEMENT OF THE ISSUES

1. Does the citizens-only provision of FOIA violate the Privileges and Immunities Clause of Article IV?

2. Does the citizens-only provision of FOIA violate the dormant Commerce Clause?

STATEMENT OF THE CASE

Mark J. McBurney and Roger W. Hurlbert filed a complaint in the United States District Court for the Eastern District of Virginia, Richmond Division, under 42 U.S.C. § 1983, alleging violations of their Constitutional rights. J.A. 8-21. Specifically, the plaintiffs allege that the restriction found in Virginia's Freedom of Information Act limiting disclosures to "citizens of the Commonwealth" violated the Privileges and Immunities Clause of Article IV of the United States Constitution. J.A. 15-17. Hurlbert also alleged that this limitation violated the Commerce Clause as applied to him. J.A. 18-19. The plaintiffs asked for declaratory and injunctive relief, J.A. 19, and further requested a preliminary injunction. J.A. 30. The defendants are Nathaniel L. Young, Jr., the Deputy Commissioner and Director of the Virginia Division of Child Support Enforcement and the Director of the Real

Estate Assessment Division in Henrico County, Virginia, currently Thomas C. Little. J.A. 10.

Initially, the district court dismissed the case for lack of standing. J.A. 106. This Court reversed, concluding that McBurney and Hurlbert had standing. *McBurney v. Cuccinelli*, 616 F.3d 393, 404-05 (4th Cir. 2010).[1] Judge Gregory separately concurred, writing that the citizens-only provision infringed on Hurlbert's right to practice a common calling. *Id*. at 405-07.

On remand, after considering additional briefing and the argument of counsel, the district court granted the defendants' cross-motions for summary judgment. J.A. 103-120. The court concluded that Hurlbert is engaged in a common calling, but that the citizens-only restriction "does not constitute discrimination pertaining to a common calling." J.A. 111. The court observed that the statute's effect on Hurlbert's ability to practice his common calling is merely incidental. J.A. 111. The court further held that a right of "access to information" is not a fundamental right protected by the Clause. Rather, it is a

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[1] The Court also affirmed the dismissal of one of the plaintiffs, Professor Bonnie Stewart, and the dismissal of one of the defendants, the Attorney General of Virginia. *Id.* at 400-02.

statutory right of recent origin. J.A. 113. The court also rejected the plaintiffs' assertions that McBurney's right of "access to courts" was implicated by the citizens-only restriction on FOIA disclosures, and that the right to "advocate for one's own interest" and to "pursue economic interests" as framed by the plaintiffs' were not fundamental rights protected by the Clause. J.A. 114-15. Because the court found that no fundamental right was burdened by Virginia law, it declined to reach the question of whether the State had offered a sufficient justification for imposing a burden on the exercise of a fundamental right. J.A. 117.

The court further held that the citizens-only privilege does not violate the dormant Commerce Clause. In doing so, the court found that this was not a protectionist measure. J.A. 119-20. The purpose of the citizens-only restriction "is not to protect an in-state business, but, instead, is to hold government officials accountable and prevent secrecy in government . . . . While the law may have some incidental impact on out-of-state business, the goal is not to favor Virginia business over non-Virginia business." J.A. 120.

STATEMENT OF FACTS

I. MCBURNEY'S FOIA REQUEST.

McBurney resided in Virginia from 1987 to 2000. J.A. 10. He currently is a citizen of Rhode Island. J.A. 33. He fathered a son, Cal, with his wife, Lore Ethel Mills, in 1990. J.A. 33. In 2002, Mills and McBurney divorced. J.A. 10, 33. Initially, Cal resided with his mother in Virginia and McBurney paid child support. J.A. 10, 33. Later, Mills and McBurney decided Cal would move to Australia to be with his father. J.A. 10-11, 34.

In March of 2006, McBurney and Mills reached a "private agreement," outside of the court system, whereby McBurney would cease paying child support once Cal arrived in Australia. Instead, Mills would be paying child support. J.A. 10, 34. Mills breached the agreement. J.A. 11, 34.

Seeking relief, McBurney turned to the Virginia Division of Child Support Enforcement (DCSE) to file a petition for a change in child support and custody. J.A. 11. McBurney alleges that DCSE botched the child support filing. J.A. 12, 34. Due to the delay, Mills was not

obligated to pay child support until nine months after McBurney asked DCSE to file the application on his behalf. J.A. 11, 34-35.

In late 2007, McBurney moved from Australia to Rhode Island. J.A. 35. In April of 2008, he mailed a letter from Rhode Island requesting documents under the "FOIA/Privacy Act" requesting, among other items, "emails, notes, files, memos, reports, letters, policies, opinions, or any other document of any type" regarding him, his application for child support, or his ex-wife's application for child support. J.A. 39. In response, DCSE informed him that that the FOIA request would not be honored because he is "not a citizen of the Commonwealth of Virginia." J.A. 42. DCSE noted in the same letter that the information he requested "cannot be sent to you under the Freedom of Information Act . . . because the information is confidential and is protected under the Virginia Code Section 63.2-102 and 63.2-103."

On May 16, 2008, McBurney sent a second letter, this time using a Virginia address, requesting essentially the same items. J.A. 43-44. On May 23, 2008, Nathaniel L. Young, Jr., the Deputy Commissioner and Director of Child Support Enforcement, denied the request. Young

stated "[o]ur records indicate that you are not a citizen of the Commonwealth of Virginia. Therefore, you are not eligible to obtain information under the Virginia Freedom of Information Act." J.A. 45. The letter further informed McBurney that he might be entitled to receive "personal information" under the Government Data Collection and Dissemination Practices Act. J.A. 45. McBurney has received extensive documents relating to his child support case under that statute. J.A. 36-37.

II. HURLBERT'S FOIA REQUEST.

Roger Hurlbert is a California citizen and the owner of Sage Information Services. J.A. 12. Hurlbert requests documents from real property assessment officials through state FOIA statutes and sells the information to private clients. J.A. 12, 46-47. When Hurlbert inquired about obtaining Henrico County tax records over the telephone, an official from the Real Estate Assessment Division denied his request and informed him that records under FOIA were available only to Virginia citizens. J.A. 12, 47. Hurlbert stated in an affidavit that this response dissuaded him from making further requests in Henrico County. J.A. 47.

SUMMARY OF THE ARGUMENT

Historically, citizens of another State who traveled to or conducted business in another sovereign State were subject to certain legal disabilities owing to their status as aliens. In forging a Union out of separate states, the framers sought through the Privileges and Immunities Clause to remove these legal disabilities. The Clause, however, applies only to certain "fundamental" rights. Those include the right to purchase and dispose of property, the right to travel to a sister state, the right to have access to the courts, and to practice a common calling in a sister State. As to other rights that are not fundamental, the states are free to, and frequently do, favor their own residents over non-residents. For example, states favor their own residents with favorable in-state tuition rates, and with other programs and services that are not bestowed on non-residents who do not live in that State. By the same token, states may favor their own citizens with respect to FOIA disclosures.

The rights deemed fundamental under the Privileges and Immunities Clause are not the same as the rights deemed fundamental for purposes of the Equal Protection Clause or substantive due process.

For example, voting and political expression are "fundamental" rights for purposes of equal protection, but not under the Privileges and Immunities Clause. The plaintiffs attempt to blur those lines.

The United States Supreme Court has never deemed as fundamental under the Clause an unqualified right to have the agents of a State of the Union copy and forward, at cost, the government records to the residents of another State. The recent origin of FOIA statutes belies the notion that such rights are fundamental. Although a common law right of access to records existed, that right was not of a constitutional stature and it differed from FOIA rights.

In an effort to turn statutory FOIA rights into fundamental constitutional rights, the plaintiffs attempt to shoehorn FOIA rights into existing categories deemed fundamental under the Clause. The plaintiffs contend that Hurlbert's right to practice a common calling is implicated by Virginia's refusal to provide him with government records. Although the Supreme Court has recognized a common calling as a right protected by the Clause, Hurlbert is asking this Court for a dramatic expansion of what constitutes a common calling. The right that is protected is a right to carry out a trade in a sister state, such as

practicing law or fishing. What the Court has never recognized as fundamental is an obligation by one State to furnish someone who carries out his trade *elsewhere* with the raw materials necessary to carry out that trade. States provide all manner of assistance to their own residents, such as low interest loans or technical assistance for small businesses, or assistance to farmers or fishermen. A State is not required to extend such assistance to persons who practice their trade in *other* states. The plaintiffs' expansive conception of what constitutes a common calling would needlessly endanger a wide variety of government programs.

The plaintiffs also claim that Virginia's restriction on FOIA disclosures to its own citizens interferes with a right of "access to information" or a right of "advocacy." There is no basis in history or precedent to sweep such rights into those deemed fundamental for purposes of the Privileges and Immunities Clause. The Third Circuit held, in a case dealing with a legal settlement that was of "national political and economic importance," that restricting access to FOIA records to a journalist who wished to inform the public about this settlement violated the Clause. Assuming this is a proper conception of

the Clause, that is plainly not the situation here. Neither plaintiff seeks to inform the public about a matter of importance to the national economy. Rather, they are pursuing their own private interests. Therefore, the Third Circuit decision is distinguishable. Furthermore, the information the plaintiffs seek is available to the plaintiffs, even if it is not available in the most convenient form.

Virginia's FOIA restriction does not violate a right of access to the courts. The plaintiffs here have access to the courts on the same terms as Virginians. The jurisprudence dealing with a "meaningful" access to courts applies to inmates and forms no part of the Privileges and Immunities Clause analysis. Under the guise of a claim of access to courts, the plaintiffs in actuality are seeking a right of pre-trial discovery. It is hard to believe, given the common law's absence of discovery, that the Clause was designed to achieve such a purpose.

Finally, the specific rights recognized as fundamental under the Clause, such as the right to pursue a trade or buy and sell property, do not include an amorphous right to pursue all economic interests. Recognizing an across-the-board right to pursue economic interests would needlessly imperil worthwhile state programs.

Were this Court to recognize that statutorily created FOIA rights are protected by the Constitution, State and local governments would still be able to limit disclosures to their own residents. Even when fundamental rights are implicated, a State can draw distinctions between citizens and non-citizens if the distinction is closely related to a substantial state interest. States have a substantial interest in avoiding the burden that would be placed on State and local government officials who would be diverted from their primary duties and pressed into serving as FOIA responders for the requests that would come in from all 50 states.

The Court also should reject the plaintiffs' claim that the dormant Commerce Clause is violated when a State provides government services to its own citizens. Government services are not Commerce. Should a State choose to provide low cost loans to small businesses, or help to farmers, it can do so without implicating Commerce Clause scrutiny. Applying Commerce Clause analysis to such programs would endanger a host of governmental activities. Moreover, the purpose of FOIA, to educate citizens and help them hold the government accountable, has nothing to do with protectionism, the animating force

of Commerce Clause jurisprudence. Finally, even if Commerce Clause scrutiny applies, the State is free under the market participant doctrine to choose with whom it will transact business. Therefore, a State can transact business with its own residents if it pleases.

ARGUMENT

Virginia Code § 2.2-3704(A) provides that the Freedom of Information Act is limited to "citizens of the Commonwealth." In addition to citizens of the Commonwealth, the law requires the disclosure of records to "representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth." *Id.*

The issues before the Court are legal ones, which this Court reviews *de novo*. *In re Morrissey*, 168 F.3d 134, 137 (4th Cir. 1999). In determining whether this provision is constitutional, it is settled law that "State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared." *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944). The plaintiffs must "shoulder [ ] the burden of overcoming that presumption." *Pharm. Research & Mfrs. of America v. Walsh*, 538 U.S. 644, 661-62 (2003).

I. LIMITING DISCLOSURE OF VIRGINIA PUBLIC RECORDS TO VIRGINIANS DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV.

A. The Privileges and Immunities Clause was designed to remove the disabilities of alienage and to protect a limited class of specific "fundamental" rights.

Upon declaring independence from the British Crown, Virginia became a sovereign entity, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991), with the "Full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." *Declaration of Independence* (capitalization original). Indeed, the Articles of Confederation confirmed that the Commonwealth retained "its sovereignty, freedom, and independence, which is not by this confederation expressly delegated to the United States, in Congress assembled." *Articles of Confederation*, art. II. In other words, Virginia and the other former colonies became independent states like France and Germany. This created a potential problem for the new nation. At common law, foreign citizens were subject to "the disabilities of alienage." *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 380 (1978) (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868)).

As Blackstone noted, an alien was not permitted to purchase, convey, or hold real property for his own use, nor was he able to inherit or transmit by inheritance such property; aliens were subject to special commercial taxes; and they were at times forbidden from working in certain trades. 2 William Blackstone, *Blackstone's Commentaries on the Laws of England* 371-74 (St. George Tucker ed., Philadelphia, Birch & Small 1803) (photo. reprint 1969). Such restrictions, of course, are destructive of commerce and undermine the process of forging a single union out of a disparate group of States.

To address this problem, when the Articles of Confederation were replaced with our current constitution, the framers added Article IV, Section 2, which provides that the "Citizens of Each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[2]

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[2] The Privileges and Immunities Clause is based on Article IV of the Articles of Confederation, which provided as follows:

"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

> The primary purpose of this clause, like the clauses between which it is located – those relating to full faith and credit and to interstate extradition of fugitives from justice – was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation.

Toomer v. Witsell, 334 U.S. 385, 395 (1948).

"It has not been suggested, however, that state citizenship or residency may never be used by a State to distinguish among persons." *Baldwin*, 436 U.S. at 383.[3] Only those activities "'sufficiently basic to the livelihood of the Nation'" are protected by the Clause. *Id.* *See also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279-82 (1985) (noting that the Privileges and Immunities Clause only applies to those

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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 restriction shall be laid by any State, on the property of the United States, or either of them."

[3] "[T]he terms 'resident' and 'citizen' are 'essentially interchangeable' for purposes of analysis of most cases under the Privileges and Immunities Clause." *United Bldg. & Const. Trades Council v. City of Camden*, 465 U.S. 208, 216 (1984).

privileges and immunities which are "fundamental."); *Parnell v. Supreme Court of Appeals of W. Va*, 110 F.3d 1077, 1080 (4th Cir. 1997) (only "fundamental right[s]" are implicated by the Clause). Other "distinctions between residents and non-residents merely reflect the fact that this is a Nation composed of individual States." *Baldwin*, 436 U.S. at 383. In other words, the scope of the Privileges and Immunities Clause is not absolute; it does not require each State to treat its own citizens and out-of-state citizens identically in every regard. Furthermore, "if the challenged restriction deprives nonresidents of a protected privilege," the restriction is invalidated only if it "is not closely related to the advancement of a substantial state interest." *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64 (1988).

What, then, is a fundamental right for purposes of the Clause? In an early influential decision, *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), Justice Washington, sitting as a Circuit Justice, observed that the Clause protects "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 551. Similarly, in *Ward v. Maryland*, 79 U.S. (12 Wall) 418, 430 (1870), the Court concluded that the Privileges and Immunities Clause

> secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.

Recent decisions adhere to this outline. The Supreme Court has concluded that practicing a trade or profession in a sister State is a fundamental privilege that is protected by the Clause. *See Toomer*, 334 U.S. at 396-97 (non-resident fishermen could not be required to shrimp in South Carolina on terms much more onerous than South Carolinians); *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (striking hiring preference for residents of Alaska). Access to the courts also constitutes such a fundamental privilege, *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 562 (1920), as is the ownership and disposition of privately held property within the State, *Blake v. McClung*, 172 U.S. 239, 252-53 (1898), and obtaining access to services, including medical services like

abortion, within the territory of a State, *Doe v. Bolton*, 410 U.S. 179, 200 (1973).

In contrast, big-game recreational hunting is not a fundamental privilege within the intendment of the Clause. *Baldwin*, 436 U.S. at 388. Therefore, a State may favor its own residents in that setting. *Id.* Public employment is not a fundamental privilege for purposes of the Clause. *Salem Blue Collar Workers Ass'n v. City of Salem*, 33 F.3d 265, 270 (3rd Cir. 1994). A city also may favor its own residents for handicapped parking permits, because such permits do not implicate a privilege that is "basic to the livelihood of the Nation." *Lai v. City of New York*, 991 F. Supp. 362, 365, *aff'd* 163 F.3d 729, 730 (2nd Cir. 1998).

The question before the Court is whether a statutorily created right to at or below cost access to government records is a fundamental privilege for purposes of the Clause.

B. Rights that are "fundamental" for substantive due process or equal protection are not the same as the "fundamental" rights protected by the Privileges and Immunities Clause.

Before analyzing the plaintiffs' specific claims, it is worth noting that a right can be "fundamental" for substantive due process or equal

protection purposes without being "fundamental" for purposes of the Privileges and Immunities Clause. *See* 2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law (4th Ed. 2007) ("whether 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 . . . . "). Therefore, the Privileges and Immunities Clause is not an obstacle to a State restricting to its own residents certain adjuncts of citizenship, including the vote and holding elective office. *Piper*, 470 U.S. at 282 n.13. *See also Baldwin*, 436 U.S. at 383. Similarly, the State can impose a residency requirement for tuition-free public education. *Martinez v. Bynum*, 461 U.S. 321 (1983). This is an important point, because the plaintiffs attempt to invoke "fundamental" rights such as rights of political expression, which have nothing to do with the Privileges and Immunities Clause.

There is no doubt that FOIA statutes strengthen certain Constitutionally protected fundamental rights, including the right to vote and rights protected under the First Amendment, including

political advocacy and participation. But FOIA rights are not themselves fundamental rights, even if voting and advocacy are, and, moreover, what is fundamental under the Privileges and Immunities Clause is not the same as what is fundamental for substantive due process or equal protection. The Court should decline the plaintiffs' invitation to conflate these concepts.

C. Neither history nor precedent supports the notion that statutorily created FOIA rights are fundamental under the Privileges and Immunities Clause.

1. FOIA is a modern statutory creation, not a deeply rooted fundamental right.

FOIA statutes are of relatively recent origin. Virginia did not enact its freedom of information act until 1968. *See* 1968 Va. Acts ch. 479. Similarly, the federal government did not pass a freedom of information act until 1966. *See* Pub. L. 89–554 (Sept. 6, 1966). The recent vintage of these statutes undermines the notion that they are so "basic to the livelihood of the Nation" that they should trigger the protections of the Clause. *Baldwin*, 436 U.S. at 388. They certainly are not rights that "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" such as the right to

purchase property, to travel or to gain access to the courts. *Corfield*, 6 F. Cas. at 551. Indeed, FOIA statutes could be repealed at any time.

2. Common law rules governing government records are distinct from modern FOIA statutes.

The plaintiffs, ignoring the fact that FOIA statutes are modern creations that could repealed at will, boldly but ahistorically maintain that "it was not believed that FOIA created a new right." Pl. Br. 24-25. In support of this contention, the plaintiffs cherry pick a few citations from the Congressional record during the debates over the passage of the federal FOIA. Pl. Br. 24-25. Of course, the very reason FOIA statutes had to be enacted was because, as a report of a Senate Subcommittee observed, "in the absence of a general or specific act of Congress creating a clear right to inspect . . . there is no enforceable legal right in public or press to inspect any federal non-judicial record." Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, *United States Senate Freedom of Information Act Source Book: Legislative Materials, Cases*, Articles 2-3 (1974) (quoting Harold L. Cross, writing for the Committee on Freedom of Information of the American Society of Newspaper Editors). It was a

statute, and not the Privileges and Immunities Clause, that created an unqualified right of access to non-judicial records. *Id.*

It should also be noted that the common law right was the right to inspect documents, not to have a government official locate, retrieve and copy records at cost. *See Nixon v. Warner Communs., Inc.,* 435 U.S. 589, 597 & n.7 (1978) (noting the recognition by the courts of a "general right to inspect and copy public records and documents."). Parenthetically, Virginia law satisfies the common law right of inspection. McBurney and Hurlbert can inspect and copy the records they are interested in: McBurney can do so on the web, and Hurlbert can travel to Henrico County and examine and copy real estate records to his heart's content. But this common law right is not a constitutional one and nothing in the jurisprudence of the United States Supreme Court suggests otherwise.

The authority offered by the plaintiffs does not support the notion that FOIA rights are fundamental under the Privileges and Immunities Clause. For example, the plaintiffs quote a Congressman as stating that Congress's purpose in enacting FOIA was to "insure a fundamental political right." Pl. Br. 24 (quoting 112 Cong. Rec. 13,007 (1966)

(statement of Rep. Benjamin Rosenthal). Ensuring the widespread availability of information about the government strengthens accountability and political expression, but as noted above these fundamental political rights have nothing to do with those protected by the Privileges and Immunities Clause.

The plaintiffs also claim that FOIA rights must be fundamental because every State and the federal government have enacted an open government or sunshine law. Pl. Br. at 25. As a matter of constitutional theory, legislative action by the states or congress cannot raise or lower the constitutional floor with regard to what is fundamental under the Clause. If all 50 states began to refuse to allow nonresident lawyers to practice law because of their nonresidency, or refused to allow nonresident fishermen to fish, that would not alter the fact that such laws are impermissible under the Clause. Conversely, if every State conferred rights of recreational big game hunting, that would not elevate that right to one of Constitutional dimension. Every State provides for workers' compensation and unemployment insurance, but that does not elevate those rights to the level of "fundamental" rights for purposes of the Privileges and Immunities Clause. Nothing in

two centuries of jurisprudence suggests that the states can alter what is "fundamental" for purposes of the Clause through a legislative enactment.

3. FOIA cannot be said to be "basic to the livelihood of the Nation."

All of the fundamental rights protected by the Clause, including employment, access to courts, ownership and disposition of property, truly are "basic to the livelihood of the Nation." *Baldwin*, 436 U.S. at 383. Should one State begin to favor its own residents in such matters, the Union as a whole would be undermined: States whose residents faced discrimination in other states would begin to retaliate against non-citizens, and the well-being of the Nation as a whole would suffer. The same cannot be said of FOIA statutes. Virginia's citizens only restriction has been the law for decades and not a hint of retaliation has emerged from any other State.

D. The Court should reject the plaintiffs' attempts to rewrite and dramatically expand the fundamental rights protected by the Privileges and Immunities Clause.

The plaintiffs contend that the citizens-only provision infringes on (1) the right to practice a profession; (2) a right of "access to

information" and to "political advocacy"; (3) the right of "access to courts" and (4) a right to pursue economic interests. These contentions are without merit.

1. Although the Privileges and Immunities Clause protects the right to pursue a common calling, it does not require a state to facilitate the exercise of that calling by providing government services to non-residents on the same terms as it provides to its own residents.

The right to pursue a common calling is a "privilege" that is protected by the Clause. *See, e.g.*, *Baldwin*, 436 U.S. at 383. The common calling that is protected by the Clause means the right of a non-citizen to practice a trade or profession in a sister State. For example, in *Toomer*, the plaintiff wished to fish in South Carolina, but was hindered from doing so because of much higher fees imposed on non-residents. 334 U.S. at 403. Similarly in *Piper*, 470 U.S. at 276, an attorney wished to practice law in New Hampshire but was precluded from doing so because she was not a resident of the State.

The plaintiffs attempt to recast this established right into something new: a right to have the government furnish a non-resident who carries out a common calling in a different State with the raw materials for their trade on the same terms as the State does with its

own residents. It is readily apparent that none of the cases from the United States Supreme Court have recognized such a right. Thus, the plaintiffs' analogy to *Toomer* fails. The plaintiffs in *Toomer* were not asking South Carolina government officials to recover the fish for them, and ship the fish at cost to Georgia. Rather, they sought a license to retrieve their own fish in South Carolina's coastal waters. *Toomer*, 334 U.S. at 403. Here, Hurlbert wants State officials to retrieve records for him and send them to a distant State for his convenience.

State governments offer any number of programs that assist residents of a State in the carrying out of a trade or business, and those programs generally are limited to the residents of that State. A State government can provide assistance to its own citizens about farming and limit that assistance to farmers in that State without infringing on the Clause.[4] Governments can provide low cost loans or technical

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[4] *See, e.g.,* Virginia Code § 23-132.3(A) ("The Virginia Cooperative Extension Service shall provide *the people of the Commonwealth* with information and knowledge on subjects related to agriculture, including horticulture and silviculture, agribusiness, home exonomics, community resource development, 4-H Clubs, and subjects relating thereto, through instruction and the dissemination of useful and practical information through demonstrations, conferences, courses, workshops, publications, meetings and mass media.") (emphasis added).

assistance to small businesses, and limit that assistance to businesses that are located in Virginia.[5] Perhaps small businesses in North Carolina or farmers in Maryland would like to benefit from these services, which would help them carry out their common calling. Nothing under the Clause, however, obligates a State to provide the raw materials or services helpful to a citizen of another State who is carrying out his common calling in a sister State. The plaintiffs' attempt to broadly redefine what constitutes carrying out a common calling calls into question these programs.

Suppose, for example, instead of increased license fees for non-residents, South Carolina in the *Toomer* case had provided low cost loans to its resident fisherman. A person who carries out the common calling of banking or brokering loans would not have that calling impaired under the Clause if South Carolina refused to make loans available to this broker for out-of-state fishermen. Or suppose in *Piper* that instead of forbidding non-residents from practicing law in New Hampshire, the State instead provided free access to resident lawyers of

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[5] *See, e.g.,* Virginia Code § 2.2-902(A)(2) (Department of Business Assistance to "[d]evelop and implement programs to assist small businesses *in the Commonwealth.*") (emphasis added).

legal research software. A lawyer practicing in California courts would have no right to demand access to the software. Such government programs certainly facilitate the exercise of a common calling and may place local fisherman or lawyers at an advantage relative to non-residents. But that is not the kind of discrimination the Privileges and Immunities Clause seeks to forbid.

Hurlbert is free to buy or sell a product in Virginia. What Hurlbert is asking is for government officials from Virginia to provide him, a non-resident, with a service the State has chosen to limit to its own residents, so that he can then practice his common calling from California. Hurlbert's unique invocation of the Clause distinguishes his situation from all other "common callings" heretofore given protection under the Clause.

Moreover, this Court's cases recognize that the Clause does not require a State to place non-residents and residents on terms of absolute equality in the exercise of a common calling. In *Parnell*, the plaintiff attacked a rule of court on the ground that it violated the Privileges and Immunities Clause. The rule precluded attorneys from sponsoring *pro hac vice* applications if the attorneys did not maintain a

physical office in the State "from which the 'responsible local attorney' practices law on a daily basis." *Id.* at 1079. This Court held that this rule did not violate the Privileges and Immunities Clause on two grounds. First, the Court held that rule did not amount to a residency classification because it applied to residents and non-resident attorneys alike. *Id.* at 1081. Second, the Court held that "sponsoring *pro hac vice* applicants is not a fundamental component of the right to practice law for purposes of the Privileges and Immunities law." *Id.* Plainly, not everything that touches upon or is associated with a common calling is protected by the Privileges and Immunities Clause.

2. The plaintiffs misconstrue the purpose of the Privileges and Immunities Clause, which is not designed to protect a sweeping right of "access to information" or a right of "advocacy."

The plaintiffs complain that Virginia's citizens-only restriction infringes on a heretofore unrecognized right to information or a right to "advocate for one's interests." Pl. Br. 22. That argument is devoid of any historical foundation and rests on confusion concerning what is fundamental under the Clause. No case from the United States Supreme Court recognizes as fundamental under the Clause a sweeping right of advocacy or information.

The plaintiffs rely heavily on *Lee v. Minner*, 458 F.3d 194 (3rd Cir. 2006). Lee was a resident of New York who sought records from the Delaware Attorney General relating to Delaware's decision to join a nationwide settlement with a firm accused of deceptive lending practices. *Id.* at 195. Lee requested the information in connection with a publication that focused on predatory lending. *Id.* Delaware refused, citing its statutory restriction on disclosures to non-residents. *Id.* at 195-96.

The Third Circuit concluded that Delaware's citizens-only FOIA provision violated the Privileges and Immunities Clause. The Court 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. The Court further reasoned that "[e]ffective advocacy and participation in the political process . . . require access to information." *Id.* Because the citizens-only FOIA provision burdened "access to public records – and the political advocacy enabled by such access," Delaware's restriction violated the Privileges and Immunities Clause. *Id.*

Lee is readily distinguishable. The right at stake in *Lee* was the right to "engage in the political process *with regard to matters of national political and economic importance*." *Id.* at 199 (emphasis added). The nationwide settlement plainly fell within that category. *Id*. at 198. McBurney, in contrast, is engaged in a private dispute about his personal child support case and Hurlbert simply wants to make money. Assuming the privilege identified in *Lee* is protected by the Clause, as applied to these plaintiffs – and "as applied challenges are the basic building blocks of constitutional adjudication," *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 301 (4th Cir. 2009) (citations omitted) – the privilege identified by the Third Circuit is plainly not present. Nothing in the complaint or the affidavits provided by the plaintiffs can be marshaled to support the contention that McBurney or Hurlbert are engaged in the political process on a matter of national importance.

Under Virginia Code § 2.2-3704(A), representatives of media outlets that broadcast or have circulation in the Commonwealth also can gain access to such records. Therefore, the scenario at issue in *Lee* is not likely to present itself in Virginia. Indeed, amicus for the

plaintiffs, despite representing a broad array of news organizations, fail to cite a single example of Virginia's FOIA law actually thwarting an out-of-state news story.

McBurney seeks to dodge the obvious distinction between *Lee* and the claims at issue here by arguing that his private dispute with a state agency actually involves a matter of "national importance." Pl. Br. at 26. That is so, he contends, because his FOIA request asked for treaties, statutes, legislation and regulations. That fact is irrelevant. McBurney asked for these records not because he wished to inform a broad audience about a matter of national importance but because he wished to pursue his own private dispute.

McBurney also claims that he faces a "special burden" on his "ability to take part in an interstate dialogue regarding state child support practices that directly affect his life and income." Pl. Br. at 27. Nowhere in the complaint did McBurney claim to be engaged in such a "dialogue." Nor did he ever allege an interest in or practice of advocating for others.

At any rate, that complaint is groundless for a separate reason that further distinguishes this case from *Lee*: the state policies at issue

are available online and can be keyword searched. Therefore, it is hard to fathom how McBurney's ability to "dialogue" or his right to "information" have been harmed at all.[6] Assuming a fundamental right of information or government-facilitated advocacy is protected by the Clause, there is no reason a State cannot make that information available through various means, so long as it is, in fact, available.

Although *Lee* can be distinguished, in the defendants' view the case, which of course is not binding on this Court, was wrongly decided. The premise at the heart of the Court's opinion is mistaken. Nothing in the history of the Clause or the jurisprudence of the United States Supreme Court supports the proposition that the Privileges and Immunities Clause was adopted to protect the right of a non-resident to "engage the *political process* with regard to matters of national political and economic importance." *Id.* at 198 (emphasis added). The Clause was designed to ensure that a citizen who ventured into a sister State could buy and sell goods and services, practice a trade, and obtain legal redress on terms of substantial equality with a State's own residents. *See, e.g., Guy v. City of Baltimore*, 100 U.S. 434, 439-40 (1879) (Clause

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[6] *See* http://townhall.virginia.gov/L/ViewGDoc.cfm?gdid=874

protects "equality of commercial privileges"). The Supreme Court has never extended the Privileges and Immunities Clause into the realm of advocacy or "engaging the political process." The First Amendment is the Constitutional provision that protects political advocacy, not the Privileges and Immunities Clause.

3. The citizens-only provision does not hamper access to courts.

The plaintiffs claim that the citizens-only provision denies them access to the courts. Pl. Br. 41. Although the rule eventually was relaxed, the common law of England for a time "barred all aliens from the courts." *Ex parte Kawato*, 317 U.S. 69, 72 (1942). Consistent with the Clause's underlying purpose of removing such disabilities, the Supreme Court has held that access to courts is a fundamental privilege protected by the Clause. *Eggen*, 252 U.S. at 562 (emphasis added).

The first obstacle to this claim is the fact that lawsuits filed by non-Virginians are treated exactly the same as lawsuits filed by Virginians. The plaintiffs are not denied access to the courts at all. To overcome this obstacle, the plaintiffs must once again seek to import concepts from a separate area of the Constitution for engrafting onto the Privileges and Immunities Clause. The plaintiffs argue that their

"access to the courts must be 'meaningful access.'" Pl. Br. 28, citing *Lewis v. Casey*, 518 U.S. 343, 351 (1996). *Lewis*, however, involves the duty of a State to ensure that "*inmate* access to the courts is adequate, effective and meaningful." *Id.* at 822 (emphasis added). Inmates present a special problem: they have certain rights, including, for example, the right to habeas corpus, but because they are incarcerated, they are not like ordinary litigants who can investigate their legal claims. This particular situation, the Court has held, requires the State to take certain steps to ensure that inmates' rights can be vindicated. *See Bounds v. Smith*, 430 U.S. 817, 821-25 (1977). *Lewis*, and cases that precede it, do not cite or discuss the Privileges and Immunities Clause and are simply irrelevant to the present context.

At any rate, the Privileges and Immunities Clause does not require that residents and non-residents be treated exactly the same with respect to access to courts. What the Constitution requires is that non-residents be "given access to the courts of the state 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 (emphasis added). Virginia does provide such access. Surprisingly, faced with this explicit but unfavorable precedent, the plaintiffs simply ignore it. This Court, on the other hand, is bound by *Eggen*.

The plaintiffs' claim boils down to a contention that the Privileges and Immunities Clause requires a State to provide an investigative tool for potential lawsuits against itself to non-residents on the same terms as to its own citizens. This proposition is quite distinct from denying access to the courts. Facilitating fact-gathering to assess whether a lawsuit should be filed is not the same thing as denying "meaningful access to the Courts."

It is hard to believe the Privileges and Immunities Clause was designed to help a litigant obtain information in advance of filing a lawsuit against a State. At common law, discovery procedures were unknown. As Professor Wigmore colorfully wrote in discussing discovery at common law:

> To require the disclosure to an adversary of the evidence that is to be produced, would be repugnant to all sportsmanlike instincts. Thus the common law permitted a litigant to reserve his evidential resources (tactics, documents, witnesses) until the final moment, marshaling them at the trial before his surprised and dismayed

> antagonist. Such was the spirit of the common law; and such in part it still is. It did not defend or condone trickery and deception; but it did regard the concealment of one's evidential resources and the preservation of the opponent's defenseless ignorance as a fair and irreproachable accompaniment of the game of litigation.

See 6 Wigmore, Discovery § 1845 at 490 (3d ed. 1940).

Furthermore, at the time the Privileges and Immunities Clause was ratified, sovereign immunity protections were much broader than they are today. There is no evidence that the Clause was ratified to help out-of-state citizens obtain pre-filing information to facilitate litigation against a State.

If the plaintiffs are correct in their expansive definition of what access to the courts means under the Clause, the logical consequence of their argument is that Legal Aid programs are constitutionally infirm unless a State offers them to non-residents as well as residents. Providing a lawyer to a resident but not a non-resident is at least as great of a litigation disadvantage to nonresidents as pre-filing access to certain documents that may prove relevant in litigation. This Court should hew to existing and binding precedent and reject the plaintiffs' attempt to redefine what access to the courts means under the Privileges and Immunities Clause.

4. The Privileges and Immunities Clause does not secure the amorphous pursuit of "economic interests."

Urging this Court to go where no court has gone before, the plaintiffs claim a protected right to pursue "their economic interests" "on equal footing with Virginia residents." Pl. Br. 29. But the cases the plaintiffs cite involve the right to practice a common calling in a sister state, a well-established right protected by the Clause. *See United Bldg.*, 465 U.S. at 219 (construction contractors); *Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264, 268 (4th Cir. 1993) (fishermen).

Were this Court to adopt such a broad conception of the privileges protected by the Clause, the results for the State would be highly problematic. The States engage in many programs designed to assist their residents to pursue economic interests. For example, a State could choose to provide subsidized loans or expert assistance from a state agency designed to help in-state small businesses or minority businesses. Similarly, a State could create a variety of funds designed to make its own residents economically whole, and deny access to such funds to non-residents. *See Ostrager v. State Board of Control*, 160 Cal. Rptr. 317, 319 (Cal. Ct. App. 1979) ("the privileges and immunities clause is not violated by requiring applicants for compensation under

the California victims of crime statute to be Californians"); *Davis v. D.C. Dep't of Consumer & Reg. Affairs*, 561 A.2d 169, 171 (D.C. 1989) (restricting eligibility for benefits from a fund to compensate victims of automobile accidents did not violate the Clause); *Law v. Maercklein*, 292 N.W.2d 86, 90-91 (N.D. 1980) (same). A State could also provide information relating to the pursuit of such economic interests to its own residents but not to non-residents. These practices would be needlessly endangered were the Court to embrace a fundamental right so vague as the pursuit of an "economic interest." The defendants urge the Court to adhere to established jurisprudence and refrain from inviting litigation over amorphous claims of "economic interests" protected by the Clause. The economic interests that are protected by the Clause are well-defined and well known.[7]

Ultimately, the plaintiffs' argument seems to be that McBurney has an "economic interest" in seeking compensation from DCSE for failure to properly handle his child support claim. Pl. Br. 30. As noted

[7] Economic interests that are protected under the Clause include practicing a trade or profession in a sister State; *Toomer*, 334 U.S. at 396-97; the ownership and disposition of privately held property within the State, *Blake*, 172 U.S. at 252-53, and obtaining access to products and services within the territory of a State, *Doe v. Bolton*, 410 U.S. at 200.

above, he can seek legal redress by filing suit, and his suit, including the right to obtain discovery of relevant documents, will be treated the same as a suit by a non-Virginian.

E. State and local governments have a substantial state interest in limiting disclosure.

Assuming Virginia's citizens-only provision implicates a "fundamental" right, such discrimination between citizens and non-citizens is permissible if it is closely related to a substantial state interest. Virginia's distinction between citizens and non-citizens for FOIA purposes is closely related to such a substantial state interest. The stated purpose of Virginia's FOIA is to enable the citizens of Virginia to hold their elected representatives accountable. Virginia Code § 2.2-3700(B). Virginia has a compelling interest in providing efficient, timely, and effective services to its citizens. Responding to out-of-state FOIA requests frustrates these interests by consuming the time and resources that would otherwise be available for providing services to its own citizens. Public records are produced and maintained at public expense. Considerable time, effort, and resources are spent by public officials and public servants generating, maintaining, and retrieving public records. In essence, public records

are the property of the jurisdiction's citizens, held in trust for their benefit by the government. Virginia may conserve the public's treasure for the public's benefit.

The plaintiffs claim that providing records to non-citizens does not diminish a limited resource. Pl. Br. 41. It is true that proving copies of public records to non-citizens would not reduce the public records available to Virginians. But the plaintiffs identify the wrong resource that is being conserved by limiting access. The scarce resource at issue is the time and effort of public servants consumed by responding to FOIA requests.

Nor does the fact that the government can recoup its copying and administrative costs associated with complying with a FOIA request diminish its substantial interest. The Virginia General Assembly surely recognized the time spent responding to FOIA requests reduces the time Virginia public servants can spend engaged in other essential activities. This is a perfectly acceptable trade-off when the requestor is a member of Virginia's political community seeking to hold his elected officials accountable, but not when the requestor is neither a Virginia citizen nor a media representative.

III. THE CITIZENS-ONLY PROVISION DOES NOT INFRINGE ON THE COMMERCE CLAUSE.

A. The dormant Commerce Clause is not implicated by services a government provides to its own residents.

Mr. Hurlbert complains that the citizens-only provision constitutes a "per se" violation of the "dormant" aspect of the Commerce Clause. Pl. Br. 36.[8] In support of this assertion, he cites a variety of cases involving a state's regulation interstate commerce – that is, the buying and selling of goods. *See, e.g., Waste Mgmt. Holdings, Inc. v. Gilmore,* 252 F.3d 316, 333-34 (4th Cir. 2001) (interstate trash hauling); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (interstate business of liquor distribution and sales).

The argument should be rejected for three reasons. First, Virginia's FOIA statute quite plainly has nothing to do with economic protectionism, so the purpose underlying the dormant Commerce

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[8] The plaintiffs do not contend that the law is deficient under the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("[W]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."). Therefore, the Court need not address the issue. Moreover, the law easily satisfies this test.

Clause is not implicated. Second, the Commerce Clause is not implicated here because services that a government itself provides to its own citizens are not "articles of Commerce." Pl. Br. at 38 (quoting *City of Philadelphia*, 437 U.S. at 626-27). Finally, opening the door to per se invalidity of services a government itself provides to its own citizens would generate a host of lawsuits and would needlessly imperil worthwhile government programs.

Under the Articles of Confederation, the National Government lacked power to regulate commerce among the States, and "[b]ecause each State was free to adopt measures fostering its own local interests without regard to possible prejudice to nonresidents, . . . a 'conflict of *commercial regulations*, destructive to the harmony of the States' ensued." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997) (emphasis added) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring)). Over the years, "[t]he Commerce Clause[9] has accordingly been interpreted . . . not only as an authorization for congressional action, but also, even in the

[9] U.S. Const. art. I, § 8, cl. 3 (empowering Congress "[t]o regulate Commerce . . . among the several states").

absence of a conflicting federal statute, as a restriction on permissible state regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

When confronted with a dormant Commerce Clause challenge, "[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." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Although the plaintiffs state that the statute "discriminates against interstate commerce," Pl. Br. 36, that is quite plainly not the purpose of the statute. *See* Virginia Code § 2.2-3700 (stating that the purpose of FOIA is, among other things, "to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.").

As with the Privileges and Immunities Clause, the plaintiffs ignore the history and purpose of the Constitutional provision at issue. Virginia's FOIA statute is obviously not "*designed to benefit* in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988). The statute is

plainly "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *City of Philadelphia*, 437 U.S. at 624.

Services a government itself provides to its own residents have never been swept into Commerce Clause analysis. As the Court noted in *Kentucky Dep't of the Revenue v. Davis*, 553 U.S. 328, 341 (2008), "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." In *Davis*, the Court upheld state laws that allowed Kentucky residents to deduct the interest of Kentucky bonds from their state taxes, but did not allow the same deduction for the interest of bonds from other States. *Id.* at 342-43. All of the cases cited by the plaintiffs involve commerce, the buying and selling of goods. Pl. Br. 36-37.

The fact that FOIA may have some incidental effect on persons who practice an unusual trade outside of Virginia does not alter the Commerce Clause analysis. For example, Virginia may chose to limit the distribution of voter guides to its own citizens during an upcoming election. Collectors of political memorabilia, or political consulting

firms, might face the minor inconvenience of having to request a Virginian to produce the guide. This does not constitute an impermissible restriction on commerce any more than the FOIA restriction at issue here. The fact that an enterprising individual can make a profit by harnessing a government service does not render the government service "commerce" in the first place.

The plaintiffs' discussion of *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 334 (2007) and *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994) is simply irrelevant. Pl. Br. 43. Those cases dealt with government regulation of an article of commerce, namely, trash. The case at bar involves a government program or service that the government itself provides to its own residents; it has nothing to do with commerce.

A wide variety of government programs favor a state's own residents or resident businesses. For example, states provide in-state tuition for residents. States can provide assistance in a variety of ways, including low cost loans, to resident small businesses. That does not render these governmental programs subject to *per se* invalidity

under the Commerce Clause. Inviting such challenges would needlessly hamper a state's ability to exercise its police power in a way never contemplated by dormant Commerce Clause jurisprudence.

B. Assuming the dormant Commerce Clause applies, the market participant exception permits a State to transact exclusively with its own residents.

Even if the Commerce Clause applies here, the State's actions do not violate the dormant Commerce Clause because the State is acting as a market participant. If the State is a valid market participant, "the dormant Commerce Clause places no limitation on its activities." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984). This market participant exception "makes sense because the evil addressed by [the dormant Commerce Clause] – the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power . . . to favor their own citizens – is entirely absent where the States are buying and selling in the market." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999). *See also Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (South Dakota may limit sales from state-owned cement plant to state citizens).

Of course, Lexis or Westlaw may refuse to deal with any particular person who wishes to gain access to the information held by those companies. Similarly, "the State, like any private [company], has a right to select the parties with whom it will deal." *Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1111 (8th Cir. 1996) (citation omitted). A State can limit its "business partners" to in-State residents. *Id.* The fact that the State is a monopoly or nearly a monopoly does not alter the analysis. *Id.* Henrico County's public records are its property. Like South Dakota's concrete plant, the County expends the taxpayers' resources to produce and maintain the information resource contained in such records. *See Reeves*, 447 U.S. at 443-44. If the County (or State) chooses to enter the marketplace and sell these records (whether for profit or at cost), it may do so in a manner that discriminates against out-of-state purchasers. *See Reeves*, 447 U.S. at 446; *see also United Haulers*, 550 U.S. at 334 (upholding refuse flow control ordinance that required all locally produced waste to be sent to a publicly-owned landfill).

South-Central, 467 U.S. at 93, cited below by the plaintiffs, is irrelevant. In *South-Central*, a plurality of the Court held that Alaska

could not, under the Commerce Clause, condition the sale of state timber to private purchasers by requiring that the timber be processed within State prior to export. *Id.* at 98. The plurality found the processing requirement impermissible, because it constituted a "restriction[ ] on dispositions subsequent to the goods coming to rest in private hands." *Id.* Virginia imposes no restrictions on what is done with information once it is disclosed. Those who come to possess records are free to give or sell them to anyone they please. Thus, the type of "downstream regulation" that the plurality in *South-Central* found objectionable is not present here. Furthermore, *South-Central* expressly applied "more rigorous" Commerce Clause scrutiny because the case involved "foreign commerce" and restrictions on the resale of a "natural resource." *Id.* at 100. Neither of those elements is present here.

Public records are a resource that is the property of Virginia's citizens, held in trust by the various Virginia governments. As with state-owned timberland or fisheries, Virginia is at once a market participant and a trustee of its citizens' treasure. As with any other state-owned resource, these records may be disposed of in the manner

decided by Virginians, as expressed through their elected representatives. *Reeves*, 447 U.S. at 437. Virginia has elected to make its public records a resource available at cost to Virginians and largely unavailable to non-Virginians. That it has done so does not make it any less of a market participant.

CONCLUSION

For the reasons set forth above, the Judgment of the U.S. District Court for the Eastern District of Virginia should be affirmed**.**

ORAL ARGUMENT

The state defendants and the County defendant request oral argument. Oral argument will assist the court with the complex issues this case presents.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief has been prepared using fourteen point, proportionally spaced, serif typeface: Microsoft Word 2007, Century Schoolbook, 14 point.

2. Exclusive of the table of contents, table of authorities and the certificate of service, this brief contains 10,659 words.

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CERTIFICATE OF SERVICE

This is to certify that on April 18, 2011, I electronically filed the foregoing JOINT RESPONSE BRIEF with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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