UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MARK McBURNEY, *et al*.,	)	
	)	
Plaintiffs,	)	
v.	)	No. 3:09-cv-44-JRS
	)	
HON. ROBERT McDONNELL, Attorney General, Commonwealth of Virginia, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR A PRELIMINARY INJUNCTION AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND TO REMOVE THE ATTORNEY GENERAL AS DEFENDANT

Plaintiffs move this Court for a preliminary injunction declaring the citizens-only provision of the Virginia Freedom of Information Act, which restricts access to public records to "citizens" of the Commonwealth, unconstitutional and enjoining its enforcement. The Virginia Freedom of Information Act (FOIA) provides that "all public records shall be open to inspection and copying" but limits access to "citizens of the Commonwealth." Va. Code Ann. § 2.2-3704 (2008). Plaintiffs Mark McBurney and Roger Hurlbert separately requested documents pursuant to Virginia's FOIA. Mr. McBurney, a citizen of Rhode Island and a former citizen of Virginia, attempted to obtain records from the Division of Child Support Enforcement (DCSE) of the Virginia Department of Social Services. Mr. Hurlbert, a citizen of California and the owner of a California business, attempted to obtain real property assessment records from the Real Estate Assessor's Office of Henrico County, Virginia. Plaintiffs were denied access to these public records solely because they are not citizens of the Commonwealth.

In this Memorandum, Plaintiffs make three points:

First, the citizens-only provision of Virginia's FOIA is unconstitutional. To start with, it violates the Privileges and Immunities Clause of Article IV of the United States Constitution. *See* U.S. Const. art IV, § 2. The right of access to public information is a privilege and immunity safeguarded by Article IV. Indeed, government information is the lifeblood of the democratic process; without information, it is impossible to exercise the social, economic and political rights inherent in a participatory democracy. Virginia may not permit only Virginia citizens to access Virginia's *public* records, any more than it may exclude non-citizens from its courts; deny non-citizens access to its roads, parks, and natural resources; or forbid non-citizens from holding jobs in Virginia. Virginia's FOIA also impermissibly interferes with the ability of citizens of other states to do business and thus violates the dormant Commerce Clause. *See* U.S. Const. art I, § 8, cl. 3. Because the citizens-only provision of Virginia's FOIA violates Plaintiffs' constitutional rights, Plaintiffs respectfully request that the Court enter a preliminary injunction declaring the provision unconstitutional and enjoining its enforcement. Because the questions presented are legal ones, Plaintiffs request that the preliminary injunction proceedings be consolidated with the merits. *See* Fed. R. Civ. P. 65(a)(2).

Second, Plaintiff Mark McBurney has standing. Defendants refused to process Mr. McBurney's two FOIA requests solely because he is not a citizen of Virginia. Those refusals constitute injury under Article III, an injury that is traceable and would be redressed by the injunctive relief Plaintiffs seek in this action. Defendants' objection to Mr. McBurney's standing is also beside the point because there is no dispute that Mr. Hurlbert has standing to bring this constitutional challenge. *See Massachusetts v. EPA*, 549 U.S. 497, 518 (2008) (only one plaintiff needs to have standing).

Third: Attorney General McDonnell is a proper defendant and should not be dismissed. *Ex parte Young*, 209 U.S. 123 (1908), remains controlling on the issue of the party status of state attorneys general in actions for prospective injunctive relief. As in *Ex parte Young*, the Attorney General here is a proper defendant because he is responsible for rendering authoritative interpretations of the laws of the state. *Id.* at 157. For this reason, the Attorney General is a proper party and should not be dismissed. *See generally S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 332 (4th Cir. 2008) (dismissal warranted only "where the relationship between the state official sought to be enjoined and the enforcement of the state statute is significantly attenuated").

I. Factual and Statutory Background

A. Factual Background

1. *Plaintiff Mark McBurney's FOIA Requests*

Mark McBurney was a Virginia citizen from 1987 to 2000. *See* McBurney Decl. ¶ 3. For much of that time, Mr. McBurney lived abroad, serving as a Foreign Service Officer for the State Department. *Id.* He did, however, retain his Virginia citizenship and pay Virginia taxes. *Id.* In 1987, Mr. McBurney married Lore Ethel Mills in Virginia and a few years later the couple had a child, Cal Mills McBurney. Mr. McBurney and Ms. Mills divorced in 2002. *Id.* ¶ 4. A Virginia court awarded Ms. Mills full custody of Cal and directed Mr. McBurney to pay child support. *Id.* Ms. Mills and Cal continued to reside in Virginia while Mr. McBurney continued his career with the State Department, posted in New Zealand and then Australia. *Id.* When Mr. McBurney's Foreign Service tour ended in 2004, he resigned from the State Department but remained in Australia. *Id.*

In March 2006, Mr. McBurney and Ms. Mills agreed that Cal would move to Australia to live with Mr. McBurney. *Id.* ¶ 5. They did not ask the court to alter the custody or the child support order. *Id.* Instead, they agreed that, when Cal arrived in Australia, Mr. McBurney's child support obligation would end and Ms. Mills would assume a child support obligation. *Id.* Ms. Mills defaulted on their agreement. *Id.* ¶ 6. On July 7, 2006, Mr. McBurney, still residing in Australia, filed an application for child support with Virginia's Division of Child Support Enforcement (DCSE). *Id.*

Under Virginia law, once Mr. McBurney filed an application with DCSE, the agency was required to establish a child support obligation on the part of Ms. Mills and to enforce that obligation. *Id.*; *see also* Va. Code Ann. § 63.2-1904 (2008). Because Mr. McBurney and Ms. Mills had not sought a modification to the original child support order, that order was still in place in July 2006. Child support cannot be awarded retroactively and Ms. Mills could not be held liable for child support until after a petition was filed in court and she was so notified. Va. Code Ann. § 20-108 (2008). Because Mr. McBurney was living abroad, he elected to have DCSE file the petition on his behalf. McBurney Decl. ¶¶ 7-8. Through circumstances that are unclear, DCSE failed to file a petition in the correct court until April 1, 2007. *Id.* A hearing took place on June 1, 2007, with Mr. McBurney testifying by phone. *Id.* ¶ 8. On July 2, 2007, Fairfax Circuit Court issued an order deeming Ms. Mills' child support obligation to have started on April 1, 2007, with the filing of the child support petition. *Id.* This was nine months after Mr. McBurney had filed his request with DCSE and over a year after he had taken custody of Cal. *Id.*

To learn more about the DCSE's handling of his case and the extent to which it did or did not conform to DCSE policy, Mr. McBurney made two requests pursuant to the Virginia Freedom of Information Act to DCSE for "all emails, notes, files, memos, reports, policies, [and] opinions" pertaining to him, his son, his former wife, or his application for child support. *Id.* ¶ 11. He sent the first request by letter dated April 8, 2008 from his residence in Rhode Island. *Id.*; Exh. A. DCSE denied his request by letter dated April 11, 2008, stating, "You are not entitled to the information as you are not a Citizen of Commonwealth of Virginia." *Id.*; Exh. B.

Mr. McBurney then consulted with various organizations in Richmond which specialize in Freedom of Information issues and learned that Virginia selectively honors FOIA requests from non-citizens if the request is sent and postmarked from a Virginia address. *Id.* ¶ 12. Mr. McBurney sent a second request from an Alexandria, Virginia address by letter dated May 16, 2008. *Id.*; Exh. C. DCSE also denied this request, explaining "our 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." *Id.*; Exh. D. Mr. McBurney was told that he could request personal documents under another Virginia statute, which he did, but still he did not receive all the records that would have been responsive to his FOIA request. *Id.*

Mr. McBurney wants to obtain the requested documents because he believes DCSE mishandled his application and that the public documents he requested will shed light on what went wrong. *Id.* ¶ 15. Mr. McBurney intends to use this information to advocate for his interests and to see if there is an avenue available for him to be reimbursed. *Id.*

2. *Plaintiff Roger Hurlbert's FOIA Request*

Roger Hurlbert is the sole proprietor of Sage Information Systems, a company he formed in 1987. Hurlbert Decl., at ¶ 2. Clients hire Sage to obtain public documents from real property assessment officials. *Id.* ¶ 4. These documents are usually copies of computer readable databases of property ownership, valuations, land tenure, and land use. *Id.* Mr. Hurlbert is a citizen of California and operates Sage from California, but he requests documents from state agencies across the country, including from agencies in Virginia. State Freedom of Information statutes play an essential role in Mr. Hurlbert's ability to conduct business. *Id.*

Clients occasionally hire Sage to obtain records from assessors in Virginia, which Mr. Hurlbert does by making requests under Virginia's FOIA. *Id.* In June 2008, Sage was hired to obtain public records from the Real Estate Assessor's Office in Henrico County, Virginia. *Id.* ¶ 5. However, when Mr. Hurlbert called the Assessor's Office on June 5, 2008, he was told that he could not get the documents because he was not a citizen of the Commonwealth. *Id.* As a result, Mr. Hurlbert was unable to obtain the documents for his client, and he has been dissuaded from making further document requests in Henrico County. *Id.* ¶ 6.

B. Statutory Background: The Virginia Freedom of Information Act

The Virginia Freedom of Information Act was enacted by the Virginia General Assembly in 1968. Va. Code Ann. § 2.2-3700 *et seq*. (formerly Va. Code § 2.1-340); *see generally Taylor v. Worrell Enter.*, 409 S.E.2d 136, 142-43 (Va. 1991). It provides that "all public records shall be open to inspection and copying by any citizens of the Commonwealth" and directs that "[a]ccess 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." § 2.2-3704. The custodian of records "may require the requester to provide his name and legal address." *Id*.

The purpose of FOIA 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." § 2.2-3700. Virginia's FOIA states, "The affairs of government are not intended to be conducted in an atmosphere of secrecy . . . ." *Id*. As was explained by the Supreme Court of Virginia in *Taylor*:

> The General Assembly's implementation of an open government policy is realized by the Act itself. The General Assembly sought to ensure public access to governmental records and meetings, to avoid an "atmosphere of secrecy" in the conduct of government affairs, and to encourage resolution of disputes in these areas through agreement rather than litigation.

409 S.E.2d at 139. FOIA also states that its provisions "shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government." § 2.2-3700.

II. Summary of Argument

A. Plaintiffs' motion for a preliminary injunction should be granted. The citizens-only provision of the Virginia Freedom of Information Act, which requires that "[a]ccess to such records shall not be denied to *citizens* of the Commonwealth," is unconstitutional. Va. Code Ann. § 2.2-3704 (emphasis added). Virginia's FOIA violates both the Privileges and Immunities Clause of Article IV and the Commerce Clause of

Article I of the United States Constitution. U.S. Const. art IV, § 2; U.S. Const., art I, § 8, cl. 3.

Article IV's Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art IV, § 2. The Clause was intended to "fuse into one Nation a collection of independent, sovereign States," *Toomer v. Witsell*, 334 U.S. 385, 395 (1948), by "plac[ing] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) (quoting *Paul v. Virginia*, 75 U.S. 168, 180 (1868)). Because access to public information is "the hallmark of effective participation in democracy," the right of access to a state's public records is a right protected by the Privileges and Immunities Clause. *Lee v. Minner*, 458 F.3d 194, 200 (3d Cir. 2006) (striking down citizens-only provision of Delaware FOIA law). Virginia's citizens-only provision impermissibly burdens that right, as well as Mr. McBurney's right to seek the resolution of grievances and Mr. Hurlbert's right to participate in a common calling, both of which are rights inherent in a democratic system of government and are also protected by the Clause. *See, e.g., Supreme Court of New Hampshire v. Piper*, 470 U.S. at 280 (citing *Toomer*, 334 U.S. at 396); *Cole v. Cunningham*, 133 U.S. 107, 114 (1890).

There is no justification for the facial discrimination against out-of-state citizens embedded in Virginia's FOIA. Even Defendants' able counsel cannot conjure up a justification, let alone point to any official statement laying out a reason why Virginia's FOIA is restricted to Virginia citizens. This is no surprise. Public records are not a

scarce or wasting resource that a state may permissibly husband for its own citizens. To the contrary, the discrimination against non-citizens serves no purpose, let alone a substantial one, and therefore it should be struck down. Virginia's FOIA also violates the dormant Commerce Clause. By giving Virginia citizens preferred access to valuable Commonwealth records, Virginia discriminates against non-Virginia citizens in the conduct of interstate commerce.

In the absence of injunctive relief, Plaintiffs will suffer irreparable harm. On the other side of the ledger, granting an injunction will not harm Defendants. Vindication of constitutional rights is a public interest of the highest order, and directing that public records that would be readily available to citizens of Virginia be made available to Plaintiffs cannot cause injury; indeed, disclosure of public information would serve the avowed purpose of Virginia's FOIA law. Because Plaintiffs are certain to succeed on the merits, and the balance of hardships weighs decidedly in Plaintiffs' favor, the motion for a preliminary injunction should be granted.

B. Mr. McBurney has standing. The deprivation of a right of information constitutes injury-in-fact sufficient to confer standing. *FEC v. Akins*, 524 U.S. 11, 20 (1998). Mr. McBurney's injury took place when Virginia officials refused even to process his FOIA requests because of his status as a non-citizen of Virginia. Defendants' claim that under FOIA the records are not subject to disclosure is irrelevant; this is not an action to compel the production of records (an action that would be filed in state court), but is instead a challenge to the constitutionality of Virginia's citizens-only provision. This claim is justiciable, even if Mr. McBurney would not ultimately succeed in prying loose additional documents. *See generally Public Citizen v. Dep't of Justice*, 491 U.S.

440, 449-50 (1989). In any event, Defendants do not challenge Mr. Hurlbert's standing; therefore, their objection to Mr. McBurney's is irrelevant. *See Massachusetts*, 549 U.S. at 518.

C. The Attorney General is a proper party-defendant and should not be dismissed from this action. *Ex parte Young*, 209 U.S. 123 (1908), controls on the issue of the party-status of state attorneys general in actions for prospective injunctive relief. The Attorney General, sued in his official capacity, is a proper defendant because he has unique responsibility for the interpretation and execution of the laws of the State. *See id.* at 157. The Virginia Attorney General's official website emphasizes that among his "duties and powers" are advising state agencies, government officials, and the public about the interpretation and enforcement of state laws generally and FOIA specifically. Accordingly, under *Ex parte Young*, the Attorney General is a proper party-defendant and should not be dismissed.

III. Preliminary Injunction Standard

In determining whether to issue a preliminary injunction, courts in the Fourth Circuit apply the test set forth in *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co. Inc.*, 550 F.2d 189 (4th Cir. 1977). Under *Blackwelder*, the district court considers four factors: (1) the likelihood of irreparable harm to the plaintiff in the absence of injunctive relief; (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood the plaintiff will succeed on the merits; and (4) the public interest. *Id*. at 194-96. As explained below, each of these factors favors Plaintiffs. The Fourth Circuit has emphasized that a "District Court has no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he

is being denied a constitutional right." *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960). This is just such a case.[1]

IV. Argument

A. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF.

1. *Plaintiffs Will Succeed On Their Privileges and Immunities Clause Challenge to the Citizens-Only Provision of Virginia's FOIA.*

The citizens-only provision of Virginia's FOIA violates the Privileges and Immunities Clause in Article IV, Section 2, of the United States Constitution, which mandates, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." To invoke protection under this Clause, an out-of-state challenger must demonstrate that the law in question discriminates against out-of-state citizens as a class, either facially or by using a classification that is a proxy for out-of-state citizens. *See Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 67 (2003). Virginia's FOIA discriminates against out-of-state citizens on its face. Excepting representatives of media outlets, the statute grants access only to *citizens* of the Commonwealth. § 2.2-3704(A). Because Virginia's FOIA facially discriminates against *non-citizens* of the Commonwealth, the only question is whether this discrimination violates the Privileges and Immunities Clause.

The Supreme Court has fashioned a three-part test to determine whether a discriminatory state law violates the Privileges and Immunities Clause. First, a court examines whether the provision at issue "burdens one of those privileges and immunities

[1] If the Court determines that it is appropriate to consolidate consideration of Plaintiffs' request for a preliminary injunction with the merits, then the sole consideration for the Court is whether Plaintiffs are entitled to prevail on the merits. *See, e.g., Wilson v. CHAMPUS*, 65 F.3d 361, 364 (4th Cir. 1995).

protected by the clause." *United Bldg. & Constr. Trades Council v. Mayer of Camden*, 465 U.S. 208, 218 (1984). Second, if it does, then the burden shifts to the state to show that the law is justified. *Barnard v. Thorstenn*, 489 U.S. 546, 552 (1989). This burden is a heavy one rarely met. The state is required to demonstrate "a substantial reason for the difference in treatment," *id.* (quoting *Piper*, 470 U.S. at 284), and that the discrimination practiced against non-citizens bears "a substantial relationship to the State's objective." *Id.* Third, the state must also show that "non-citizens constitute a peculiar source of the evil at which the statute is aimed," *Toomer*, 334 U.S. at 398, and that it cannot achieve its objective through less restrictive means. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 69 (1988). The citizens-only provision of Virginia's FOIA cannot survive this review.

a. *The Citizens-Only Provision of Virginia's FOIA Burdens Fundamental Rights Protected by the Privileges and Immunities Clause.*

"[A]ccess to public records is a right protected by the Privileges and Immunities Clause." *Lee*, 458 F.3d at 200. As the Third Circuit explained in *Lee*, the right of access to information is fundamental because it is an instrumental right — a right that animates and makes effective other rights secured by the Constitution. *Id.* at 199-200. Access to public records enables Americans to exercise the right to engage in informed civic participation. *Id.* Among the rights secured by the Privileges and Immunities Clause are the right to engage in advocacy and to otherwise participate in a state's governing processes. *Id.* at 200 (holding that the right to engage in "advocacy enabled by" access to public records is at the core of the Clause's protection).

The principle that both citizens and non-citizens have a right to access a state's governing processes was recently underscored by the Third Circuit in *Lee*. *Lee* was a

challenge to Delaware's FOIA which, like Virginia's FOIA, contained a "citizens-only" provision that restricted access to public records to citizens of Delaware. *Id*. at 195-96. Mr. Lee is a journalist and consumer activist who was denied access to records concerning Delaware's decision to join a nationwide settlement in a deceptive lending case. *Id*. at 195. Mr. Lee argued that the denial of records rendered him unable to advocate effectively and unable to participate in Delaware's political process by offering informed objections to the settlement. *Id*. at 198. In ruling in Mr. Lee's favor, the court held that the right to advocate effectively and the right to participate in a state's political process are fundamental under the Privileges and Immunities Clause. *Id*. "No state is an island . . . and some events which take place in an individual state may be relevant to and have an impact upon" both the national government and other states. *Id*. Advocacy "plays an important role in furthering a vital national economy and vindicating individual and societal rights." *Id*. at 200. And because "effective advocacy and participation in the political process . . . require access to information," "access to public records is a right protected by the Privileges and Immunities Clause." *Id*. at 200.

Lee is important here because Mr. McBurney is confronted with the same dilemma Mr. Lee faced. Mr. Lee needed Delaware records to oppose Delaware's settlement of a case that had national impact. Mr. McBurney's wants to be able to advocate his interests effectively to resolve his child support dispute with a Virginia agency. Mr. McBurney has exactly the same interest in having these issues resolved as a citizen of Virginia, yet the citizens-only provision of Virginia's FOIA thwarts his ability to do so, just as Delaware's citizens-only restriction hobbled Mr. Lee's ability to object to Delaware's settlement.

The principle that non-citizens have a fundamental right to engage in state procedures for dispute resolution is confirmed by the long line of cases holding that "a state cannot forbid citizens of other States from suing in its courts." *Blake v. McClung*, 172 U.S. 239, 256 (1898); *see also Cole*, 133 U.S. at 114 (holding that citizens of one state shall "have the full use and benefits of the courts of [any other] state in the assertion of their legal rights"); *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907) (same). The ability to resolve disputes is an "essential" right because it is one of "the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the government of the Union was ordained and established." *Blake*, 172 U.S. at 256-57; *see also Canadian Northern Ry. v. Eggen*, 252 U.S. 553, 562 (1920) (observing that the "right to maintain actions in the courts is one of the fundamental privileges guaranteed and protected by the Constitution, and that this right must be given to non-citizens the same as to citizens, no more, no less, and without any restrictions or reservations that are not of equal application to citizens and non-citizens."); *Chambers*, 207 U.S. at 148 (same). Virginia's citizens-only provision does not measure up to that standard; instead, it denies non-citizens the ability to advocate their claims effectively.

Mr. Hurlbert's right to public records is also protected by the Privileges and Immunities Clause, not only for all of the reasons applicable to Mr. McBurney, but for yet an additional reason. Barring Mr. Hurlbert from obtaining records thwarts his ability to pursue a common calling, which is "one of the most fundamental of those privileges protected by the Clause." *Camden*, 465 U.S. at 218. States are forbidden from discriminating against "nonresidents seeking to ply their trade, practice their occupation,

or pursue a common calling within the state." *Hicklin*, 437 U.S. at 524. The Supreme Court "has repeatedly found that 'one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.'" *Piper*, 470 U.S. at 280 (citing *Toomer*, 334 U.S. at 396). The right to pursue a common calling is necessary to maintain the well-being of the Union because a core purpose of the Privileges and Immunities Clause is "to create a national economic unit." *Piper*, 470 U.S. at 279-80.

The right to access information is essential for Mr. Hurlbert to pursue his calling. Indeed, Sage Information, Mr. Hurlbert's business, was established to obtain records from states and local governments. Virginia's citizens-only provision deprives Mr. Hurlbert of the ability to do business on terms of substantial equality with Virginia citizens. If other states were to enact and enforce "citizen-only" provisions, Mr. Hurlbert's livelihood would be destroyed and Sage would be forced to shut its doors. Because the right to pursue a common calling requires access to information, Mr. Hurlbert's ability to use Virginia's FOIA is protected by Article IV's Privileges and Immunities Clause.

b. *Virginia Cannot Justify Burdening Fundamental Rights Protected by the Privileges and Immunities Clause.*

The Commonwealth must shoulder a heavy burden in justifying the citizens-only provision because "the purpose of [the Privileges and Immunities Clause] is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a *peculiar source of the evil at which the statute is aimed*." *Toomer*, 334 U.S. at 398 (emphasis added). The Commonwealth cannot meet this burden because the citizens-only provision of Virginia's FOIA addresses no "evil," let alone an

evil peculiar to residents of other states. Indeed, Defendants fail even to offer a theory as to why Virginia's FOIA discriminates against outsiders.

There is no legitimate reason. Virginia's FOIA was enacted "to ensure public access to governmental records and meetings, to avoid an 'atmosphere of secrecy' in the conduct of government affairs," and to "promote an increased awareness by *all persons* of governmental activities." § 2.2-3704 (emphasis added); *Taylor*, 242 Va. at 224. As is evident from FOIA's text, the statute is addressed to the "evil" of government secrecy, not the "evil" of permitting non-Virginia citizens access to public records. As the Third Circuit emphasized in *Lee*, "permitting noncitizens to access public information is more likely to advance [FOIA's goals] than to thwart them." *Lee*, 458 F.3d at 201 n.5. "[B]ecause information is not a diminishing resource, there is no risk that permitting noncitizens to access public information will impair a citizen's ability to do so as well." *Id*. It is difficult to see how non-citizens could be a peculiar source of an "evil" when it comes to access to information. Because there is no justification for the citizens-only provision of Virginia's FOIA, it is unconstitutional.

c. *Defendants' Merits Arguments Are Off Base.*

Defendants' half-hearted defense of the constitutionality of the "citizens-only" provision fails, not only for the reasons stated above, but for four additional reasons.

First, quite remarkably, nowhere in Defendants' Memorandum is any effort made to demonstrate "a substantial reason for the difference in treatment" between Virginia citizens and non-citizens that bears "a substantial relationship to the State's objective." *Barnard*, 489 U.S. at 552. Nor have Defendants attempted to show that "non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Toomer,* 334 U.S. at

398. This failure is fatal. To defend the constitutionality of a state law that, like Virginia's FOIA, discriminates on its face, the state must point to a "justification [that] must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations . . . ." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Defendants have made no effort to meet this burden.

Second, Defendants' Memorandum at times suggests that Plaintiffs have invoked the Privileges and Immunities Clause of the *Fourteenth Amendment*, rather than the Privileges and Immunities Clause of *Article IV*. *See, e.g.*, Defendants' Memorandum at 9 (citing *Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 77 (1873)). Not so. Plaintiffs have relied exclusively on Article IV. But perhaps the confusion explains Defendants' claim that the Privileges and Immunities Clause protects only those citizens who physically move from one state to another. *See* Defendants' Memorandum at 9 (arguing that the Clause provides protection only "to newly arrived resident[s] of the Commonwealth."); *see also id.* at 10 (arguing that "If the plaintiff moved to Virginia and were denied access to government records because he hailed from a sister State, that would create a problem under the Privileges and Immunities Clause. No such problem is present here.").

This argument is wrong for many reasons. One is that, had a Plaintiff moved to Virginia and been denied access because he hailed from another state, the Plaintiff would have a slam dunk constitutional case, not just under the Privileges and Immunities Clause, but under the Equal Protection Clause. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969) (Equal Protection); *Saenz v. Roe*, 526 U.S. 489 (1999) (Privileges and Immunities Clauses of both Article IV and 14th Amendment). Another flaw is that, contrary to Defendants' claims, Article IV's Privileges and Immunities Clause protects

citizens of other states who do not *physically* enter Virginia. The point of Article IV's Privilege and Immunities Clause is to protect non-Virginia citizens who venture into Virginia to transact business, to travel, or to interact with Virginia's government. *See, e.g., Toomer*, 334 U.S. 403 (Clause protects out-of-state fisherman); *Barnard*, 489 U.S. at 553 (Clause protects out-of-state lawyers) (citing *Friedman*, 487 U.S. at 65; *Piper,* 470 U.S. at 284); *Hicklin*, 437 U.S. at 524-26 (Clause protects out-of-state workers). Mr. McBurney and Mr. Hurlbert are in exactly the same position; each has ventured into Virginia (albeit through the mail rather in person) in order to interact with Virginia's government (Mr. McBurney) or to conduct business (Mr. Hurlbert) and have been subject to discrimination solely because they are not Virginia citizens. This is precisely the discrimination Article IV's Privileges and Immunities Clause forbids.

Third, Defendants' argument focuses exclusively on Mr. McBurney: no mention is made of Mr. Hurlbert. That omission is telling. Virginia's discrimination against non-citizens thwarts Mr. Hurlbert's ability to pursue his common calling, which the Courts have uniformly said is a classic violation of the Privileges and Immunities Clause. *See, e.g., Camden*, 465 U.S. at 218. And that violation alone is ample reason to declare the citizens-only provision of Virginia's FOIA unconstitutional.

Fourth, Defendants' efforts to distinguish *Lee* are unavailing. As noted, *Lee* was a unanimous decision of the Third Circuit, which affirmed the district court's ruling that the Delaware "citizens-only" provision was unconstitutional. What Defendants' gloss over is the key ruling of *Lee*: namely, that "access to public records is a right protected by the Privileges and Immunities Clause." 458 F.3d at 200. Defendants presumably do not mention this part of the court's ruling because it is so clearly correct. Many of the rights

embraced by Article IV's Privileges and Immunities Clause—the right to pursue a common calling, the right of access to a state's court system, the right to travel through a state, the right to hold property—depend on the ability to access state information. Thus, *Lee*'s fundamental insight is that access to public state information is a right protected by the Privileges and Immunities Clause because that right is instrumental to the exercise of *other* rights protected by the Clause. There are no grounds for the Court to reject *Lee*.

For these reasons, Defendants' defense of the "citizens-only" provision of Virginia's FOIA falls short of the mark. The Court should declare that the provision violates the Privileges and Immunities Clause and enjoin its enforcement.

2. ***Mr. Hurlbert Will Succeed on His Dormant Commerce Clause Claim***.

Although the Court need not reach this issue if it agrees with Plaintiffs that the citizens-only provision of Virginia's FOIA violates Article IV's Privileges and Immunities Clause, it bears noting that the provision also violates the dormant Commerce Clause. This point could be significant, both here and in other litigation brought by corporate entities, because Article IV's Privileges and Immunities Clause protects only persons, not corporations, *see, e.g., Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656 (1981) (citing *Hemphill v. Orloff*, 537, 548-550 (1928)), while the dormant Commerce Clause protects persons and corporations alike, so long as they are engaged in commerce. *See, e.g., Bendix Autolite Corp. v. Midwesco Enter.*, 486 U.S. 888, 893 (1988).

The Commerce Clause grants Congress the sole power to "regulate Commerce . . . among the several States." U.S. Const., art. I, § 8, cl. 3. Since the Constitution reserves this power to Congress alone, "the Commerce Clause even without implementing

legislation by Congress is a limitation upon the power of the States." *Complete Auto Transit v. Brady*, 430 U.S. 274, 278 n.7 (1977). This "dormant" or "negative" aspect of the Commerce Clause prevents states from enacting "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996). The dormant Commerce Clause thus serves to prevent "economic Balkanization." *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577 (1997) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)).

Under the dormant Commerce Clause, "'a virtually *per se* rule of invalidity' applies where a state law discriminates facially, in its practical effect, or in its purpose" and when the law does not regulate in-state and out-of-state interests "evenhandedly." *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir.1996) (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992)). "In order for a law to survive such scrutiny, the state must prove that the discriminatory law 'is demonstrably justified by a valid factor unrelated to economic protectionism' . . . and that there are no 'nondiscriminatory alternatives adequate to preserve the local interests at stake.'" *Id*. (quoting *New Energy Co. v. Limbach,* 486 U.S. 269, 274 (1988); *Chem. Waste Mgmt., Inc. v. Hunt,* 504 U.S. 334, 342 (1992)). The citizens-only provision of Virginia's FOIA cannot survive this review.

Virginia's FOIA discriminates against interstate commerce because it gives Virginia citizens access to a local resource that is not available on equal terms to non-citizens. Public records are a local resource because they are a useful "product" for which there is a demand, they have potential economic value, and they are located

exclusively within the State. In these respects, public records are similar to minerals, wildlife, scenic views, and other local natural resources, although, unlike other resources, public records are not finite. *See, e.g.*, *Camps Newfoundland/Owatonna, Inc.*, 520 U.S. at 577. The Supreme Court has "consistently . . . held that the Commerce Clause . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom.'" *Id*. at 576; *see also United Haulers Ass'n, v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 341 (2007) (holding that "offending local laws [which] hoard a local resource . . . for the benefit of local businesses" violate the Commerce Clause); *Envtl. Tech. Council*, 98 F.3d at 774. The Court has laid down this rule because preferred access places out-of-state businesses at a competitive disadvantage to similarly situated in-state businesses. *See, e.g.*, *Granholm v. Heald*, 544 U.S. 460, 472 (2005) ("Time and again [the Supreme Court] has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'") (quotation omitted).

In *Environmental Technology Council*, the Fourth Circuit struck down a South Carolina law that restricted the amount of hazardous waste that companies could bring into South Carolina from out-of-state. 98 F.3d 774 (4th Cir. 1996). The court found that the law "hoarded" the state resource of "disposal capacity" because it preserved South Carolina's existing disposal capacity for waste generated within that State. *Id*. at 786. In this case, the public records that Mr. Hurlbert is trying to obtain for his business are a local resource that only Virginia can provide, and Virginia is "hoarding" that resource by

providing it to Virginia citizens only. If Mr. Hurlbert's client wishes to obtain the documents from Henrico County's Assessor's Office, it will have to bypass Mr. Hurlbert and instead hire a business located in Virginia to submit a request on its behalf. Virginia's FOIA discriminates against interstate commerce because it gives Virginia citizens a "preferred right of access," placing Hurlbert's out-of-state business at a competitive disadvantage.

Because the statute's clear language gives access to Virginia citizens *only*, it is facially discriminatory and thus "a virtually *per se* rule of invalidity" applies. *Id*. at 785. Virginia's FOIA is not exempted from this virtually *per se* rule because there is no "valid factor" that justifies its citizens-only provision. *Id*. "More than mere speculation" is required to support discrimination against interstate commerce, *Granholm*, 544 U.S. at 492, and "the standards for such justification are high," *New Energy Co.*, 486 U.S. at 278. Here, the citizens-only provision fails because, as noted above, it does *not* advance the rationales for which Virginia's FOIA was enacted. On the contrary, "permitting non-citizens to access to public information is more likely to advance the goals of . . . FOIA than to thwart them." *Lee*, 458 F.3d at 201 n.5. The citizens-only provision of Virginia's FOIA violates the dormant Commerce Clause in addition to the Privileges and Immunities Clause, and should be struck down for this reason as well.

3**. The Equities Favor Granting the Injunction**.

Plaintiffs will suffer irreparable injury in the absence of injunctive relief because the citizens-only restriction in Virginia's FOIA violates their rights under both the Privileges and Immunities Clause and the dormant Commerce Clause. The loss of a constitutional right "unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427

U.S. 347, 373 (1976). Because "the only possible remedy ultimately available to the plaintiff[s] is injunctive relief . . . the requisite showing [of irreparable injury is] 'less strict than in other instances where future monetary remedies are available.'" *Waste Mgmt. Holdings, Inc. v. Gilmore*, 64 F.Supp.2d 523, 531 (E.D.Va. 1999) (quoting *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 362 (4th Cir. 1991)); *see also Dean v. Leake*, 550 F.Supp.2d 594, 602 (E.D.N.C. 2008) ("Deprivation of a constitutional right, even for a short period of time, constitutes irreparable harm."); *Container Corp. of Carolina v. Mecklenburg County*, No. 3:92cv-154-MU, 1995 WL 360185, at *6 (W.D.N.C. June 22, 1992) (enjoining further violations of the Commerce Clause because "the allegations of [Plaintiffs] that constitutional rights will be violated does serve to satisfy the Plaintiffs' burden of showing irreparable harm").

Defendants will not suffer any legally cognizable harm if the preliminary injunction is granted. "[A] state is in no way harmed by issuance of a preliminary injunction which prevents [it] from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (internal quotations omitted); *see also Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1984) ("the INS cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations"). The balance of harms tips decidedly in Plaintiffs' favor.

The public interest weighs in favor of granting the preliminary injunction because "upholding constitutional rights surely serves the public interest." *Carandola*, 303 F.3d at 521. This interest is substantial because "there is the highest public interest in the due observance of all the constitutional guarantees." *United States v. Raines*, 362 U.S. 17, 27

(1960); *see also Llewelyn v. Oakland County Prosecutor's Office*, 402 F.Supp. 1379, 1393 (D. Mich. 1975) ("[I]t may be assumed that the Constitution is the ultimate expression of the public interest."); *Legal Aid Soc'y v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1491 (D. Haw. 1997) ("[P]erhaps no greater public interest exists than protecting a citizen's rights under the constitution."). Granting the preliminary injunction is also in the public interest because it would help ensure that "[t]he affairs of government are not . . . conducted in an atmosphere of secrecy." Va. Code Ann. § 2.2-3700. [2]

B. MR. McBURNEY HAS STANDING.

Defendants' motion to dismiss relies mainly on the claim that Mr. McBurney lacks standing in this case because, were the Court to examine the state-law question of whether the records Mr. McBurney requested were subject to disclosure under Virginia's FOIA law, the Court would find that the answer to that question was "no." This argument should be rejected because it misconceives the relevant standing inquiry under

[2] Plaintiffs recognize the bonding requirement of Rule 65(c), Fed. R. Civ. P., but as the Rule makes explicit, the requirement applies *only* to the issuance of "a preliminary injunction or a temporary restraining order." Thus, the bonding requirement does not apply where, as here, Plaintiffs request the Court to consolidate its preliminary injunction ruling with one on the merits. Even if the Court is inclined to grant Plaintiffs a preliminary rather than permanent injunction, the bond should be set at zero or at a nominal amount. The Fourth Circuit has recognized "a district court's discretion to set a bond amount of zero where the enjoined or restrained party faces no likelihood of material harm." *Md. Dep't of Human Res. v. U.S. Dep't of Agric.*, 976 F.2d 1462, 1483 n.23 (4th Cir. 1992) (citing authorities), *see also Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999) (noting that where the "district court determines that the risk of harm is remote, or the circumstances otherwise warrant it, the court may fix the amount of the bond accordingly," and citing approvingly a case setting a zero bond). This is a rare case where there is "no likelihood of material harm" to Defendants. Virginia law permits Defendants to charge requestors for the costs they incur in finding and copying records, *see* Va. Code Ann. § 2.2-3704(f), and thus Defendants may recoup any expenses they incur as a result of an injunction.

Article III, rests on an incorrect view of the facts of this case, and is beside the point, since it is uncontested that Mr. Hurlbert has standing.

First, Defendants' claim that Mr. McBurney lacks standing is unanchored to any Article III theory of injury-in-fact, traceability, or redressability, the essential components of standing. *See Massachusetts*, 549 U.S. at 517. It is clear that Mr. McBurney satisfies these criteria. Mr. McBurney's injury, as set forth in the Complaint, is his inability to access public records under Virginia's FOIA (not because the records may be unavailable under state law, but because Virginia's FOIA is categorically unavailable to him because of his status as a non-citizen). Virginia did not deny Mr. McBurney's requests on the merits; it refused even to process them. The Supreme Court has routinely held that the deprivation of information constitutes injury-in-fact sufficient to confer standing. *See, e.g., FEC*, 524 U.S. at 20; *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982). And the Supreme Court has routinely held that an out-of-state citizen has a right to challenge a state statute that discriminates on its face against non-state citizens. *See, e.g., Piper*, 470 U.S. 274; *Barnard*, 489 U.S. 456; *Camden*, 465 U.S. 208. There is no standing argument here.

Defendants' argument—that Mr. McBurney lacks standing because he "fails to prove an essential element of his claim – that the records he requested were 'public records' releasable under FOIA" (Defendants' Mem. at 8)—misconceives the nature of this litigation. This action was not brought to obtain records, let alone to prove that Mr. McBurney has sought and been denied "'public records' releasable under FOIA." Whether the records Mr. McBurney seeks may be disclosed is solely a matter of state law that is not before this Court. Rather, this action was brought to challenge Virginia's *per*

se exclusion of non-citizens from using its FOIA at all. That Mr. McBurney may ultimately lose on the merits of his claim, should he bring one in state court, has nothing to do with his standing to bring this suit. *See, e.g., Public Citizen,* 491 U.S. at 450 (holding that plaintiffs had standing even where they were unlikely to obtain records even if they prevailed).

This point takes on special force in Article IV Privileges and Immunities Clauses cases. Consider *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988), where the Court struck down Virginia's residency requirement to be admitted to the Bar on motion. The Court's ruling did not rule that Ms. Friedman was *entitled* to become a member of Virginia's bar; that was not the relief sought. Rather, the Court ruled that Virginia's residency requirement violated the Privileges and Immunities Clause and sustained a lower court ruling declaring the provision invalid. *Id.* at 70. In the same vein, Mr. McBurney is not seeking an order directing Virginia to release documents; like Ms. Friedman, he is seeking an order declaring the citizens-only provision invalid.[3]

Second, Defendants' standing argument also depends on a misguided view of the facts of this case. Defendants' claim that Mr. McBurney lacks standing "because FOIA does not apply to his request for documents." Defendants' Mem. at 4. But not only is that state-law question not before this Court, that claim is not supported by the record. The only reason given—and given twice—to Mr. McBurney for refusing to process his FOIA requests was that he was not a citizen of Virginia. *See* McBurney Decl. Exhs. B,

[3] This observation could be made for virtually any case litigated under Article IV's Privilege and Immunities Clause, including the bar admission cases, *see, e.g.*, *Piper*, 470 U.S. 274 (striking down New Hampshire's residency requirement but not requiring the admission of Ms. Piper); *Barnard*, 489 U.S. 456 (striking down the Virgin Island's residency requirement, but not requiring the admission of Ms. Thorstenn), or the cases involving restrictions on employment. *See, e.g.*, *Camden*, 465 U.S. 208 (striking down municipality's residency requirement, but not awarding contracts to union employers).

D. It is too late in the day for Defendants to revise the record in this case and claim that he was denied records because they were unavailable under Virginia law. That just is not so. The inescapable fact is Virginia refused to even look for records in response to Mr. McBurney's FOIA requests, much less identify responsive records and then claim that they were unavailable. That refusal constitutes injury under Article III. That is how the case comes before the Court.

Finally, Defendants' standing argument is beside the point. As is evident, Mr. McBurney has standing to challenge the constitutionality of the "citizens-only" provision of Virginia's FOIA. But even if there were grounds to question Mr. McBurney's standing, Defendants have not questioned Mr. Hurlbert's standing; indeed, given Defendants' arguments supporting the constitutionality of the "citizens-only" provision of the Act, it is hard to imagine Defendants taking a different position. Defendants' objections to Mr. McBurney's standing are therefore irrelevant. *See, e.g.*, *Massachusetts*, 549 U.S. at 518 (only one plaintiff needs to have standing); *Rumseld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 52 n.2 (2006) (same).

C. THE ATTORNEY GENERAL IS A PROPER PARTY-DEFENDANT.

Attorney General McDonnell is a proper defendant and should not be dismissed. *Ex parte Young*, 209 U.S. 123 (1908), remains controlling on the issue of the party-status of state attorneys general in actions for prospective injunctive relief. There, the Supreme Court held that federal courts have the power "to enjoin a state officer from executing a state law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant." *Id.* at 150-51. The Court went on to hold that the Attorney General in his official capacity was a proper defendant because

he was responsible for the interpretation and execution of the laws of the state. *Id.* at 156-57. The same is true here, and for this reason, the Attorney General is a proper party and should not be dismissed. *See generally S.C. Wildlife Fed'n*, 549 F.3d at 332 (dismissal warranted only "where the relationship between the state official sought to be enjoined and the enforcement of the state statute is significantly attenuated").

Defendants' only argument is that the "Attorney General's connection to FOIA" is attenuated because "[t]he documents sought by the plaintiff are not in the custody of the Attorney General." Defendants' Mem. at 13 (citing *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001)). But this argument ignores the special role the Attorney General plays in providing authoritative advice to state officials about legal questions—legal questions like the one posed here, namely, whether Virginia officials may, consistent with the Constitution, enforce the citizens-only provision of Virginia's FOIA? There is no question that the responsibility for deciding legal questions is uniquely conferred on the Attorney General. Indeed, the Attorney General himself, in explaining the "role of the office," lists his first two "duties and powers" as follows:

> - Provide legal advice and representation to the Governor and executive agencies, state boards and commissions, and institutions of higher education. The advice commonly includes help with personnel issues, contracts, purchasing, regulatory and real estate matters and the review of proposed legislation. The Office also represents those agencies in court.
> - Provide written legal advice in the form of **official opinions** to members of the General Assembly and government officials.

See Official Website, Commonwealth of Virginia, Role of the Office of Attorney General, http://www.oag.state.va.us/OUR_OFFICE/Role.html (last visited Feb. 22, 2009) (emphasis in original).

In particular, the Attorney General plays a central role in advising executive agencies, state officials, and members of the public about Virginia's FOIA, how to implement it, and who may invoke it. There is a designated link on the Attorney General's website entitled "FOIA," and clicking it displays a Memorandum entitled "*Rights and Responsibilities: The Virginia Freedom of Information Act*." *See* http://www.oag.state.va.us/FOIA.pdf (last visited Feb. 22, 2009). Among other things, the Memorandum says that Virginia's FOIA "guarantees citizens of the Commonwealth . . . access to public records," making clear that non-citizens have no rights under the Act. *Id.* Having announced to the public and to government officials throughout the Commonwealth that only Virginia citizens may invoke FOIA, the Attorney General's argument that he has no role in interpreting or enforcing FOIA rings hollow.

The central role the Attorney General plays in FOIA makes it clear that he is a proper party-defendant in this case, with regard to both Mr. McBurney and Mr. Hurlbert's claims. As is reflected in the proposed order Plaintiffs submit herewith, Plaintiffs ask this Court to enjoin the Attorney General to stop "representing to the public or other state officials or agencies that only Virginia citizens may make FOIA requests." And the role the Attorney General plays in the interpretation and enforcement of state laws distinguishes this case from *Waste Management*, the one case Defendants cite. Plaintiffs agree that, as a general matter, a governor is not necessarily a proper party defendant in cases where the question presented involves the interpretation and enforcement of state law, in part because those responsibilities are usually the "duties and

powers" of the Attorney General. That was the Supreme Court's point in *Ex Parte Young*, and that is why the Attorney General is a proper party-defendant in this case.[4]

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully urge the Court to declare the citizens-only provision of the Virginia Freedom of Information Act unconstitutional and enjoin its enforcement, and to deny Defendants' Motion to Dismiss and to Remove the Attorney General as a party.

Respectfully submitted,

/s/ *Steve Bricker*
Steve Bricker
Bricker Anderson PC
411 E. Franklin Street
Suite 504
Richmond, Virginia 23219
(804) 649-2304
(804) 649-3380
bricker@brickeranderson.com

/s/ *Kathryn Sabbeth*
Kathryn A. Sabbeth
David C. Vladeck
Georgetown University Law Center
Institute for Public Representation
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 662-9546

Attorneys for Plaintiffs*

[4] It is also hard to see how, as a practical matter, Plaintiffs could obtain meaningful relief if the Attorney General is not a party to this case. As Mr. Hurlbert's declaration makes clear, he makes frequent requests to county tax officials; the only office-holder in Virginia capable of providing binding instructions on the interpretation of a state law is the Attorney General.

* Ms. Sabbeth and Mr. Vladeck are not members of the Bar of this Court; they have filed a motion for leave to appear in this action *pro hac vice* along with this motion.

CERTIFICATE

I hereby certify that on the 24th day of February 2009, I will electronically file the foregoing Memorandum of Law with declarations and exhibits attached thereto, with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Christy Warrington Monolo
Office of the Attorney General
900 E Main St
Richmond, VA 23219
(804) 692-0129
Fax: (804) 371-2087
Email: cmonolo@oag.state.va.us

Benjamin Adelbert Thorp, IV
Henrico County Attorney's Office
P. O. Box 27032
Richmond, VA 23273-7032
(804) 355-4043
Email: Tho18@co.henrico.va.us

/s/
Stephen W. Bricker
VSB # 14564
Bricker Law Firm, P.C.
411 E. Franklin Street, Suite 504
Richmond, VA 23219
Tel: 804-649-2304
Fax: 804- 649-3380
Email: bricker@brickerlawfirm.com