No. 12-17

IN THE
Supreme Court of the United States

MARK J. MCBURNEY AND ROGER W. HURLBERT,
Petitioners,

v.

NATHANIEL L. YOUNG, JR. AND THOMAS C. LITTLE,
Respondents.

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

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Under the Privileges and Immunities Clause of Article IV and the dormant Commerce Clause of the United States Constitution, may Virginia grant its citizens access to non-judicial governmental records without providing the same right of access to non-citizens?

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INTEREST OF *AMICI CURIAE*[1]

Amici are national organizations whose members include State, county, and local governments and officials throughout the United States who are responsible for responding to public-record requests. *Amici* urge this Court to protect the States' flexibility to structure their open-records laws to meet their primary purpose of allowing State citizens to see what *their own government* is up to. Because States are not constitutionally required to provide such access to their own citizens, the Court should decline to impose an all-or-nothing rule that would effectively encourage States to provide less public access, not more.

BACKGROUND

The common law did not recognize a broad right of access to non-judicial governmental records.[2] Since the 1950s, however, all fifty States and the District of Columbia have adopted open-records or "Freedom of Information Act" (FOIA) laws. Their language varies considerably, as States have experimented with the scope of access to provide, exemptions for certain documents, and the extent to which requestors are required to pay the cost of producing the records. In the experience of *amici,* State FOIA laws do not fully reimburse the government for the true cost and

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[1] The parties have consented to the filing of this brief and their letters of consent are on file with the clerk. (Rule 37.2.) This brief was not written in whole or in part by the parties' counsel, and no one other than the *amici* made a monetary contribution to its preparation. (Rule 37.6.)

[2] *Infra* at IV.B.

significant burden imposed in responding to such requests.[3]

Virginia is not the only State to limit public-record access by non-citizens.[4] The same approach is followed in Alabama,[5] Arkansas,[6] Missouri,[7] New Hampshire,[8] New Jersey,[9] and Tennessee,[10] although the Attorneys General of Alabama and New Hampshire have opined that their laws would permit access by any U.S. citizen.[11] Delaware deleted its citizens-only limitation after the Third Circuit ruled it unconstitutional in *Lee v. Minner,* 458 F.3d 194 (3d Cir. 2006).[12] Georgia followed Delaware's example, deleting its citizens-only provision last year as well.[13] Tennessee's citizens-only provision is the subject of pending litigation in the Sixth Circuit.[14]

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[3] *Infra* at II.

[4] VA. CODE ANN. §§ 2.2-3700(B), 2.2-3704(A) (2011).

[5] ALA. CODE § 36-12-40 (2012).

[6] ARK. CODE ANN. § 25-19-105 (2012).

[7] MO. REV. STAT. § 109.180 (2012).

[8] N.H. REV. STAT. ANN. § 91-A:4 (2012).

[9] N.J. STAT. ANN. § 47:1A-1 (2012).

[10] TENN. CODE ANN. § 10-7-503 (2012).

[11] Ala. Op. Att'y Gen. No. 2001-107, 2001 Ala. AG LEXIS 31 (Mar. 1, 2001); N.H. Att'y Gen., NEW HAMPSHIRE'S RIGHT-TO-KNOW LAW 36 n.23 (July 15, 2009), *available at* http://www.doj.nh.gov/civil/documents/right-to-know.pdf.

[12] *See* 78 Del. Laws ch. 382 (2012), *amending* DEL. CODE ANN. tit. 29, § 10003 (2012).

[13] 2012 Ga. Laws 218, § 2, *amending* GA. CODE ANN. § 50-18-70 (2012).

[14] *Jones v. City of Memphis*, 852 F. Supp. 2d 1002, 1011 (W.D. Tenn. 2012), *appeal stayed,* No. 12-5558 (6th Cir. Dec. 26, 2012).

SUMMARY OF ARGUMENT

Petitioners overstate the restrictiveness of Virginia's open-records laws by blurring the distinction between judicial and non-judicial records. Virginia's citizens-only provision does not apply to judicial records, which are available to *anyone* who wishes to access them. Such judicial records include real estate title records, judgment liens, tax liens, and financing statements filed under Article 9 of the Uniform Commercial Code. As to non-judicial records, Virginia's Government Data Collection and Dissemination Practices Act gives all persons the right to obtain any records relating to them. Petitioner McBurney used that law to obtain a number of the records that he sought. In addition, the print, radio and television media operating in Virginia may also obtain records under Virginia's FOIA, although the issue of press access is not presented in this case.

Petitioners also understate the cost and burden to government to administer open-records laws. No amount of reimbursement makes up for the fact that government employees responding to open-records requests are unable to spend that time fulfilling the primary governmental mission they were hired to perform. Moreover, Virginia's reimbursement provisions do not compensate for all costs, such as an attorney's time to screen public records for privileged information, or the overhead associated with government employees tasked with searching for records and responding to such requests. Examples abound of uncompensated burdens and abuses of open-records laws. Thus, the Petitioners are incorrect when they argue that there would be no cost or burden to States if the Court required them to open their non-judicial records to everyone as a condition

of making them available to State citizens. *Amici* favor open-records laws. But because the Constitution does not require States to make their non-judicial records available for public inspection at all, the all-or-nothing rule urged by Petitioners could incentivize some States to restrict access to their citizens as well, leading to less openness, not more.

The central purpose of Virginia's open-records law is to enable Virginia citizens to observe their government in operation and to hold their public officials accountable. This Court has made clear that States may properly determine membership in their own political community. Virginia's decision to open its non-judicial records to Virginia citizens so they can see what their own government is up to fits comfortably within that tradition.

Virginia's citizens-only provision does not violate the Privileges and Immunities Clause because the privilege to access the non-judicial records at issue in this case is not a fundamental right. This Court has never recognized a constitutional right to access such records and has upheld government action limiting such access against various constitutional challenges. The common law did not recognize a general right of access to such records either. While parties with an interest in the proceeding were granted rights of access to judicial records, there was no generally recognized right of access to non-judicial records. States in this country reached inconsistent results, showing that the right in question is not fundamental under the long-accepted test set forth by Justice Washington in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C. E.D. Pa. 1823) (No. 3230).

Virginia's citizens-only provision also does not offend the dormant Commerce Clause, as claimed by Petitioner Hurlbert, but not McBurney. The virtually *per se* rule of invalidity—which applies to State laws that facially discriminate against interstate commerce—has no place here. First, as in *Department of Revenue v. Davis,* 553 U.S. 328, 341 (2008), Virginia has exercised a traditional governmental function in determining the extent to which it will make its own governmental records accessible to its citizens, so the standard Commerce Clause doctrine does not apply. Virginia has acted in a traditional governmental role to fulfill its governmental obligations, not to promote the economic interests of citizens over non-citizens. Second, Virginia's citizens-only provision discriminates neither against similarly situated persons nor against interstate commerce. State citizens who fund their government and elect their officials have a stronger interest in seeing what their government is up to compared to non-citizens. So the two types of requestors are not similarly situated. And nothing on the face of Virginia's FOIA suggests it has anything to do with economic considerations at all, let alone giving citizens a competitive economic advantage over non-citizens. Accordingly, the *per se* rule is inapplicable.

The *Pike* balancing test for statutes alleged to unduly interfere with interstate commerce is also inappropriate here. As the Court said in *Davis,* it is unclear whether *Pike* applies at all in cases like this one, where the State acts for the benefit of a government fulfilling governmental obligations, not to advance private commercial interests. What is more, the balancing needed here would, as Justice Scalia observed in *Davis*, require the Court to compare "apples" to "tangerines." 553 U.S. at 360 (Scalia, J.,

concurring in part). The Court would have to weigh the good-government benefits provided to Virginia and its citizens by Virginia's open-records law against the alleged economic burdens that a citizens-only provision imposes on the national economy, discounting that burden by the risk that Virginia might choose to end her open-access policy altogether were she confronted with the all-or-nothing choice urged by Petitioners.

The Court should preserve the States' flexibility to structure their open-records laws in a manner best suited to serve their primary function: promoting accountability of State government to the citizens it serves.

ARGUMENT

I. Petitioners overstate the restrictiveness of Virginia's open-records laws.

Virginia's public-record laws are not as restrictive as Petitioners and their *amici* suggest.

First, *judicial* records are not at issue here. Judicial records are "[d]istinguished from government records of the executive or legislative branches."[15] Judicial records, including legal filings and land records, are available in Virginia to *anyone* who wants to inspect or copy them. Virginia law provides that "any records and papers of every circuit court that are maintained by the clerk of the circuit court shall be open to inspection by *any person* . . . ."[16] These

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[15] William Ollie Key, Jr., *The Common Law Right to Inspect and Copy Judicial Records: in Camera or on Camera*, 16 Ga. L. Rev. 659, 660 n.9 (1982).

[16] *See* VA. CODE ANN. § 17.1-208 (2010) (emphasis added); *see Shenandoah Publ'g House, Inc. v. Fanning*, 368 S.E.2d 253, 258-

documents include real estate title records that are required to be kept by circuit court clerks,[17] judgment liens,[18] tax liens,[19] and financing statements under Article 9 of the Uniform Commercial Code.[20]

Thus, Petitioners are misinformed when they claim that such key documents as "real property records," title records, "Virginia civil judgments," and "tax liens" cannot be inspected by non-citizens.[21] It speaks volumes that Petitioners and their *amici* have not offered real-world examples of actual problems associated with accessing records like these in Virginia.

Second, as to *non-judicial* records—those held by executive and legislative branch agencies—Virginia's Government Data Collection and Dissemination Practices Act[22] grants open-records access to *every* person (not just Virginia citizens) if the governmental record relates to the requestor or "data subject."[23] Indeed, it is undisputed that Petitioner McBurney

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59 (Va. 1988) ("a rebuttable presumption of public access applies in civil proceedings to judicial records").

[17] VA. CODE ANN. § 55-106 (2012).

[18] VA. CODE ANN. §§ 8.01-446, 8.01-447 (2007 & Supp. 2012); *see also id.* §§ 55-138 to 55-141 (2012).

[19] *E.g.,* VA. CODE ANN. §§ 58.1-314, 58.1-908, 58.1-1805, 58.1-2021, 58.1-3172 (2009) (requiring various tax liens to be recorded in circuit court); *see also id.* § 55-142.1 (2012) (requiring federal tax liens to be recorded in circuit court).

[20] VA. CODE ANN. § 8.9A-501(a)(1) (2001).

[21] Pet'rs' Br. 2-3, 34; Brief for the Coalition for Sensible Public Records Access as Amici Curiae Supporting Petitioners at 18-19 (same).

[22] VA. CODE ANN. §§ 2.2-3800 through 2.2-3809 (2011 & Supp. 2012).

[23] VA. CODE ANN. § 2.2-3806(A)(3) (2011).

obtained a number of such records by using that statute. (4th Cir. J.A. 36A-37A.)

And third, Virginia's FOIA grants access to print, radio, and television media whose publications or broadcasts reach into Virginia, even if the request comes from out of state.[24] One can debate as a policy matter whether Virginia's media-access provision should be broadened to encompass other media. But because that issue was "barely discussed" by the parties and "not examined" by the Court of Appeals, it "is not properly pursued in this Court."[25] It suffices to say that Virginia has genuinely attempted to give the press access to its non-judicial records to further help the citizenry see what its government is up to.

Accordingly, the records at issue in the case are non-judicial, governmental records that do not relate to the person making the request. McBurney seeks documents from the Division of Child Support Enforcement (DCSE) of the Virginia Department of Social Services that do not pertain to him but that might help him understand the DCSE's delay in handling an application it filed to obtain child support from his ex-wife. (4th Cir. J.A. 37A-38A.) And Hurlbert seeks certain property assessment records from the tax assessor for Henrico County, Virginia (*id.* at 47A), not land records or tax liens that could have been obtained from the Clerk of the Circuit Court of Henrico County.

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[24] VA. CODE ANN. § 2.2-3704(A).

[25] *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 522 & n.1 (2012).

II. Because open-records laws substantially burden State and local governments, the Court should exercise caution before holding that the Constitution requires that States give non-citizens the same access rights as citizens.

While amici generally support open-records laws, they have first-hand experience that providing open access results in significant unreimbursed staff time and distracts public employees from their primary mission. And while State laws typically authorize public bodies to obtain partial reimbursement, they do not fully compensate for the actual expense and burden. This is true in Virginia and elsewhere.

Petitioners are simply incorrect that "Virginia law authorizes the state to *fully* recoup its actual cost incurred through fees." (Pet'rs' Br. 19 (emphasis added).) It is true that Virginia's FOIA states that a public body "may make reasonable charges *not to exceed its actual cost* incurred in accessing, duplicating, supplying, or searching for the requested records."[26] But that does not mean that public bodies are permitted to recover, let alone that they routinely recover, their "actual cost."

The statute cautions that "[n]o public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body."[27] In those frequent instances in which significant staff or attorney time is required to review and produce records,

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[26] VA. CODE ANN. § 2.2-3704(F) (2011) (emphasis added).

[27] *Id.*

this limitation prevents public bodies from recovering their true costs. Records must often be reviewed by legal counsel to screen them for information protected by the attorney-client privilege or work-product doctrine.[28] Virginia legal guidance currently instructs that a public body may *not* charge its *attorney's* hourly rate for reviewing documents for privilege, except perhaps in rare or extraordinary circumstances.[29] In addition, a public body cannot recover any portion of the overhead and employee-benefit costs associated with the time spent by public employees searching and reviewing records, even if the employees spend many hours on those tasks.[30] Nor can a public body charge separately for the time spent redacting a document and the time determining its responsiveness; the redactions must be made simultaneously with the initial review.[31]

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[28] *See* VA. CODE. ANN. §§ 2.2-3705.1(1)-(2) (2011) (exempting from mandatory production "records protected by the attorney-client privilege" and legal "work product").

[29] Letter from Maria J.K. Everett, Executive Director, Va. Freedom of Info. Advisory Council, to Sylvia Saunders, Southeastern Public Service Authority (Mar. 14, 2007), *available at* http://foiacouncil.dls.virginia.gov/ops/07/AO_02_07.htm. Other States similarly limit recoverable costs to respond to open-records requests. For instance, Alabama and New Jersey impose the same limitations as Virginia on the recovery of counsel fees incurred to protect privileged information from disclosure. *See* 251 Ala. Op. Atty. Gen. 38 (June 12, 1998); *Courier Post v. Lenape Reg'l High Sch. Dist.*, 821 A.2d 1190, 1200-01 (N.J. Super. Ct. Law Div. 2002).

[30] Letter from Maria J.K. Everett, Executive Director, Va. Freedom of Info. Advisory Council, to Scott Madsen (May 24, 2002), *available at* http://foiacouncil.dls.virginia.gov/ops/02/AO_05.htm.

[31] *Id.*

These various limitations result in significant, unreimbursed costs, particularly when FOIA requests are used by adverse parties as an alternative to litigation discovery. For instance, the Fairfax County Water Authority, a political subdivision of Virginia, recently responded to a FOIA request received before the requestor commenced litigation. Because it was unable to charge for the cost incurred by its legal counsel to screen the records for privileged information, and because it could not recover the cost of creating the electronic review database that was needed to facilitate the collection and review of records, the public body was able to recover only $16,510 in reimbursable costs from the requestor; the actual cost exceeded $200,000.[32]

Virginia's statute also does not ensure that the public body is compensated even for allowable charges. A public body in Virginia may require an advance deposit only if the estimated cost exceeds $200.[33] If the requestor fails to collect the materials or to pay the bill, no mechanism exists to compel reimbursement, although the public body may refuse further requests for a requestor who is in arrears.[34]

Examples of such uncompensated FOIA burdens abound throughout the country. For instance:

- Catawba County, North Carolina, received a FOIA request from a graduate student work-

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[32] Letter from Jeanne Bailey, Public Affairs Officer, Fairfax County Water Authority, to Stuart Raphael, Esq. (Jan. 25, 2013) (Rule 32.3 lodging request pending).

[33] VA. CODE ANN. § 2.2-3704(H) (2011); *Hill v. Fairfax Cnty. Sch. Bd.,* 83 Va. Cir. 172, 178 n.4 (2011), *aff'd on other grounds,* 727 S.E.2d 75 (Va. 2012).

[34] VA. CODE ANN. § 2.2-3704(I).

ing with a professor at an out-of-state university seeking all emails for every department head for the month of February 2011. The request covered 17 separate departments and required the department heads to spend an average of 20 hours each to compile a total of 25,743 emails, corresponding to approximately $20,000 in unreimbursed staff-time. The out-of-state requestor subsequently abandoned the request and never sought to collect the records.[35]

- In Minnesota, a citizen requested "'all public data on all past and present employees" of five State agencies, a dragnet covering 11,000 individuals.[36] In several prior instances, she failed to review the records after they were compiled.[37] While the Minnesota Commissioner of Administration determined that "unique" circumstances warranted denying this particular request, he emphasized it was in "no way intended to suggest that a government entity does not have to respond to a data request merely because responding will be costly or time-consuming."[38] The same person subsequently made a similar request to a local school district, which would have required two employees working full-time for

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[35] Letter from Debra Bechtel, County Attorney for Catawba County, N.C., to Stuart Raphael, Esq. (Jan. 15, 2013) (Rule 32.3 lodging request pending).

[36] Minn. Dep't of Admin. Op. 01-031 (Mar. 22, 2001), *available at* http://www.ipad.state.mn.us/opinions/2001/01031.html.

[37] *Id.*

[38] *Id.*

more than a year to answer at a cost of at least $100,000.[39] The Commissioner again opined that the request could be denied based on the extreme burden and unique circumstances there, but he reiterated that cost and burden alone ordinarily are not enough to refuse a public records request.[40]

- In the State of Washington, the City of Gold Bar received 82 public record requests from a group of allied requestors. "To avoid the city from coming to a standstill, the city hired an additional employee and transferred an employee from the maintenance department to work on responding to [the] requests."[41] Although the court held that the city's delay and actions in responding were reasonable, the "city spent 12 percent of its income responding to public records requests in 2010."[42]
- In Utah, the media recently described an epic FOIA battle that "began in 2002, took seven years to play out, produced more than 250,000 documents and involved tens of thousands of dollars."[43]

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[39] Minn. Dep't of Admin. Op. 01-034 (Mar. 27, 2001), *available at* http://www.ipad.state.mn.us/opinions/2001/01034. html.

[40] *Id.*

[41] *Forbes v. City of Gold Bar,* No. 66630-4-I, 2012 Wash. App. LEXIS 2637, at *6 (Nov. 13, 2012).

[42] *Id.* at *9.

[43] Brooke Adams, *Battle over Alta Records Ignited HB477 War*, SALT LAKE TRIBUNE (Apr. 25, 2011), *available at* http://www.sltrib.com/sltrib/news/51664304-78/town-records-tolton-documents.html.csp.

- In Maine, "[s]ome towns have seen 80 to 100 [public record] requests from the same individual or small group of people over a one-year period."[44] The Maine Municipal Association reports that "[i]t's very disruptive to small towns . . . . The requests are repetitive, often redundant, and they take many, many hours to sort out."[45]

Using open-records laws for litigation leverage is also commonplace. The Village of Bull Valley, Illinois, a small rural community of 500 residents, was served with multiple records requests by a real estate developer whose attorney admitted that his approach was to "carpet bomb" the Village to pressure it to give up on the litigation because of the expense.[46] And as noted by the City Attorney for Portland, Maine, "[s]ome law firms use [the public records law] to try to get us to settle with them. It's an unfortunate perversion of the law."[47]

In short, open-records requests can be costly to comply with and can divert State and local officials from their primary mission. Accordingly, the Court should exercise great caution before adopting any constitutional rule that is premised on the false assumption that State FOIA laws fully reimburse the

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[44] Judith Meyer, *Peru Man's Requests Anger Town Officials*, SUN JOURNAL (Aug. 14, 2011), *available at* http://www.sunjournal.com/river-valley/story/1073236.

[45] *Id.*

[46] Letter from Michael J. Smoron, Esq., to Brian Day, Illinois Municipal League (Mar. 31, 2011) (Rule 32.3 lodging request pending).

[47] Erie Conrad, *Serial FOAA Requests Swamp Officials, Staffs,* MAINE TOWNSMAN (Oct. 2011), *available at* http://www.memun.org/public/publications/townsman/2011/serial.html.

government for the actual costs to respond to such requests. They don't.

III. Virginia enacted its open-records laws to make Virginia's government politically accountable to its own citizens, a valid exercise of the State's power to define its own political community.

The Court has "uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders."[48] "[A]lthough citizenship is not a relevant ground for the distribution of economic benefits, it is a relevant ground for determining membership in the political community."[49] Indeed, "a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community.'"[50]

Virginia's FOIA fits comfortably within that tradition. It permits Virginia citizens to observe how their *own* government operates and to hold their *own* political officials accountable. Virginia states that purpose expressly, reciting that its FOIA "ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees" so as to "afford every opportunity to citizens to witness the operations of government."[51]

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[48] *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 68-69 (1978).

[49] *Cabell v. Chavez-Salido*, 454 U.S. 432, 438 (1982).

[50] *Id.* at 438-39 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973)).

[51] VA. CODE ANN. § 2.2-3700(B).

Virginia's stated purpose is similar to the policy animating the federal Freedom of Information Act. "This basic policy . . . focuses on the *citizens'* right to be informed about 'what *their* government is up to.'"[52] "Their" government means their *own* government, not someone else's. The relevant audience for State government consists of State citizens, just like U.S. citizens comprise the audience of citizens entitled to hold their federal officials accountable.

What is more, since Petitioners concede that a State government is not required to open its public records to anyone (Pet'rs' Br. 46), the Court should avoid a constitutional rule that requires openness to everyone as the condition of openness to the State's own citizens. As Justice Ginsburg pointed out in *Los Angeles Police Department v. United Reporting Publishing Corp.*, where the Court rejected an overbreadth challenge to a California statute that restricted the disclosure of arrestee information to limited-purpose requestors, requiring an all-or-nothing approach to records disclosure would federalize an area traditionally left to the States and could lead to *less* governmental transparency, not more:

> [I]f States were required to choose between keeping proprietary information to themselves and making it available without limits, States might well choose the former option. In that event, disallowing selective disclosure would lead not to more speech overall but to more secrecy and less speech . . . . [S]ociety's interest in the

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[52] *United States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting) (quoting NEW YORK REVIEW OF BOOKS, Oct. 5, 1972, p. 7)) (emphasis altered).

free flow of information might argue for upholding laws like the one at issue in this case rather than imposing an all-or-nothing regime under which "nothing" could be a State's easiest response.[53]

IV. Accessing non-judicial governmental records is not a "fundamental" right within the meaning of the Privileges and Immunities Clause.

This Court has repeatedly looked to *Corfield v. Coryell*[54] to determine when a right is protected by the Privileges and Immunities Clause of Article IV, § 2.[55] Sitting as a circuit judge, Justice Washington wrote that the Clause protects rights "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."[56] "When describing those 'fundamental' rights, Justice Washington thought it 'would perhaps be more tedious than difficult to enumerate' them all, but suggested that they could 'be all comprehended under' a broad list of 'general heads,' such as '[p]rotection by the government,' 'the enjoyment of

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[53] 528 U.S. 32, 43-44 (1999) (Ginsburg, J., concurring).

[54] 6 F. Cas. 546 (Cir. Ct. E.D. Pa. 1823).

[55] *E.g., McDonald v. City of Chicago*, 130 S. Ct. 3020, 3067 (2010) (Thomas, J., concurring in part); *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 384-86 (1978); *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975); *United States v. Wheeler*, 254 U.S. 281, 297 (1920); *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 75-76 (1873).

[56] 6 F. Cas. at 546.

life and liberty, with the right to acquire and possess property of every kind,' 'the benefit of the writ of habeas corpus,' and the right of access to 'the courts of the state,' among others.'"[57]

Obtaining access to non-judicial governmental records does not qualify as a "fundamental right" under that standard. The broad right of access to public records, advocated by Petitioners, has never been recognized as a "fundamental right," either under the Constitution or at common law.

A. There is no constitutional right of access.

In *Nixon v. Warner Communications, Inc.*,[58] a case involving judicial records, this Court held there was no constitutional right for the press or public to have access to the White House tape recordings introduced into evidence at the criminal trial of the Watergate conspirators.[59] Similarly, in *Houchins v. KQED, Inc.*,[60] in which this Court held that members of the press had no right of access to inspect prison facilities or interview prisoners, the plurality noted that "[t]his Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control."[61] "The right to speak and publish does not carry with it the unrestrained

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[57] *McDonald,* 130 S. Ct. at 3067 (Thomas, J., concurring) (quoting *Corfield*, 6 F. Cas. at 551-52).

[58] 435 U.S. 589 (1978).

[59] *Id.* at 608-10.

[60] 438 U.S. 1 (1978).

[61] *Id.* at 9 (Burger, C.J.).

right *to gather information*."[62] "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."[63] Indeed, "[t]here is no constitutional right to have access to particular government information, or to require openness from the bureaucracy."[64] Likewise, in *United Reporting*, the Court, citing *Houchins*, said that "what we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment."[65]

The Court recently repeated that principle in *Sorrell v. IMS Health Inc.*[66] *Sorrell* invalidated limitations that Vermont imposed on the ability of *private* pharmacies to disclose prescriber information for commercial uses. Significantly, the Court distinguished a "restriction on access to government-held information," like the one upheld in *United Reporting*, from a "restriction on access to information in private hands," which *Sorrell* struck down.[67] The dissent would have upheld the Vermont

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[62] *Id.* at 12 (quoting *Zemel v. Rusk*, 381 U. S. 1, 17 (1965)) (emphasis altered).

[63] *Id.* at 15; *see also id.* at 16 (Stewart, J., concurring) ("The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government . . . .").

[64] *Id.* at 14.

[65] 528 U.S. at 40. *See also id.* at 43 (Ginsburg, J., concurring) ("California could, as the Court notes, constitutionally decide not to give out arrestee address information at all.").

[66] 131 S. Ct. 2653 (2011).

[67] *Id.* at 2665.

law but agreed with the majority that "this Court has *never* found that the First Amendment prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate. . . ."[68]

That there is no Constitutional right of access to public records goes a long way to showing that it is not a "fundamental right" under the Privileges and Immunities Clause, and certainly not a fundamental right within the meaning of *Corfield.*

Cases like *Nixon, Houchins,* and *United Reporting* also show the error of Third Circuit's decision in *Lee v. Minner,* which invalidated Delaware's citizen-only provision after concluding that access to public records was a fundamental right because it was "essential" to effective "political advocacy."[69] One can ignore, for the moment, that neither McBurney nor Hurlbert sought records in order to foster political advocacy.[70] Even assuming they had, if a right to access public records is not fundamental under the First and Fourteenth Amendments, it is hard to see how it could be fundamental under the Privileges and Immunities Clause. *Lee* overlooked that flaw in its "recognition of this new right."[71] The Fourth Circuit, by contrast, correctly found that "the specific right that *Lee* identified is not one previously recognized by the Supreme Court" in its Privileges and Immunities Clause case law.[72]

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[68] *Id.* at 2677 (Breyer, J., dissenting) (emphasis altered).

[69] 458 F.3d 194, 200 (3d Cir. 2006).

[70] *McBurney v. Young*, 667 F.3d 454, 466-67 (4th Cir. 2012).

[71] *Jones,* 852 F. Supp. 2d at 1011.

[72] *McBurney*, 667 F.3d at 465.

B. The common law recognized no fundamental right of access.

Petitioners argue that access to public records is a fundamental right because the common law recognized a broad right of access. But Petitioners and their *amici* overstate the clarity of the common law and elide important distinctions between judicial records and non-judicial records. As noted by Harold L. Cross in his 1953 survey, cited by Petitioners (Pet'rs' Br. 5), "English courts were not often called on to enforce rights of individuals to inspect public records."[73] "[T]he courts declared the primary rule that there was *no general common law* right in all persons (as citizens, taxpayers, electors or merely as persons) to inspect public records or documents."[74]

Indeed, the early English decisions by the King's Bench, cited by Petitioners, do not support the broad right they claim. It is true that "English common law as early as 1372 authenticates a right to inspect and copy *judicial* records. All persons enjoyed the right although only persons with evidentiary or proprietary interests in the court records could enforce their right if it were wrongfully denied."[75] Thus, the 1745 decision in *Wilson v. Rogers*, cited by Petitioners, upheld the right of a party to inspect the records of the Court of Conscience in a proceeding in which he had been taken into custody.[76] The King's Bench ruled that "every man has a right to look into the

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[73] Harold L. Cross, *The People's Right to Know* 25 (1953).

[74] *Id.* (emphasis added).

[75] Key, *supra* note 15, at 666 (emphasis added).

[76] *Wilson v. Rogers*, 2 Str. 1242, 93 Eng. Rep. 1157 (K.B. 1745).

proceedings to which he is a party."[77] While that decision supports the existence of "a common-law right of access to *judicial* records,"[78] it does not support a right of access to the *non-judicial* records at issue in this case.

To be sure, some early cases granted persons the right to inspect non-judicial records if they had a specific, proprietary interest, such as granting shareholders with a particular interest the right to inspect the books of the corporation,[79] or granting a tenant the right to inspect manorial records in support of his claim of tenancy.[80] But they denied access in the absence of such an interest. Thus, in 1789, the King's Bench observed that "one man has no right to look into another's title, deeds and records, when he . . . has no interest in the deeds or rolls himself . . . ."[81] And in 1831, it rejected a broad right of shareholders to inspect a corporation's books and records.[82]

Significantly, in *Rex v. Justices of Staffordshire*, the King's Bench ruled that taxpayers had no general

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[77] *Id.* at 1242, 93 Eng. Rep. at 1158.

[78] *Nixon*, 435 U.S. at 597 (emphasis added); *but see Rex v. Allgood,* 7 T. R. 742, 101 Eng. Rep. 1232 (K.B. 1798) (refusing mandamus to compel inspection of court rolls by tenant in absence of proceeding instituted relating to his tenancy).

[79] *Rex v. Fraternity of Hostmen in Newcastle-Upon-Tyne*, 2 Str. 1223, 93 Eng. Rep. 144 (K.B. 1744).

[80] *Rex v. Shelley,* 3 T.R. 141, 142, 100 Eng. Rep. 498, 499 (K.B. 1789); *Rex v. Lucas,* 10 East 235, 236, 103 Eng. Rep. 765, 765 (K.B. 1808) (stating that inspection request by claimant was "not the impertinent intrusion of a stranger").

[81] *Rex v. Shelley,* 3 T. R. at 142, 100 Eng. Rep. at 499.

[82] *Rex v. Merchant Tailors' Co.*, 2 B. & Ad. 115, 109 Eng. Rep. 1086 (K.B. 1831).

right to inspect records relating to property assessments taken by their public officials,[83] the same type of records sought by Petitioner Hurlbert. The Court explained:

> The utmost . . . that can be said on the ground of interest, is that the applicants have a rational curiosity to gratify by this inspection, or that they may thereby ascertain facts useful to them in advancing some ulterior measures in contemplation as to regulating county expenditure; but this is merely an interest in obtaining information on the general subject, and would furnish an equally good reason for permitting inspection of the records of any other county; there is not that direct and tangible interest, which is necessary to bring them within the rule on which the Court acts in granting inspection of public documents.[84]

The court further cautioned that recognizing a broad right of access would impose undue burden ("no slight inconvenience") on public officials.[85]

In the nineteenth and early twentieth centuries, State courts in this country reached varying outcomes when confronted with whether to recognize a right of access to public records. As in England, American courts generally permitted access to judicial records in a case in which the party had an

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[83] 6 Ad. & E. 84, 112 Eng. Rep. 33 (K.B. 1837).

[84] *Id.* at 101, 112 Eng. Rep. at 39.

[85] *Id.* at 103, 112 Eng. Rep. at 39-40. This decision overruled an earlier opinion, *Rex v. Justices of Leicester*, 4 B. & C. 891, 107 Eng. Rep. 1290 (K.B. 1825), which had intimated broader taxpayer rights. *See* 6 A. & E. at 101-02, 112 Eng. Rep. at 39.

interest.[86] As to non-judicial records, however, some courts granted access[87] while others did not.[88]

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[86] *E.g., Daly v. Dimock*, 12 A. 405 (Conn. 1887) (holding that criminal defendant in murder case could obtain witness statements compiled by the coroner and filed with the trial court); *but see In re Caswell,* 29 A. 259 (R.I. 1893) (denying non-party access to divorce records, stating "no one has a right to examine or obtain copies of public records from mere curiosity, or for the purpose of creating public scandal").

[87] *New Jersey ex rel. Ferry v. Williams*, 41 N.J.L. 332, 334 (N.J. 1879) (granting mandamus to citizen seeking access to license rolls to confirm that purveyors of ale complied with license requirements); *Clay v. Ballard*, 13 S.E. 262, 264 (Va. 1891) (granting mandamus to permit inspection and copying of voter registration books, stating "that a party has a right to inspect and take copies of all such books and records as are of a public nature wherein he has an interest.") (emphasis omitted).

[88] *E.g., Brewer v. Watson*, 71 Ala. 299, 305 (1882) (denying access to inspect state-auditor records to attorney who failed to prove he was representing person with an interest; "[t]he individual demanding access to, and inspection of public writings must not only have an interest in the matters to which they relate, a direct, tangible interest, but the inspection must be sought for some specific and legitimate purpose. The gratification of mere curiosity, or motives merely speculative will not entitle him to demand an examination of such writings."); *Cormack v. Wolcott*, 15 P. 245, 246 (Kan. 1887) (denying mandamus to plaintiff seeking to compile abstracts of title records; "[a]t common law, parties had no vested rights in the examination of a record of title, or other public records, save by some interest in the land, or subject of record."); *Belt v. Prince George's County Abstract Co.*, 20 A. 982, 983 (Md. 1890) (holding that title record company had no common law or statutory right to examine title records); *Diamond Match Co. v. Powers*, 16 N.W. 314, 315-16 (Mich. 1883) (holding that foreign corporation had no right to inspect registry of deeds); *Minnesota v. McCubrey*, 87 N.W. 1126, 1127 (Minn. 1901) (holding that abstract company had no common law or statutory right to inspect title records).

Petitioners and their *amici* incorrectly suggest that the results in America were uniform. Cross's 1953 survey more accurately reflects the varying results.[89]

That mixed track record—in England and this country—is inadequate to show that the right of access to non-judicial public records is "fundamental" under *Corfield*. To the contrary, it is demonstrably *not* a right that has "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."[90] Indeed, had the common law recognized a broad right of access to public records, there would have been no need for States to enact public record laws in the first place, and McBurney and Hurlbert could have brought common law claims for the records they seek here.

C. *Nixon v. Warner Communications, Inc.* did not establish a common-law right of access to non-judicial records.

Petitioners misread this Court's dictum in *Nixon v. Warner Communications, Inc.*[91] when they claim that *Nixon* recognized a common law, "general right to inspect and copy public records and documents." (Pet'rs' Br. 45.) As noted above, the issue in *Nixon* was whether the district court should have released to the press copies of White House tape recordings that had been introduced into evidence and played at the criminal trial of the Watergate conspirators. The parties "acknowledge[d] the existence of a common-law right of access to *judicial* records, but they dif-

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[89] Cross, *supra* note 73, at 55-56.

[90] 6 F. Cas. at 551 (emphasis added).

[91] 435 U.S. 589 (1978).

fer[ed] sharply over its scope and the circumstances warranting restrictions of it."[92] The Court found it "difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate."[93] But the Court said it "need not undertake to delineate precisely the contours of the common-law right, as we assume, *arguendo*, that it applies to the tapes at issue here."[94] The Court went on to hold that the trial court properly withheld release of the tapes because Congress prescribed in the Presidential Recordings Act a procedure for reviewing the tapes and making them available to the public.[95]

Unfortunately, one sentence in *Nixon* has lent itself to the misreading that the case recognized a right of access extending beyond judicial records. The Court said that "[it] is clear that the courts of this country recognize a general right to inspect and copy public records and documents, *including* judicial records and documents."[96] Petitioners read that sentence as recognizing a common law right of access to all public records. (Pet'rs' Br. 8, 45.) But that interpretation is untenable. The question on which the Court granted *certiorari* related to the "common-law right of access to *judicial* records,"[97] and the majority referenced such "judicial records" no fewer

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[92] *Id.* at 597 (emphasis added).

[93] *Id.* at 598-99.

[94] *Id.* at 599.

[95] *Id.* at 603-04.

[96] *Id.* at 597 (emphasis added).

[97] *Id.* at 596 (emphasis added).

than eight times.[98] Indeed, because the Court decided the case "on the basis of the Presidential Recordings Act, the discussion of the common law right to inspect and copy judicial records [was] mere dicta."[99] It is "generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code."[100] In truth, *Nixon* does not establish the scope of the common law right to access judicial records, let alone non-judicial records.

Petitioners are not alone, however, in reading too much into that sentence. In *Washington Legal Foundation v. United States Sentencing Commission,* the Court of Appeals for the District of Columbia read the same sentence to suggest a federal common law right of access extending beyond judicial records.[101] Even so, the court limited that right, ruling that it did not reach records that "are preliminary, advisory, or, for one reason or another, do not eventuate in any official action or decision being taken."[102] Applying that test, the court denied the petitioners' request for internal documents and memoranda held by the United States Sentencing Commission.[103] Although the Department of Justice subsequently argued "that the common law right of access is limited to *judicial* records,"[104] the Court of Appeals declined to revisit its

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[98] *Id.* at 596, 597, 598, 602, 607, 608, 611 n.20.

[99] Key, *supra* note 15*,* at 670.

[100] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

[101] 89 F.3d 897, 903 (D.C. Cir. 1996) (Ginsburg, J.).

[102] *Id.* at 905.

[103] *Id.* at 906.

[104] *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918, 936-37 (D.C. Cir. 2003) (emphasis added).

earlier ruling.[105] The D.C. Circuit appears to be the only circuit court to have read *Nixon* as recognizing a common law right of access that extends beyond judicial records.

V. Virginia's FOIA does not violate the dormant Commerce Clause.

Petitioner Hurlbert—but not McBurney—also claims that Virginia's citizens-only provision violates the "negative" or "dormant" Commerce Clause because it has prevented him from obtaining access to governmental records that he could sell to a client for profit. (4th Cir. J.A. 11-12; Pet'rs' Br. 14.) Petitioner has incorrectly framed the Commerce Clause question by assuming that Virginia enacted its open-records laws to benefit private commercial interests, rather than for the traditional governmental purpose of fostering good government and holding public officials accountable.

A. The *per se* rule of invalidity does not apply because Virginia's FOIA serves traditional governmental purposes in promoting good government and does not facially discriminate against interstate commerce.

There are two independent reasons why Virginia's citizens-only provision does not trigger the first-tier, "virtually *per se*" rule of invalidity urged by Hurlbert. (Pet'rs' Br. 24.)

First, as this Court said in *Department of Revenue v. Davis,* when a State engages in "a traditional governmental function," its action "is not susceptible to *standard* dormant Commerce Clause scrutiny

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[105] *Id.*

owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors."[106] "Restraint in this area is . . . counseled by considerations of state sovereignty, the role of each State as guardian and trustee for its people . . . ."[107] In this case, Virginia was acting "for the benefit of a government fulfilling governmental obligations," not "for the benefit of private interests, favored because they were local."[108]

Providing access to the government's own records is unquestionably a traditional governmental function. Virginia makes clear that it undertook that function to improve governance and accountability, not to promote its citizens' private interests. Virginia's FOIA appears in Title 2.2 of the Virginia Code, in Subtitle II ("Administration of State Government") as the very first chapter of Part B—"Transaction of Public Business." It recites that "[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government."[109] Allowing Virginia citizens to access their government's records fulfills Virginia's interest in governmental transparency and political accountability. As the Court aptly said in *Reeves, Inc. v. Stake,* such a provision is "protectionist"

> only in the sense that it limits benefits generated by a state program to those who fund the state

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[106] 553 U.S. 328, 341 (2008) (emphasis added).

[107] *Reeves, Inc. v. Stake*, 447 U.S. 429, 438 (1980) (internal quotations omitted).

[108] *Davis,* 553 U.S. at 341 n.9.

[109] VA. CODE ANN. § 2.2-3700(B).

> treasury and whom the State was created to serve. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural improvement and business development programs. Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State.[110]

Second, although Virginia's FOIA distinguishes between citizens and non-citizens, it discriminates neither against similarly situated persons nor on the basis of interstate commerce. As the Court held in *General Motors Corp. v. Tracy*, "any notion of discrimination assumes a comparison of substantially similar entities."[111] But citizens who pay taxes and elect their governmental officials have a different and stronger claim to see their government's records than non-citizens without that relationship to the State. Accordingly, citizens and non-citizens "should not be considered 'similarly situated' for purposes of a claim of facial discrimination under the Commerce Clause."[112]

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[110] *Reeves,* 447 U.S. at 442.

[111] 519 U.S. 278, 298 (1997); *see also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 601 (1997) (Scalia, J., dissenting) ("Disparate treatment constitutes discrimination only if the objects of the disparate treatment are, for the relevant purposes, similarly situated.").

[112] *Tracy,* 519 U.S. at 310.

Moreover, Virginia's open-records law does not facially discriminate against *interstate commerce.* "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about '*economic protectionism*—that is, regulatory measures designed to benefit in-state *economic* interests by burdening out-of-state competitors.'"[113] It is discrimination for that "forbidden purpose" that is suspect.[114] Virginia's FOIA does not meet that test. Nothing on the face of Virginia's FOIA suggests it had anything to do with economic considerations at all, let alone giving citizens a competitive economic advantage over non-citizens. That distinguishes this case from the ones cited by Hurlbert, where the Court invalidated the statute under the *per se* rule after finding that it explicitly imposed different economic burdens on in-state and out-of-state interests.[115] So the Fourth Circuit was correct when it concluded that Virginia's law "is wholly silent as to commerce or economic interests, both in and out of Virginia . . . . Any effect on commerce is incidental and unrelated to the actual language of VFOIA or its citizens-only provision."[116]

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[113] *Davis*, 553 U.S. at 337-38 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988)) (emphasis added).

[114] *Id.* at 338.

[115] *Camps Newfound*, 520 U.S. at 581 (invalidating Maine law that denied a property-tax exemption to charitable institutions if they operated principally for the benefit of nonresidents); *Oregon Waste Systems, Inc. v. Dep't of Env'l Quality of Ore.,* 511 U.S. 93, 100 (1994) (invalidating Oregon statute that imposed surcharge on disposal of solid waste generated out-of-state); *Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978) (invalidating New Jersey law that prohibited disposal of most forms of solid or liquid out-of-state waste).

[116] *McBurney*, 667 F.3d at 469.

That conclusion is not undermined by *Reno v. Condon,*[117] a case involving Congress's *affirmative* powers under the Commerce Clause. The Court said that Congress could properly find that motor vehicle information sold by the States for commercial purposes could qualify as "a 'thing in interstate commerce,' and that the sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation."[118] But even assuming for argument's sake that Congress could expand its reach under *Reno* to regulate *all* State and local governmental records, it would not carry the day for Hurlbert. For saying that public records are subject to potential regulation by Congress is different from concluding that a State facially discriminates against interstate commerce when it opens its governmental records only to its own citizens in order to promote governmental transparency and political accountability. Virginia's FOIA law survives first-tier dormant Commerce Clause scrutiny, not because public records can *never* constitute things in interstate commerce, but because the statute was enacted to serve a traditional governmental purpose and does not facially discriminate on the basis of interstate commerce.

B. Virginia's statute is not invalid under the *Pike* balancing test.

Under *Pike v. Bruce Church, Inc.,* a plaintiff who fails in the first tier of the analysis to show that a statute facially discriminates against interstate commerce can nevertheless succeed in invalidating it by showing that its effect interferes with interstate

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[117] 528 U.S. 141 (2000).

[118] *Id.* at 148.

commerce and that "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[119] The Fourth Circuit found that Hurlbert waived any argument about how the District Court applied the *Pike* test by failing to argue it in his opening brief below.[120] But even absent that procedural default, *Pike* does not call for invalidating Virginia's statute.

Importantly, *Davis* left open "whether *Pike* even applies to a case of this sort."[121] Here, as in *Davis,* the State has engaged in "traditional government function" that was "for the benefit of a government fulfilling governmental obligations . . . ."[122] Even though Kentucky did not dispute *Pike*'s applicability in *Davis*,[123] the Court declined to apply *Pike*; the test would have required the Court to balance the complex economic costs and benefits resulting from Kentucky's decision to grant a tax-exemption for interest on State and municipal bonds only if the bonds were issued by Kentucky or its political subdivisions. The Court said "it must be apparent to anyone that . . . a cost-benefit analysis would be a very subtle exer-

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[119] 397 U.S. 137, 142 (1970); *Davis,* 553 U.S. at 353 ("Concluding that a state law does not amount to forbidden discrimination against interstate commerce is not the death knell of all dormant Commerce Clause challenges, for we generally leave the courtroom door open to plaintiffs invoking the rule in *Pike*, that even nondiscriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice.").

[120] *McBurney,* 667 F.3d at 469-70.

[121] 553 U.S. at 353.

[122] *Id.* at 341 n.9.

[123] *Id.* at 353.

cise."[124] And it was an exercise that the Court said was not suited to judicial decision-making.[125] In his opinion concurring in part, Justice Scalia added that such balancing was *always* inappropriate because the benefits and burdens are "always incommensurate," like weighing "apples" against "tangerines":

> The problem is that courts are less well suited than Congress to perform this kind of balancing *in every case*. The burdens and the benefits are *always* incommensurate, and cannot be placed on the opposite balances of a scale without assigning a policy-based weight to each of them. It is a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines.[126]

That admonition applies no less in this case. The *Pike*-balancing test would require the Court to weigh the good-government benefits provided to Virginia and its citizens by Virginia's open-records law against the alleged economic burdens that a citizens-only provision imposes on the national economy, discounting that burden by the risk (identified by Justice Ginsburg in *United Reporting*[127]) that Virginia might choose to end her open-access policy altogether were she confronted with the all-or-nothing choice urged by Petitioners. The burdens and benefits are not comparable. As Justice Scalia correctly assessed, "you cannot decide which interest 'outweighs' the

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[124] *Id.* at 354.

[125] *Id.* at 355.

[126] *Id.* at 360 (Scalia, J., concurring in part) (emphasis added).

[127] 528 U.S. 32, 43-44 (1999) (Ginsburg, J., concurring).

other without deciding which interest is more important to you."[128]

CONCLUSION

Open-records laws serve important public interests by making the government more transparent and accountable to the citizenry it serves. But the burden of complying with public-record requests is significant and is only partially offset by provisions requiring reimbursement. The States have historically enjoyed great flexibility to determine the extent to which they should open their governmental records to the public, particularly their non-judicial records. The rule urged by Petitioners would require an all-or-nothing decision by States that are not constitutionally required to release such records at all. It could well lead to less openness, not more.

The decision below should be affirmed.

Respectfully submitted,

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[128] *Davis*, 553 U.S. at 360 (Scalia, J., concurring in part).