No. 09-1615

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARK J. MCBURNEY, ROGER W. HURLBERT,
and BONNIE E. STEWART,
Plaintiffs-Appellants,

v.

HON. WILLIAM C. MIMS, Attorney General,
Commonwealth of Virginia,

HON. NATHANIEL L. YOUNG, JR., Deputy Commissioner and Director,
Division of Child Support Enforcement, Commonwealth of Virginia, and

SAMUEL A. DAVIS, Director, Real Estate Assessment
Division, Henrico County, Commonwealth of Virginia,
Defendants-Appellees.

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

BRIEF OF APPELLANTS MARK J. MCBURNEY, ET AL.

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September 21, 2009

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus) (appellant/appellee/amicus)

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

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
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I certify that on September 21, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Leah M. Nicholls
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9/21/09
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JURISDICTIONAL STATEMENT

Appellants Mark J. McBurney, Roger W. Hurlbert, and Bonnie E. Stewart filed this § 1983 action in the Eastern District of Virginia to require the defendants-appellees—the Attorney General, Virginia's Director of Child Support Enforcement, and the Director of the Real Estate Assessment Division of Henrico County, Virginia—to process appellants' Virginia Freedom of Information Act requests that had been denied because appellants are not Virginia citizens.

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. The district court's May 1, 2009 Opinion and Order dismissed appellants McBurney and Hurlbert for lack of standing, dismissed appellant Stewart on the ground that the Attorney General was an improper party, and thus disposed of all claims of all parties. JA at 86A–87A. Appellants timely filed a notice of appeal on May 28, 2009. JA at 88A. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Does a non-Virginian whose requests for public records under Virginia's FOIA were denied because of his out-of-state citizenship have standing to bring a constitutional challenge to the statute's citizens-only provision when some of the responsive records may be exempt from disclosure under state law?

2. Is an out-of-state requester's as-applied constitutional challenge to the citizens-only provision justiciable when the requester has alleged that he has been chilled from making future requests and the county provided the records only after litigation had commenced and the records were no longer useful?

3. Is the Virginia Attorney General a proper defendant under *Ex Parte Young* when the constitutionality of a state statute is challenged and the Attorney General, by issuing official advisory opinions and being statutorily authorized to bring enforcement actions, has a real connection to the implementation and enforcement of the statute?

4. Does the citizens-only provision violate the Article IV Privileges and Immunities Clause and/or the dormant Commerce Clause of the United States Constitution?

STATEMENT OF THE CASE

This appeal arises out of an action by Mark J. McBurney, Roger W. Hurlbert, and Bonnie E. Stewart challenging the constitutionality of Virginia's Freedom of Information Act ("VFOIA"), VA. CODE ANN. §§ 2.2-3700 *et seq.* (2008), insofar as it limits access to public records in Virginia to "citizens of the Commonwealth."

§ 2.2-3704(A).[1] As the Third Circuit held with respect to an analogous Delaware statute, this citizens-only provision discriminates against non-Virginians, violating the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution. *See Lee v. Minner*, 458 F.3d 194, 201 (3d Cir. 2006). The citizens-only provision also violates the Constitution's dormant Commerce Clause as to Hurlbert.

On January 21, 2009, McBurney and Hurlbert filed a complaint under 42 U.S.C. § 1983 for declaratory and injunctive relief against the Attorney General of the Commonwealth of Virginia; Nathaniel L. Young, Deputy Commissioner and Director of the Virginia Division of Child Support Enforcement; and Samuel A. Davis, Director of the Real Estate Assessor's Office in Henrico County, Virginia. JA at 11A. Stewart was added as a plaintiff on April 7, 2009. *Id.* at 58–59A.

On February 13, 2009, the Virginia state defendants moved to dismiss under Rule 12(b)(6), asserting that McBurney failed to state a claim because VFOIA did not apply to his request for documents and that the statute does not violate the Privileges and Immunities Clause. They also contended that the Attorney General is not a proper party to the suit and should be dismissed. Doc. 6, Br. in Supp. of McDonnell and Young's Mot. to Dismiss 4. The county defendant filed an Answer on February 16,

[1]Relevant portions of VFOIA and the Virginia Data Collection and Dissemination Practices Act are contained in the addendum to this brief.

2009, asserting that appellants failed to state a claim and that Hurlbert lacked standing to vindicate the alleged harm to Hurlbert's business, Sage Information Services. JA at 28A–29A.

Shortly thereafter, McBurney and Hurlbert cross-moved for a preliminary injunction, requesting processing of their VFOIA requests and seeking a declaration that VFOIA's citizens-only provision violates the Privileges and Immunities Clause and the dormant Commerce Clause of the U.S. Constitution. Doc. 9, Mem. of Law in Supp. of Plaintiffs' Cross-Mot. for Prelim. Inj. 2. The county defendant then moved to dismiss, arguing that Hurlbert lacked standing because he was ultimately, albeit belatedly, provided with the public records he had requested. Doc. 21, Mem. of Law in Supp. of Davis Mot. to Dismiss 6. He also maintained that VFOIA's citizens-only provision does not violate the Privileges and Immunities or the dormant Commerce Clause. *Id.* at 7–9, 13–15.

On May 1, 2009, the district court issued a memorandum opinion granting the appellees' 12(b)(6) motions. To start, the district court held that the Attorney General is not a proper party because he has no enforcement authority with regard to VFOIA. JA at 78A. Equating the general duty of a Governor to enforce a state's laws to the duties of an Attorney General, the court noted that general authority to enforce a challenged law is insufficient to make a government official a proper party in

litigation. *Id.* at 77A. Accordingly, the court held that to invoke the *Ex Parte Young* exception to state sovereign immunity, there must be a "special relation" between the state officer sued and the challenged statute. *Id.* Despite taking judicial notice of information from the Attorney General's website indicating that the duties and powers of the Attorney General include "the interpretation and enforcement of state laws generally and FOIA specifically," the court found that no such "special relation" existed and dismissed the Attorney General. *Id.* at 78A.

Upon dismissal of the Attorney General, the court also dismissed Stewart because her claims were made solely as to the Attorney General. *Id.* at 78A–79A. Stewart, a citizen of West Virginia and a professor at West Virginia University, seeks to obtain the employment contracts of the presidents of two of Virginia's public universities as part of a class exercise and for use in a potential article to be written by her public affairs reporting class. The district court did not address the merits of her claims. *Id.* at 79A .

Next, the court addressed McBurney's standing. McBurney, a citizen of Rhode Island and a former citizen of Virginia, seeks information from the Division of Child Support Enforcement ("DCSE") of the Virginia Department of Social Services about the delay in the Division's filing of his child support petition, which caused him to lose eligibility for nine months of child support payments from his ex-wife. *Id.* at

37A. The court concluded, without considering the nature and scope of the documents requested by McBurney, that a ruling on the merits could not provide redress for McBurney's injuries because all the documents he requested were private, confidential documents that, even as a citizen of Virginia, McBurney would not have access to under VFOIA. *Id.* at 82A–83A. Implying that McBurney's injuries had been fully redressed because he received more than eighty documents under Virginia's Government Data Control and Disseminations Practices Act ("Data Collection Act"), VA. CODE ANN. §§ 2.2-3800 *et seq.*, the court did not mention that some non-confidential documents responsive to McBurney's VFOIA request were unavailable under that statute. JA at 81A; *see* Doc. 9, Mem. of Law in Supp. of Appellants' Cross-Mot. for Prelim. Inj. 5.

Turning to Hurlbert, the court briefly concluded that Hurlbert lacked standing because he had not alleged ongoing injury. JA at 84A–85A. Hurlbert, a citizen of California, sought public records from the Real Estate Assessor's Office in Henrico County, Virginia, for a client of his public information collection business, but was denied access to the information because of his out-of-state residency. The court declined to look past the face of the Amended Complaint to other places in the record where Hurlbert expressed concern about how his future VFOIA requests would be handled and where he asserted that he was chilled from making any further VFOIA

requests to Henrico County. Because the court found that Hurlbert had made no claim of ongoing or future injury, and because it considered his claim for past injury redressed, it concluded that Hurlbert did not have standing. *Id.* at 84A–85A.

Finally, the district court chose to do what it claimed it was trying to avoid—issue an advisory opinion on the merits of Hurlbert's constitutional claims. *Id.* at 85A. As to the Privileges and Immunities claim, Hurlbert contended that VFOIA interfered with his fundamental freedom to pursue a common calling. *Id.* at 67A, 85A. The court responded that providing public records, "which could ultimately be used in any manner, including for a business purpose, is not conduct sufficient to determine that Virginia's law interferes with Hurlbert's pursuit of his common calling." *Id.* at 85A.

With regard to Hurlbert's dormant Commerce Clause claim, the court summarily concluded that VFOIA "does not discriminate against interstate commerce," and that "its impact, if any, on interstate commerce does not exceed the local benefits gained." *Id.* at 86A. In addressing the merits, the court did not mention, let alone distinguish or rebut, *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006), which invalidated the citizens-only provision of Delaware's Freedom of Information statute under the Privileges and Immunities Clause.

STATEMENT OF FACTS

A. McBurney

McBurney was a citizen of Virginia for thirteen years from 1987 to 2000. JA at 35A. McBurney retained his citizenship and paid Virginia taxes even when he lived abroad as a foreign service officer with the State Department. *Id.* Also during this time, McBurney married Lore Ethel Mills and had a son, Cal. *Id.* When the couple divorced in 2002, the court awarded custody of Cal to Mills. *Id.* McBurney was ordered to pay child support. *Id.*

In March 2006, McBurney and Mills privately agreed that Cal would live with McBurney in Australia and that Mills would pay child support. *Id.* at 36A. When Mills defaulted on the agreement, McBurney, still in Australia, filed a child support application with DCSE. *Id.* Because he was living out of the country, McBurney elected to have DCSE file the petition for child support on his behalf. *Id.* Although DCSE told McBurney that his petition had been filed on August 23, 2006, DCSE failed to file the petition in the proper court until April 2007. *Id.* at 36A–37A. As a result, that court established April 1, 2007 as the date on which Mills' child support obligation commenced, denying McBurney nearly nine months of child support payments. *Id.* at 37A.

McBurney believes that DCSE mishandled his petition for child support and that it possesses public documents that will help him resolve the issues surrounding the botched filing of his petition. *Id.* at 14A, 39A–40A. McBurney submitted a VFOIA request to DCSE asking for records pertaining to him, his son, Mills, or his application for child support. *Id.* at 38A, 41A. Although the district court characterized his request as consisting solely of personal information, *id.* at 74A, McBurney also requested non-personal documents such as treatises, statutes, legislation, regulations, administrative guidelines, or other reference material that DCSE relied on in making relevant decisions, *id.* at 42A.

McBurney sent his first request by letter in April 2008 from his new residence in Rhode Island. *Id.* at 38A. DCSE promptly denied his request on the ground that portions of the requested information were confidential under Virginia law and that McBurney was not entitled to any remaining non-confidential information because he was "not a Citizen of the Commonwealth of Virginia." *Id.* at 44A. Shortly thereafter, McBurney submitted a second request from an Alexandria, Virginia address. *Id.* at 38A; 46A. DCSE again denied his request, explaining that "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.* at 38A, 47A. McBurney was instructed that he may be able to obtain

personal documents under Virginia's Data Collection Act, which permits citizens and noncitizens alike to access certain "personal information" maintained by DCSE. *Id.* at 38A–39A, 47A.

Although McBurney received documents under the Data Collection Act, there are some documents responsive to his VFOIA request, such as the treatises, statutes, and regulations that the DCSE relied on in making certain decisions related to his petition, that he did not receive and could not have received under the Data Collection Act. *Id.* at 39A. McBurney intends to use the information he receives to advocate for his interests and to determine if there is any avenue for him to recover the nine months of child support he was denied. *Id.* at 40A.

B. Hurlbert

Hurlbert is the sole proprietor of Sage Information Services, which he operates from California. *Id.* at 48A. Clients hire Sage to obtain public documents from real property assessment officials. *Id.* at 49A. Consequently, Hurlbert requests documents from public agencies across the country, including in Virginia. *Id.* at 48A. Because acquiring these documents is central to Sage's mission, state freedom of information statutes play an essential role in Hurlbert's ability to conduct his business. *See* Doc. 9, Mem. of Law in Supp. of Plaintiffs' Cross-Mot. for Prelim. Inj. 6; JA at 49A.

Clients occasionally hire Sage to obtain records from assessors in Virginia, which Hurlbert does by making requests under VFOIA. JA at 49A. In June 2008, Sage was hired to obtain public records from the Real Estate Assessor's Office of Henrico County, Virginia. *Id.* When Hurlbert attempted to obtain these records, his request was denied on the ground that, under VFOIA, documents are available only to Virginia citizens. *Id.* Eight months after his VFOIA request, and nearly a month after commencement of this litigation, the County finally provided Hurlbert with an electronic copy of the requested information—long after it was useful to Hurlbert or his client. Doc. 21, Mem. of Law in Supp. of Davis's Mot. to Dismiss 5–6; *see* JA at 56A. Hurlbert is concerned about how his future VFOIA requests will be handled in Henrico County and has been dissuaded from making any further VFOIA requests. JA at 49A–50A, 57A.

C. Stewart

Stewart is an Assistant Professor of Journalism at West Virginia University ("WVU"). *Id.* at 59A. As part of an educational project for her public affairs reporting class during the 2008–2009 academic year, Stewart asked her students to compare the salary, benefits, and other terms of employment that WVU offers its presidents to those offered by public universities in other states. *Id.* at 63A. To obtain pertinent information, Stewart filed requests under state open government laws for the

contracts of twelve public university presidents in various states, including Virginia Commonwealth University ("VCU") and Virginia Polytechnical Institute and State University ("Virginia Tech"). *Id.*

VCU denied Stewart's request, stating that VFOIA limits access to public records "to citizens of the Commonwealth of Virginia. Since you write from an address in the State of West Virginia, it appears you do not qualify as a citizen of the Commonwealth of Virginia." *Id.* at 64A. Virginia Tech also denied Stewart's request, at first claiming that its president operated without a contract. *Id.* Stewart then orally requested copies of a contract or other public documents reflecting the terms of the president's employment from Virginia Tech. *Id.* In response, Stewart was told that Virginia Tech possessed no responsive records and that, even if it did, it would not provide her with the records because she is not a Virginia citizen. *Id.*

Virginia Tech's representative then referred Stewart to a Chronicle of Higher Education website containing some information about prior presidents' employment terms and referencing other public records. *Id.* at 51A, 64A–65A. Although the website had some information about president salaries, the fragmented information was out-of-date and not fully responsive to Stewart's VFOIA requests. *Id.* at 51A. Additionally, Stewart requested copies of the presidents' actual contracts so that her

students could analyze all of their terms rather than just salary information. *Id.* at 52A.

Because of Virginia Tech and VCU's insistence that Stewart was ineligible to obtain records under VFOIA, Stewart did not make any further VFOIA requests. *Id.* at 65A. Stewart, however, plans to continue to require her students to rely on and, where necessary, request from public bodies public records like those at issue here. *Id.* at 62A. Stewart believes that, absent judicial intervention, Virginia agencies will continue to deny her access to public records available to Virginia citizens because she is not a citizen of Virginia. *Id.* at 53A. Should the Court rule that VFOIA may be used by non-Virginians, Stewart would routinely invoke VFOIA to obtain public information from Virginia agencies, just as she routinely uses other states' open record laws to obtain information for her classes. *Id.* at 53A, 62A.

SUMMARY OF THE ARGUMENT

The district court erred in holding that McBurney and Hurlbert lacked standing to challenge the constitutionality of VFOIA's citizens-only provision and that the Attorney General is not a proper party. McBurney and Hurlbert have alleged both past and ongoing injuries, giving them standing to bring their claims. Additionally, the Attorney General, who has a real connection to the enforcement of VFOIA, is a proper party and should not have been dismissed. Finally, VFOIA's citizens-only

provision violates the Privileges and Immunities and dormant Commerce Clauses of the U.S. Constitution.

1. McBurney has standing to challenge the constitutionality of VFOIA's citizens-only provision. The district court erred in summarily concluding that McBurney's injuries were fully redressed by his subsequent acquisition of some documents under a separate state statute. The court failed to acknowledge that the denial of a procedural right and the related denial of other procedural benefits afforded Virginia citizens—such as an accounting of the documents withheld and the ability to seek state-court judicial review of DCSE's determination that certain documents are confidential—constitutes an ongoing and redressable injury. *Fed. Election Comm'n v. Akin*, 524 U.S. 11, 21 (1998); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989).

Furthermore, although McBurney obtained some documents from DCSE related to his child support petition under a different state statute, the documents provided under that statute do not fully satisfy McBurney's VFOIA request, also evidencing the ongoing nature of his injury.

2. Hurlbert has alleged an ongoing injury adequate to sustain his claim for injunctive relief. The denial of Hurlbert's previous VFOIA requests by Henrico County have dissuaded Hurlbert from making future VFOIA requests, and thus

constitutes an injury-in-fact sufficient to confer standing for his claim of injunctive relief. *See, e.g.*, *Akin*, 524 U.S. at 21; *Public Citizen*, 491 U.S. at 449. The district court also erred when it limited its standing inquiry to the face of the Amended Complaint. The court is free to consider record evidence beyond the pleadings themselves when ruling on its own jurisdiction. *See, e.g.*, *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). Therefore, Hurlbert's declaration, in which he states he has been chilled from making future VFOIA requests, is sufficient to confer standing.

Hurlbert's claims were not mooted because the County decided, after the start of this litigation and eight months after his original VFOIA request, to provide Hurlbert with the requested records. It is well established that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted). Because Hurlbert has been chilled from making future VFOIA requests and because he continues his business practice of obtaining real estate tax records, injunctive relief is the only effective remedy to Virginia's categorical refusal to process noncitizens' VFOIA requests.

3. The district court's decision to dismiss the Attorney General as an improper party should be reversed. The district court erroneously concluded that the Attorney General is not a proper party because he is not responsible for enforcing VFOIA and thus does not have a "special relation" to the enforcement of the statute required under *Ex Parte Young*. The Attorney General, however, has a real connection to VFOIA sufficient to satisfy the "special relation" requirement because VFOIA singles out the Attorney General as having special standing to enforce the law. The Attorney General is also intimately involved in shaping the course of how VFOIA is applied through the issuance of official advisory opinions that are treated as binding by state agencies and officials.

4. VFOIA's citizens-only provision, which limits access to public records in Virginia to "citizens of the Commonwealth," violates the Article IV Privileges and Immunities Clause of the U.S. Constitution. VFOIA, which discriminates on its face, impermissibly burdens McBurney's right to seek the resolution of grievances and curtails Hurlbert's and Stewart's rights to participate in common callings—all rights protected under the Clause. Because the discriminatory provision burdens "privileges and immunities protected by the Clause," and because the appellees have articulated no substantial reason for discriminating against non-citizens, the statute should be

declared unconstitutional. *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 218 (1984).

5. VFOIA's citizens-only provision violates the dormant Commerce Clause as to Hurlbert because it erects impermissible barriers to interstate commerce. VFOIA is a facially discriminatory statute that gives Virginia citizens access to a local resource—public records—while explicitly excluding non-citizens. As a result, the provision favors in-state interests by giving in-state businesses similar to Hurlbert's access to a market—clients seeking records from Virginia localities—that Hurlbert and other non-citizens cannot serve. Because it is facially discriminatory and discriminatory in practical effect, VFOIA is the type of statute that is "virtually per se" invalid. *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)); *Brooks v. Vassar*, 462 F.3d 341, 363 (4th Cir. 2006) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). Additionally, there are no countervailing legitimate concerns here to justify limiting access to public records in Virginia. *See Envtl. Tech. Council*, 98 F.3d at 785 (quoting *Wyoming*, 502 U.S. at 454–55).

Nor is the citizens-only provision saved by the market-participant exception to the dormant Commerce Clause, as Virginia public bodies do not qualify as market participants because they do not compete as private actors would in an open market

for an exhaustible good. *See Dep't of Revenue of Ky. v. Davis*, 128 S. Ct. 1801, 1809 (2008). Instead, they are regulating an administrative process in their "distinctive governmental capacity." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 592 (1997). Even if Virginia public bodies were participants in the market for public records, the citizens-only provision would still violate the dormant Commerce Clause because it imposes discriminatory regulation on a *different* market—the market for public document acquisition services.

STANDARD OF REVIEW

This Court reviews a district court's dismissal for lack of standing de novo. *Bishop v. Bartlett*, 575 F.3d 419, 423 (4th Cir. 2009). This Court reviews properly preserved constitutional claims de novo. *United States v. Hall*, 551 F.3d 257, 266 (4th Cir. 2009).

ARGUMENT

I. APPELLANT'S CLAIMS ARE JUSTICIABLE BECAUSE MCBURNEY AND HURLBERT HAVE STANDING AND THE ATTORNEY GENERAL IS A PROPER PARTY.

McBurney and Hurlbert have standing to challenge the constitutionality of VFOIA's citizens-only provision. Standing requires the plaintiff to have suffered an injury-in-fact, which is an invasion of a legally protected interest that is concrete and particularized. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). There

must also be a causal connection between the injury and conduct that is fairly traceable to the challenged action of the defendant. *Id*. Lastly, it must be likely that the injury will be redressed by a favorable decision. *Id.*; *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006). McBurney and Hurlbert have been injured by DCSE's and Henrico County's determinations that VFOIA is unavailable to non-Virginians, and their claims are redressable by this Court.

A. McBurney Has Standing to Challenge VFOIA's Citizens-Only Provision.

1. McBurney Has Been Injured by DCSE's Denial of His VFOIA Request Based on VFOIA's Citizens-Only Provision.

McBurney has been and is being injured by DCSE's denial of McBurney's VFOIA requests. First, due to DCSE's denial of the request based on VFOIA's citizens-only provision, McBurney's VFOIA request has not been fully processed and McBurney still has not acquired requested nonconfidential documents. Second, even if, as the lower court erroneously accepted, DCSE's determination that the requested documents were confidential covered the entirety of McBurney's requests, VFOIA's citizens-only provision would preclude McBurney from seeking judicial review of DCSE's determination of confidentiality.

a. McBurney's Requests Were Not Processed Under VFOIA Like a Virginian's Would Have Been, and He Still Has Not Obtained Requested Documents.

DCSE's application of VFOIA denied McBurney the right to have his VFOIA request processed. Denial of process is an injury-in-fact, *Akin*, 524 U.S. at 21, because injury can be the barrier to a benefit, not just the denial of a benefit. *Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993). DCSE's refusal to process the nonconfidential portion of McBurney's first request and his entire second request because he was not a Virginian is an injury-in-fact.

The district court maintained that because McBurney requested only confidential documents he would not have had access to them under VFOIA regardless of citizenship. However, some of the documents requested in McBurney's initial VFOIA request were withheld because he is not a Virginia citizen. On April 8, 2008, in his first request, McBurney requested several sets of documents essential to evaluating his claim against DCSE, including "any and all treaties, statutes, legislation, regulations, administrative guidelines or any other reference material that DSS relied upon in deciding that its actions outweigh or trump actions by Australian child support agencies." JA at 42A. DCSE replied that "*Portions* of the information you requested cannot be sent to you . . . because [those portions are] confidential under Virginia Code Section 63.2-102 and 63.2-103. The *remainder* of the requested

information as listed below is attached." *Id.* at 44A (emphasis added). However, nothing was listed below and the remainder of the nonconfidential information was *not* attached. DCSE instead denied McBurney access to the remainder of the nonconfidential public documents because he was "not a Citizen of the Commonwealth of Virginia." *Id.* Although some of the information McBurney requested may have been exempt from disclosure under VFOIA as confidential, DCSE's own response indicated that some of it was not. By denying the remainder of McBurney's request under VFOIA's citizens-only provision, DCSE denied his request without determining whether the remainder was otherwise exempt from disclosure under VFOIA. *See* VA. CODE ANN. § 2.2-3704(B)(1) (requiring record custodians to provide reasons for the withholding of any records as well as descriptions of withheld records).

Even assuming the lower court was correct that McBurney's first request related only to confidential documents not subject to disclosure, his second VFOIA request was denied solely on noncitizenship grounds. In his second VFOIA request, McBurney requested several different types of information on file with DCSE: information that was collected about McBurney, information regarding the handling of his child support claim, and information about DCSE's procedures and policies generally. JA at 45A–46A. DCSE denied McBurney's second VFOIA request without

processing it solely because he was not a Virginia citizen. *Id.* at 47A. Instead, DCSE suggested that McBurney use an alternate statute to obtain the information. *Id.*

DCSE's production of some of the requested documents under the Government Data Collection and Dissemination Practices Act did not fully satisfy McBurney's request for information under VFOIA. Indeed, McBurney still has not received any documents regarding the general policies and practices of DCSE relating to claims of overseas parents. *Id.* at 39A, 46A. Because McBurney was denied access to all the public documents he requested, he has been, and remains, injured.

b. VFOIA Forecloses McBurney's Ability to Challenge DCSE's Unilateral Determination that the Requested Information is Confidential.

Even assuming that the district court's characterization of DCSE's initial denial was correct, McBurney still has standing to challenge the constitutionality of VFOIA's citizens-only provision. McBurney's ability to challenge DCSE's confidentiality determination is barred under VFOIA's citizens-only provision. VFOIA provides that "[a]ny person . . . denied *the rights and privileges conferred by this chapter* may proceed to enforce such rights by filling a petition for mandamus or injunction." VA. CODE ANN. § 2.2-3713(A) (emphasis added). But VFOIA only gives Virginia citizens the right to public information. § 2.2-3704(B). McBurney is thus

foreclosed from filing a claim under VFOIA in state court, and suffers an injury-in-fact for that reason as well.

2. McBurney's Injuries Were Caused by DCSE and Are Redressable by This Court.

There is no disagreement that McBurney's injury was caused by DCSE's action, as DCSE denied McBurney's request for information. Redressability requires that a plaintiff allege that prospective relief would eliminate or ameliorate the harm. *Warth v. Seldin*, 422 U.S. 490, 505 (1975). It need not be certain that the requested relief will, in fact, alleviate the harm, but only that it is likely the alleged injury would be redressed by a favorable decision. *Friends of the Earth*, 528 U.S. at 181. McBurney has alleged denial of access to public documents—because of his noncitizen status—related to DCSE's tardy prosecution of his child support claim. JA at 12A.

A decision favorable to McBurney would require DCSE to process his VFOIA requests as if he were a citizen of Virginia. A refusal to process a request for information is a redressable injury. *Akin*, 524 U.S. at 21; *Public Citizen*, 491 U.S. at 449. "Those requesting information under [the Freedom of Information Act] need [not] show more than that they sought and were denied specific agency records." *Public Citizen*, 491 U.S. at 449. But for DCSE's unconstitutional application of

VFOIA, McBurney would be entitled to a detailed explanation of which documents are publicly available, which documents are withheld, and why withheld documents are exempt from disclosure. VA. CODE ANN. § 2.2-3704(B)(1)–(4). This detailed explanation is independently valuable to McBurney's search for information about DCSE's mishandling of his child support claim.

Moreover, if McBurney were to prevail on his federal constitutional claims here, he would, as a result, be entitled to state-court judicial review of DCSE's unilateral confidentiality determination. As explained above, VFOIA provides only Virginia citizens with the right to have an agency's exemption or confidentiality determination reviewed in state court. § 2.2-3713(A). Were this Court to rule VFOIA's citizens-only provision a violation of the Privileges and Immunities Clause, McBurney would be able to challenge DCSE's unilateral determination that some of the documents requested are exempt from disclosure as confidential under VFOIA.

B. Hurlbert Has Standing to Challenge VFOIA's Citizens-Only Provision, and His Claims Are Not Moot.

Hurlbert's claims are justiciable. Hurlbert meets all three requirements for Article III standing to seek an injunction: (1) an ongoing threat of injury-in-fact, (2) caused by defendants, (3) which would be redressed if the requested relief is granted. *Lujan*, 504 U.S. at 560–61. Hurlbert's claims are likewise not moot because his injury

is not only Henrico County's one-time withholding of certain records, but also his inability to obtain public records from Virginia public bodies in the future. Virginia's policy of categorically denying access to public records to out-of-state residents may not evade review simply because Henrico County sought to moot this lawsuit by complying with Hurlbert's request eight months late. Consequently, Hurlbert's claims are justiciable.

1. Hurlbert Has Adequately Alleged Ongoing Injury.

The County's denials have dissuaded Hurlbert from making future VFOIA requests, creating an ongoing threat of injury-in-fact that is more than sufficient to confer standing on his claim for injunctive relief. *See, e.g.*, *Akin*, 524 U.S. at 21 (refusal to consider requests for information constitutes injury-in-fact); *Public Citizen*, 491 U.S. at 449 (finding distinct injury when defendant advisory committee categorically refused to consider all Federal Advisory Committee Act requests). Under VFOIA, when information requests would likely be futile—a conclusion Hurlbert sensibly reached because his request was previously denied solely because of his status as an out-of-state resident—the law *presumes* injury and permits review even absent a document request. *Cf. Hale v. Wash. County Sch. Bd.*, 400 S.E.2d 175, 177 (Va. 1991) (finding ongoing injury under VFOIA in the absence of a document request when complying with the requesting procedure would have served no

purpose). Yet, the district court ruled that Hurlbert lacks standing because he did not plead ongoing injury in the Amended Complaint. JA at 84A–85A. The district court erred when it confined its standing inquiry to the Amended Complaint alone, and this Court is free to consider record evidence outside the pleadings when ruling on its own or the district court's jurisdiction. *See Warth*, 422 U.S. at 501–02 ("It is within the trial court's power to allow or require the plaintiff to supply, by amendment to the complaint *or by affidavits*, further particularized allegations of fact deemed supportive of plaintiff's standing." (emphasis added)); *Richmond, Fredericksburg & Potomac R.R. Co.*, 945 F.2d at 768 ("In determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment."). As Hurlbert stated in his declaration below, he has been chilled from making future VFOIA requests after his request to Henrico County was categorically denied because he is not a Virginia citizen. JA at 49A–50A.

Alternatively, even if this Court confines its standing analysis to the Amended Complaint, the district court nevertheless erred when it found that Hurlbert had not alleged an ongoing injury. The description of Hurlbert's injury in the Amended Complaint is both retrospective and forward-looking. *Id.* 67A, 68A. The Amended Complaint demonstrates that Hurlbert has suffered past injury from his inability to

obtain the documents he requested on June 5, 2008 in a timely manner *and* that VFOIA's citizens-only provision *continues* to make it impossible for Hurlbert to pursue his common calling while permitting Virginia citizens to do so. *Id*. Moreover, the section of the Amended Complaint titled "Irreparable Harm," which applies to Hurlbert, likewise uses forward-looking language to reiterate Hurlbert's allegation of ongoing lack of access to information from Virginia public entities that forms the basis of his claim for injunctive relief. *Id.* at 69A. Therefore, the Amended Complaint's factual allegations sufficiently pled ongoing injury to support the issuance of an injunction.

2. Hurlbert's Claims Are Not Moot.

Hurlbert's claims are not rendered moot by the County's decision to provide Hurlbert with the requested records eight months late, *see* VA. CODE ANN. 2.2-3704(B) (requiring response to record requests within five days), and after this litigation commenced. Doc. 21, Mem. of Law in Supp. of Davis's Mot. to Dismiss 5–6; JA at 56A, 57A. By the time Hurlbert received the requested records, they were no longer useful to him or his client. *See* JA at 57A. Seizing on its self-serving empty gesture, the County has claimed that Hurlbert "lacks any 'legally cognizable interest' in the outcome of this litigation," that Hurlbert's claim is moot, and that Hurlbert now lacks standing to challenge VFOIA's citizens-only provision. Doc. 21, Mem. of Law

in Supp. of Davis's Mot. to Dismiss 5. Not so. Both Hurlbert's business practice of obtaining real estate tax records and Virginia's practice of denying VFOIA requests from noncitizens are ongoing. The only effective remedies for Hurlbert's ongoing injury are a declaration that Virginia public bodies' practice of refusing to process his VFOIA requests violates the Constitution and an injunction against Virginia's categorical refusal to process noncitizens' VFOIA requests.

The Supreme Court has repeatedly held that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)); *Fed. Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 462 (2007); *accord United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). As the Court made clear in *Friends of the Earth*, "a defendant claiming that its voluntary compliance moots a case bears a formidable burden of showing that it is absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur." 528 U.S. at 190 (citation omitted); *see Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 719 (2007). Here, the County has done the opposite. By vigorously defending the constitutionality of VFOIA's citizens-only provision, it has guaranteed that, absent

judicial intervention, the wrongful conduct will recur. Consequently, Hurlbert's claims are not moot.

C. The Attorney General Is a Proper Party.

The Attorney General of Virginia plays a significant role in ensuring the proper application of VFOIA. As such, he is a proper party and should not be dismissed. Under *Ex Parte Young*, 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." 209 U.S. 123, 150–51 (1908). Although there must be a "special relation" between the state officer named in the lawsuit and the challenged statute, this requirement is satisfied when the officer has "*some* connection with the enforcement of the act." *Id.* at 157 (emphasis added).

VFOIA singles out the Attorney General to provide him with special standing to enforce the Act. VFOIA's standing provision provides that "[a]ny person, *including the attorney for the Commonwealth acting in his official or individual capacity*, denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction." VA. CODE ANN. § 2.2-3713(A) (emphasis added). Section 2.2-3713(A) identifies the Attorney General as the only public officer with enforcement power above and

beyond that of a normal citizen. Consequently, the statute itself creates a "special relation" between the Attorney General and enforcement of VFOIA.

The district court relied on this Court's ruling in *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001), to support its conclusion that the Attorney General is not a proper party because he does not have a specific duty to enforce VFOIA. JA at 77A; *see Waste Mgmt.*, 252 F.3d at 331 (Governor of Virginia was not a proper defendant because he had no connection to the statute beyond a general duty to execute the laws of the state). A state official's general authority to enforce state laws, this Court held, is insufficient to subject that official to suit in federal court. JA at 77A.

However, the district court stretched *Waste Management* beyond its holding by requiring a specific duty to enforce a statute to form a "special relation" between the state official and the challenged statute. Although the lack of a specific duty was determinative in *Waste Management*, the Court did not say that the existence of a specific statutory duty is the only way to establish a "special relation." 252 F.3d at 331. The "special relation" requirement is intended to bar injunctive actions where the connection between the official and the enforcement of the statute is "significantly attenuated." *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008). As this Court has explained, the requirement serves "as a measure of proximity to and

responsibility for the challenged state action." *Id.*; *see Lytle v. Griffith*, 240 F.3d 404, 415 (4th Cir. 2001) (Wilkinson, C.J., dissenting) (the requirement "seeks to enforce a modicum of precision in determining which state officials are named").

The relationship between the Attorney General and the enforcement of VFOIA is not "significantly attenuated." Unlike the Governor in *Waste Management*, the Attorney General has a real connection to the challenged statute. First, in addition to the Attorney General's unique status as a potential public officer claimant under VFOIA's standing provision, VA. CODE ANN. § 2.2-3713(A), the Attorney General has a direct and substantial role in the interpretation and implementation of Virginia's laws. The Attorney General himself characterizes two of his duties as "provid[ing] legal advice and representation to the Governor and executive agencies, state boards and commissions, and institutions of higher education," and giving "written legal advice in the form of official opinions to members of the General Assembly and government officials." See Attorney General of Virginia, Role of the Office of Attorney General, http://www.oag.state.va.us/OUR_OFFICE/Role.html (last visited Sept. 17, 2009). And, although the Governor in *Waste Management* was only engaging in the political activity of "publicly endors[ing] and defend[ing] the challenged statutes," *Waste Mgmt.*, 252 F.3d at 331, the Attorney General here is

intimately involved in shaping how state agencies, officials, institutions of higher education, and other public entities apply the law.

Courts have acknowledged that a "special relation" may exist where there is a real connection between the official and the enforcement of the statute against the plaintiffs. *See, e.g.*, *1st Westco Corp. v. Sch. Dist. of Phila*., 6 F.3d 108, 114 (3d Cir. 1993); *see also Lytle*, 240 F.3d at 413 (Wilkinson, C.J., dissenting). Official Attorney General opinions are "extremely influential in shaping the course of state law" and are typically considered binding by state agencies and officials. 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 668 (1974); *Beck v. Shelton*, 593 S.E.2d 195, 200 (Va. 2004) (although not binding on courts, Attorney General opinions are "entitled to due consideration"). The influence of Attorney General advisory opinions on the application of state laws has not been lost on the courts. In *Gay Lesbian Bisexual Alliance v. Evans*, although the Attorney General disavowed responsibility for enforcing the challenged statute at state universities, he was a proper party because it was "allegedly in reliance on an 'advisory opinion' from the Attorney General" that the university continued its enforcement of the discriminatory statute against the plaintiffs. 843 F. Supp. 1424, 1426 (M.D. Ala. 1993), *aff'd sub nom. Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997).

Furthermore, even without a specific statutory duty to enforce VFOIA, the Attorney General has chosen to issue advisory opinions on the topic, thus assuming responsibility for ensuring compliance of public entities with the citizens-only provision. The Attorney General has issued hundreds of official opinions on how to apply VFOIA since its enactment, including approximately twenty in the last decade alone, in response to particular factual situations presented by government officials. *See* Virginia Coalition for Open Government, http://www.opengovva.org/foi-opinions/attorney-general-opinions-mainmenu-63 (last visited Sept. 17, 2009); *see also* Attorney General of Virginia, Official Opinions, http://www.oag.state.va.us/OPINIONS/index.html#Opinions (last visited Sept. 17, 2009).

Appellees' refusals to provide noncitizens access to public documents in Virginia are directly traceable to the Attorney General's position on the proper application of VFOIA. The Attorney General's position in his opinions, typically treated as binding by state agencies and officials, *see* HOWARD, *supra*, at 668, gives legal validation to the appellees' conduct and makes it highly unlikely that a state official or other public body would take action contrary to the Attorney General's position. Those advisory opinions, in which the Attorney General routinely refers to VFOIA as imposing a statutory duty on government agencies and institutions to "furnish copies of records requested by a citizen," Attorney General Opinion No.

02-095 (2002), underscore that the provision only applies to Virginia citizens. *See also, e.g.*, Attorney General Opinion No. 04-087 (2005); Attorney General Opinion No. 02-149 (2003). Because the Attorney General has taken the position in official opinions and this litigation that VFOIA applies only to citizens of Virginia, he has harmed and continues to harm the appellants.

The purpose of the "special relation" requirement is to "ensure[] that a federal injunction will be effective with respect to the underlying claim." *S.C. Wildlife Fed'n*, 549 F.3d at 333. Currently, a number of Virginia agency websites contain memoranda that are virtually identical to the memorandum posted on the Attorney General's own website explaining that VFOIA is available to Virginia citizens and how citizens may obtain public documents from the particular agency. *See, e.g.*, Virginia Department of Social Services, Official Website , http://www.dss.virginia.gov/geninfo/ foia.html (last visited Sept. 17, 2009); Attorney General of Virginia, Official Website, http://www.oag.state.va.us/FOIA.pdf (last visited Sept. 17, 2009). Both Hurlbert and Stewart plan to seek documents held by public bodies in Virginia in the future. JA at 57A, 62A. A declaration that the citizens-only provision is unconstitutional would, as a practical matter, compel the Attorney General to advise state agencies to alter their VFOIA memoranda and process VFOIA requests from noncitizens such as

Hurlbert and Stewart. Thus, the presence of the Attorney General as a party would enhance compliance with any court-ordered remedy.

Finally, the Virginia Attorney General has a duty to defend the constitutionality of state laws when they are challenged in court. Role of the Office of Attorney General, *supra*. Not surprisingly, therefore, the Attorney General is regularly named as a proper defendant in suits challenging the constitutionality of state statutes. *See, e.g.*, *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003) (Attorney General defendant in a dormant Commerce Clause case); *Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002) (Attorney General defendant in a Compact Clause and dormant Commerce Clause case). As such, his presence as a party in this lawsuit is appropriate.

II. VFOIA'S CITIZENS-ONLY PROVISION IS UNCONSTITUTIONAL UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE AND THE DORMANT COMMERCE CLAUSE.

A. VFOIA's Citizens-Only Provision Is Unconstitutional Under the Privileges and Immunities Clause.

VFOIA's citizens-only provision, which provides that "[a]ccess to such records shall not be denied to *citizens* of the Commonwealth," VA CODE ANN. § 2.2-3704(A) (emphasis added), violates appellants' rights under the Privileges and Immunities Clause because it discriminates against out-of-state requesters. Article IV, Section 2 of the U.S. Constitution provides that "[t]he Citizens of each State shall be entitled

to all Privileges and Immunities of Citizens in the several States." 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)). The Clause protects rights that are fundamental to the promotion of interstate harmony, *New Hampshire Supreme Court v. Piper*, 470 U.S. 274, 279–80 (1985), by relieving noncitizens "from the disabilities of alienage in other States," and "inhibit[ing] discriminating legislation against them by other States," *Hicklin*, 437 U.S. at 524. By barring noncitizens from accessing Virginia records, VFOIA's citizens-only provision impermissibly burdens appellants' rights to access public records, a right inherent in a democratic system of government and thus protected by the Clause. *Lee*, 458 F.3d at 200. The inability to access public records also burdens McBurney's right to seek resolution of grievances and Hurlbert's and Stewart's rights to participate in a common calling in violation of the Clause. *See, e.g.*, *Piper*, 470 U.S. at 280 (citing *Toomer*, 334 U.S. at 396); *Cole v. Cunningham*, 133 U.S. 107, 114 (1890).

To determine whether a state has discriminated in violation of the Privileges and Immunities Clause, a court first looks to whether the discriminatory provision at

issue "burdens one of those privileges and immunities protected by the clause." *United Bldg.*, 465 U.S. at 218. If the court finds that the discrimination burdens a right protected by the Clause, then the state must 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 the discrimination against noncitizens bears a substantial relationship to the state's objective, *Barnard v. Thorstenn*, 489 U.S. 546, 552 (1989); *Piper*, 470 U.S. at 284 (1985).

1. VFOIA Violates McBurney's Rights Under the Privileges and Immunities Clause.

a. VFOIA Burdens Several Interests Fundamental to National Unity.

VFOIA burdens several interests fundamental to national unity. An interest is fundamental to national unity if it is basic to the promotion of interstate harmony. *See Piper*, 470 U.S. at 279–80. A main concern of the Privileges and Immunities Clause is the prevention of retaliation by states for unequal treatment of their citizens at the hands of another state. *Toomer*, 334 U.S. at 395. Typical challenges under the Privileges and Immunities Clause involve "economic discrimination," but the Clause protects more than just economic interests. *Piper*, 470 U.S. at 281 n.11. Among the interests protected by the Clause, the Supreme Court has included the right to travel, *Saenz v. Roe*, 526 U.S. 489, 501 (1999), medical treatment, *Doe v. Bolton*, 410 U.S.

179, 200 (1973), pursue economic interests, *Hicklin*, 437 U.S. at 524, access state courts, *Canadian N. R.R. Co. v. Eggen*, 252 U.S. 553, 562 (1920), practice law, *Piper*, 470 U.S. at 281, and equal tax treatment, *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975), as fundamental to national unity; these enumerated protected rights are not exhaustive. VFOIA directly burdens noncitizens' ability to access publicly available information, implicating an out-of-stater's right to advocate for his interests, to equal access to courts, and to pursue economic interests on equal footing with a state's citizens.

i. VFOIA Implicates McBurney's Right of Equal Access to Information.

The Third Circuit has recently held that equal access to public information is a fundamental right under the Privileges and Immunities Clause. *Lee*, 458 F.3d at 200. Access to public information animates other rights and is essential to the promotion of democratic values. *Id.* at 199–200. Because "[n]o state is an island, . . . events which take place in an individual state may . . . have an impact upon policies of not only the national government, but also of the states." *Id.* VFOIA effectively creates an island of information accessible only to Virginia citizens.

By discriminating against McBurney based on his citizenship, VFOIA has burdened his ability to advocate for his interests. *Lee* held that limiting a noncitizen's

ability to advocate for his interests by restricting his access to information solely because he is a noncitizen burdens a fundamental right under the Privileges and Immunities Clause. *Id.* at 200. In *Lee*, the plaintiff was seeking access to records regarding a Delaware settlement with a Delaware corporation over lending practices that affected citizens in other states. *Id.* at 195. The court noted the national importance of Delaware's settlement and how Delaware's practices may affect the practices of other states. *Id.* at 199–200.

How states handle noncitizens' FOIA requests and claims about government programs is nationally important. This is true generally and as it pertains to McBurney's child support claims with DCSE. Like McBurney, many custodial parents with Virginia-based custody orders seek enforcement from outside Virginia. *See* VIRGINIA DIVISION OF CHILD SUPPORT ENFORCEMENT, CHILD SUPPORT ARREARAGES: A LEGAL, PROCEDURAL, DEMOGRAPHIC AND CASELOAD ANALYSIS 52–53 (2004) (noting that only 74% of Virginia DCSE cases are in-state), available at http://www.dss.virginia.gov/files/about/reports/children/child_support/2004/arrrearages.pdf. Nationally, $38 billion in child support is due annually to custodial parents. U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2005, at 8 (2007), available at http://www.census.gov/prod/2007pubs/p60-234.pdf. In 2006, over 30% of all custodial parents used a child

support enforcement office to help with child support issues, and almost 30% of those parents were specifically seeking collection assistance. *Id.* at 10. Virginia's DCSE alone oversees around $630 million annually in child support payments and is currently pursuing $2.5 billion in outstanding child support. Virginia Dep't of Social Services, Child Support Collections, http://www.dss.virginia.gov/files/division/dcse/facts_statistics/ CollectionsSFY08.pdf (last visited Sept. 18, 2009).

By excluding non-Virginians from accessing public information about how their claims are handled by DCSE, VFOIA is impermissibly undermining noncitizens' ability to understand how their claims are handled and to advocate for changes to practices that adversely affect their child support rights. More importantly, VFOIA places a special burden on McBurney's ability to take part in any interstate discussion of state practices that directly affect his life and income. By making noncitizenship an improper basis for imposing a special burden, the Privileges and Immunities Clause maintains the structural balance between states that is essential to federalism. *Austin*, 420 U.S. at 662. "[S]chemes that burden [noncitizens] particularly would remit them to such redress as they could secure through their own State; but 'to prevent (retaliation) was one of the chief ends sought to be accomplished by the Constitution.'" *Id*. (quoting *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 82 (1920)). For out-of-state residents like McBurney, a national or interstate forum is the

only outlet for politically altering government practices that adversely affect their interests.

ii. VFOIA Implicates McBurney's Right of Equal Access to the Courts.

VFOIA also burdens McBurney's right to equal access to the courts, which is a fundamental right protected by the Privileges and Immunities Clause. *Blake v. McClung*, 172 U.S. 239, 249 (1898). In *Blake*, a Tennessee law gave resident unsecured creditors claim preference over nonresident unsecured creditors in bankruptcy proceedings. *Id.* at 243. Although nonresidents were not barred from bringing their unsecured claims against the debtor, because the law favored residents over nonresidents, it implicated the protected privilege of access to courts. *Id.* at 247. VFOIA similarly prefers residents over nonresidents by denying non-Virginians access to public information essential to meaningfully advocating one's interests in court.

When the right of access to the courts "is concerned, 'meaningful access to the courts is the touchstone.'" *Lewis v. Casey*, 518 U.S. 343, 351 (1996) (quoting *Bounds v. Smith*, 430 U.S. 817, 823 (1977)). Thus at a minimum, the state cannot construct barriers to meaningful access to the courts. VFOIA does not give a direct in-court advantage to citizens, however, it both strategically and financially disadvantages

non-Virginians in suits against Virginia public officials by limiting a nonresident's ability to discover when and where a legal wrong may have occurred. This scheme, in turn, allows Virginia's public officials to control access to public information that may expose their own wrongdoing and to operate under the veil of darkness freedom of information laws are meant to illuminate. *See* VA. CODE ANN. § 2.2-3700(B).

iii. VFOIA Implicates McBurney's Ability to Pursue his Economic Interests.

VFOIA has also burdened McBurney's ability to pursue an economic interest on equal footing with Virginia residents. The right to pursue an economic interest is the most fundamental of privileges protected by Article IV. *United Bldg.*, 465 U.S. at 219; *Tangiers Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264, 266 (4th Cir. 1993). Essential to this right is the ability to investigate and adequately assess potential claims against government agencies with which one transacts. The decision to file suit against any party or pursue other means of advocacy is a business decision that implicates one's ability to protect and earn income. In any given individual case, such as McBurney's, it is an economically driven decision.

In *Tangiers Sound*, this Court held that Virginia cannot charge the equivalent of a special non-resident tax for access to state resources without substantial justification. 4 F.3d at 268. As in *Tangiers Sound*, McBurney—and any other non-

Virginian seeking public information for economic purposes—has been and will be charged the equivalent of a nonresident tax or fee for access to government documents essential to his ability to acquire income from DCSE's failure to properly handle his child support claim. Although not a direct tax or fee as in *Tangiers Sound*, by requiring McBurney to overcome extra barriers to access information, Virginia is forcing McBurney to incur extra costs to access the same information freely available to Virginians.

b. A Non-Virginian's Ability to Circumvent VFOIA Does Not Cure Its Defects.

The ability to access information by circumventing VFOIA is not relevant to whether the statute discriminates against non-Virginians, and the suggestion that citizens ought to circumvent the law undermines appellees' assertion that noncitizens must be excluded from access to public records because their requests would impose a burden on the state. Below, appellees contended that non-Virginians could mitigate harm caused by VFOIA by asking Virginians to file a VFOIA request for them, rendering any harm caused *de minimus*. Doc. 21, Def. Davis's Mem. Supp. Mot. to Dismiss 17. But any discrimination, no matter how slight, requires the state to justify the discrimination. In *Piper*, the Court noted that although the challenged state law did not completely bar out-of-state lawyers from practicing in New Hampshire,

because non-residents could appear *pro hace vice* when needed, it still failed to meet the demands of Article IV, as it did not allow nonresidents the right to practice on the same terms as residents. 470 U.S. at 277 n.2. Like the plaintiff in *Piper*, under appellees' proposed circumvention, McBurney would be forced to take extra steps to access a benefit that a Virginian can access directly.

2. VFOIA Violates the Privileges And Immunities Clause Because It Interferes With Hurlbert's and Stewart's Common Callings.

Virginia's discrimination against noncitizens implicates the fundamental right to pursue a common calling, which is "one of the most fundamental of those privileges protected by the [Privileges and Immunities] Clause." *United Bldg.*, 465 U.S. at 219; *see Baldwin v. Mont. Fish & Game Comm'r*, 436 U.S. 371, 383 (1978). As the Supreme Court has noted, "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 citizens of that State." *Toomer*, 334 U.S. at 396; *see Piper*, 470 U.S. at 280–81. The citizens-only provision abridges Hurlbert's right to pursue his common calling as the operator of a national records search service, and Stewart's right to pursue her common calling as a journalism professor and scholar, on equal footing with Virginia citizens. Hurlbert and Stewart both rely extensively on access to public records to pursue their respective common callings. *See* JA at 48A–49A, 53A.

a. VFOIA's Discrimination Against Noncitizens Interferes With Hurlbert's Pursuit of His Common Calling.

VFOIA is facially discriminatory and burdens Hurlbert's ability to pursue his common calling. The object of Hurlbert's business is to obtain public records for clients more efficiently than clients can obtain records on their own. *Id.* at 48A. Indeed, VFOIA's burden on Hurlbert's common calling is greater than the burden in *Toomer*, in which the Supreme Court struck down a state law charging out-of-state shrimp boats one hundred times the cost of an in-state license fee, 334 U.S. at 403; the citizens-only provision goes further than simply imposing a higher cost on noncitizens. By categorically blocking Hurlbert's access to any public records in Virginia, Hurlbert finds himself unable to serve the sizeable market of clients requiring records from Virginia localities. *See* JA at 48A–49A. Meanwhile, Virginia businesses similar to Hurlbert's are able to serve the same client base that Hurlbert is unable to serve. Hurlbert is thus unable to pursue his common calling in Virginia "on terms of substantial equality with citizens of that State." *Toomer*, 334 U.S. at 396.

Despite the district court's contrary statements, no court has ever ruled that a state law interferes with a common calling only when it "attempts to regulate a trade or profession . . . with the aim of improving the competitive advantage of a state's citizens over noncitizens." JA at 85A. Such a narrow reading conflates the Privileges

and Immunities Clause, which exists to protect any rights that are "fundamental to the promotion of interstate harmony" and "bear upon the vitality of the Nation as a single entity," *United Bldg.*, 465 U.S. at 218, with the dormant Commerce Clause, which exists specifically to prevent "economic Balkanization," *Granholm v. Heald*, 544 U.S. 460, 472 (2005). Indeed, the Supreme Court has expressly distinguished the concerns underlying the Privileges and Immunities Clause—which are those that are "vital" to preserving the nation "as a single entity," *Baldwin*, 436 U.S. at 383—from the purely commercial concerns underlying the dormant Commerce Clause. *E.g.*, *id.* at 379–80 (noting that the Framers consciously separated the Privileges and Immunities Clause from the Commerce Clause); *Piper*, 470 U.S. at 281 (identifying non-commercial reasons for recognizing the practice of law as a "fundamental right" under the Privileges and Immunities Clause).

b. VFOIA's Discrimination Against Noncitizens Interferes With Stewart's Pursuit of Her Common Calling.

VFOIA's citizens-only provision similarly interferes with Stewart's pursuit of her common calling as a professor of journalism "on terms of substantial equality with citizens of" Virginia. *Toomer*, 334 U.S. at 396. Obtaining public documents from multiple states pertaining to the terms of university presidents' employment contracts is an essential component of Stewart's pedagogical efforts, and of her and

her students' journalistic efforts, to make meaningful comparisons across state universities. JA at 51A–52A. But VFOIA's citizens-only provision directs Virginia public universities to categorically deny Stewart's access to Virginia public records containing information unattainable elsewhere, thereby compromising the quality and usefulness of Stewart's study. *Id.* at 52A. In contrast, a Virginia citizen conducting the same study would be able to obtain the records Stewart sought and compile a more complete study that included Virginia universities. As long as VFOIA's citizens-only provision remains in force, it will interfere with Stewart's access to information essential to performing her role as an educator—specifically, improving the quality of the education she provides to her students and of her educational institution—"upon the same footing" with Virginia citizens. *Hicklin*, 437 U.S. at 524.

3. There is No Valid Justification for VFOIA's Citizens-Only Provision.

Because VFOIA burdens fundamental rights under the Privileges and Immunities Clause, it is unconstitutional unless Virginia can demonstrate a substantial reason for the discrimination that bears a substantial relationship to the state's objective. The Supreme Court has recognized very few substantial reasons for discriminating against citizens of other states. *See Baldwin*, 436 U.S. at 388; *Canadian N. R.R.*, 252 U.S. at 562. Public records are not a scarce or diminishing

resource that a state may permissibly husband for its own citizens. *Cf. Baldwin*, 436 U.S. at 388 (recognizing in-state game as an exhaustible resource for which states may permissibly favor their own residents).

In *Lee*, the Third Circuit rejected Delaware's claims that "defin[ing] the political community and strengthen[ing] the bond between citizens and their government" were substantial reasons justifying Delaware FOIA's facially discriminatory citizens-only provision. 458 F.3d at 200–01. Restricting noncitizen access to public documents does not bear a substantial relationship to a state's goal of defining a distinct political body that influences the political process. Although the Supreme Court has previously recognized that a state's right to limit participation in state government is essential to establishing a unique political body within a state, *Sugarman v. Dougall*, 413 U.S. 634, 642–43 (1973), Virginia's ability to do so is unaffected by an out-of-state resident's access to public information. A non-Virginian's ability to obtain public information neither forecloses a Virginian's access to the same documents nor blurs the political lines between Virginians and non-Virginians.

Excluding noncitizens from accessing public documents is also not closely tailored to reducing the alleged extra cost to the state associated with noncitizen access. In *Baldwin*, the Supreme Court recognized that a state may charge

nonresidents a higher fee for recreational hunting licenses to deal with the extra cost associated with a nonresident's burden on a local resource. 436 U.S. at 390–91. Unlike *Baldwin*, however, Virginia has completely barred access to public documents. Although increased processing of noncitizen requests is likely to increase state expenditures, denying access to the documents is not tailored to alleviate that harm, as Virginia could pass the increased costs on to requesters. Indeed, VFOIA already provides Virginia public bodies with the ability to charge requesters the cost of retrieving and duplicating records. VA. CODE ANN. § 2.2-3704(F). In sum, VFOIA's citizens-only provision violates the Privileges and Immunities Clause because Virginia is unable to show a substantial justification for its facially discriminatory law.

B. VFOIA'S Citizens-Only Provision Is Unconstitutional Under the Dormant Commerce Clause.

VFOIA's citizens-only provision violates the "dormant" or "negative" aspect of the Commerce Clause because it erects barriers to interstate commerce. VFOIA prevents Hurlbert from obtaining a unique local resource essential to his business—public records—while allowing Virginia citizens access to that resource. The dormant Commerce Clause prohibits a state from discriminating in its governmental capacity against interstate commerce to favor in-state interests. *Davis*,

128 S. Ct. at 1808; *Camps Newfound/Owatonna*, 520 U.S. at 575–77. If a state law is facially discriminatory, "in its practical effect, or in its purpose," it is "virtually per se" invalid. *Envtl. Tech. Council*, 98 F.3d at 785 (quoting *Wyoming*, 502 U.S. at 454–55); *see Brooks*, 462 F.3d at 363 (quoting *Granholm*, 544 U.S. at 476). If a law facially discriminates, the state has the burden of demonstrating that the law "advances a legitimate local purpose that cannot be adequately served by reasonably nondiscriminatory alternatives." *Granholm*, 544 U.S. at 489; *Envtl. Tech. Council*, 98 F.3d at 785.

1. VFOIA's Citizens-Only Provision Is Discriminatory On Its Face, and There Are No Legitimate Local Concerns Justifying the Discrimination.

The district court erred when it ruled—without offering any explanation—that VFOIA does not discriminate against out-of-state interests. VFOIA's citizens-only provision discriminates against interstate commerce on its face because it gives Virginia citizens access to a local resource—public records—while explicitly excluding noncitizens. VA. CODE ANN. § 2.2-3704(A). A state may not give in-state residents preferred access to resources located within the state's borders. *E.g.*, *Camps Newfound/Owatonna*, 520 U.S. at 576 (citing *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982)); *see also Hughes v. Oklahoma*, 441 U.S. 322, 336–37 (1979) (finding that Oklahoma's ban on the transportation of minnows out

of the state "overtly blocks the flow of interstate commerce" at the state's borders). That VFOIA does not explicitly regulate Hurlbert's trade is irrelevant. *See Envtl. Tech. Council*, 98 F.3d at 785. The practical effect of VFOIA's citizens-only provision is to give in-state businesses similar to Hurlbert's access to prospective clients (those seeking records from Virginia localities) that Hurlbert and other noncitizens cannot serve. Hence, VFOIA erects barriers to Hurlbert's interstate commercial activity while favoring in-state interests, rendering the law "virtually per se" invalid. *Id.*

Moreover, Virginia has failed to meet its burden of demonstrating that legitimate local concerns justify limiting public records to citizens. "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. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992)). Virginians' greater interest in their government does not justify denying noncitizens access to public records because providing noncitizens with equal access to public records in no way undermines Virginians' interests in their government. *Cf. Lee*, 458 F.3d 194

(out-of-state plaintiff who sought financial records for investigative journalism suffered injury due to state FOIA citizens-only provision).

2. The Market Participant Exception to the Dormant Commerce Clause Does Not Apply to Hurlbert in This Case.

In the trial court, appellees invoked the dormant Commerce Clause's market-participant exception, which exempts discriminatory laws from constitutional scrutiny when the state participates in the relevant market as a purchaser or seller. Doc. 21, Mem. of Law in Supp. of Davis Mot. to Dismiss 14–15; *see Davis*, 128 S. Ct. at 1808–09 (citing *Hughes v. Alexandria Scrap, Corp.*, 426 U.S. 794, 810 (1976)). The dormant Commerce Clause prevents states from using "taxes and regulatory measures," which are unavailable to private market actors, to "imped[e] free private trade in the national marketplace." *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 207 (1983) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 436–37 (1980)). When a state achieves its objectives through market competition that is available to all market participants, including private actors, the concerns articulated in *White* are absent. *Id*. at 207–08. However, the market-participant exception does not apply to VFOIA's citizens-only provision.

Virginia public entities that discriminate against noncitizens under VFOIA are regulating an administrative process in their "distinct governmental capacity," *Camps*

Newfound/Owatonna, 520 U.S. at 592 (citation omitted), not acting as sellers in the market for public records. For the market-participant exception to apply, a state must operate in an open market as would a private actor. *Davis*, 128 S. Ct. at 1809; *see, e.g.*, *Reeves*, 447 U.S. 429 (applying market-participant exception when state was one of several sellers in the open market for concrete); *Brooks*, 462 F.3d 341 (applying market participant exception when Virginia sold wine in competition with more than 10,000 other vendors). Here, Virginia public bodies do not operate in an open market because they do not compete with other sellers; Virginia's unreleased public records are a unique resource for which Virginia public bodies are the only possible suppliers. *See S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 98 (1984) (state was not a market participant because it was not an economic competitor in the relevant market); *Brooks*, 462 F.3d at 356–57. Thus, the kinds of market forces—notably, price competition—that justify the market-participant exception are absent under VFOIA. *See, e.g.*, *White*, 460 U.S. at 207 n.3 (noting the policy goal of "[e]venhandedness" between states and private market participants underlying the market-participant exception).

Even if Virginia public bodies were participants in the market for public records, the citizens-only provision would still violate the dormant Commerce Clause here because VFOIA regulates Hurlbert in another market: the market for public

records retrieval services. Although a state may constitutionally enter a market and discriminate in favor of its residents, "[t]he State acts unconstitutionally when its participation in one market results in regulation of another market in which it does *not* participate." *Brooks*, 462 F.3d at 358 (finding that Virginia's participation in the wine market had no regulatory effect on the liquor market); *see S.-Cent. Timber Dev.*, 467 U.S. at 96–98. Here, even if we assume (incorrectly) that Virginia public bodies participate in a market at all, they and Hurlbert operate in two different markets. Although Virginia public bodies offer public records, the value that Hurlbert offers his clients is not the public records themselves, but the efficiency that comes from his familiarity and experience with the process of requesting those records. In short, Virginia public bodies offer a good, while Hurlbert offers a service. Consequently, a finding that Virginia public entities are participants in *some* market would not cure the dormant Commerce Clause violation.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with directions that the district court declare the citizens-only provision of Virginia's Freedom of Information Act unconstitutional and enter judgment for appellants.

Respectfully submitted,

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September 21, 2009

[*]Counsel gratefully acknowledge the substantial assistance of Andrew Deeringer, Sara Liebschutz, and Jeremiah Nelson, all of whom are third-year law students at Georgetown University Law Center.

REQUEST FOR ORAL ARGUMENT

This appeal presents an important constitutional issue of first impression in this Circuit, and the court below decided the question contrary to the holding of another court of appeals. Appellants therefore respectfully request oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,780 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14 point Times New Roman font.

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STATUTORY ADDENDUM

Virginia Freedom of Information Act

VA. CODE ANN. § 2.2-3700(B)

B. By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.

VA. CODE ANN. § 2.2-3704

A. Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth. The custodian may require the requester to provide his name and legal address. The custodian of such records shall take all necessary precautions for their preservation and safekeeping.

B. A request for public records shall identify the requested records with reasonable specificity. The request need not make reference to this chapter in order to invoke the provisions of this chapter or to impose the time limits for response by a public body. Any public body that is subject to this chapter and that is the custodian of the requested records shall promptly, but in all cases within five working days of receiving a request, provide the requested records to the requester or make one of the following responses in writing:

> 1. The requested records are being entirely withheld because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with this chapter. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.
>
> 2. The requested records are being provided in part and are being withheld in part because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with this chapter. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records. When a portion of a requested record is withheld, the public body may delete or excise only that portion of the record to which an exemption applies and shall release the remainder of the record.

3. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.

4. It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period. Such response shall specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven work days in which to provide one of the four preceding responses.

* * *

E. Failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of this chapter.

F. A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No 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. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. The public body may also make a reasonable charge for the cost incurred in supplying records produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than 50 acres. All charges for the supplying of requested records shall be estimated in advance at the request of the citizen.

VA. CODE ANN. § 2.2-3713

A. Any person, including the attorney for the Commonwealth acting in his official or individual capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good cause. Venue for the petition shall be addressed as follows:

> 1. In a case involving a local public body, to the general district court or circuit court of the county or city from which the public body has been elected or appointed to serve and in which such rights and privileges were so denied;
>
> 2. In a case involving a regional public body, to the general district or circuit court of the county or city where the principal business office of such body is located; and
>
> 3. In a case involving a board, bureau, commission, authority, district, institution, or agency of the state government, including a public institution of higher education, or a standing or other committee of the General Assembly, to the general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond.

* * *

D. The petition shall allege with reasonable specificity the circumstances of the denial of the rights and privileges conferred by this chapter. A single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein. If the court finds the denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover reasonable costs and attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust. In making this determination, a court may consider, among other things, the reliance of a public body on an opinion of the Attorney General or a decision of a court that substantially supports the public body's position.

E. In any action to enforce the provisions of this chapter, the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence. Any failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter.

Government Data Collection and Dissemination Practices Act

VA. CODE ANN. § 2.2-3806

A. Any agency maintaining personal information shall:

1. Inform an individual who is asked to supply personal information about himself whether he is legally required, or may refuse, to supply the information requested, and also of any specific consequences that are known to the agency of providing or not providing the information.

2. Give notice to a data subject of the possible dissemination of part or all of this information to another agency, nongovernmental organization or system not having regular access authority, and indicate the use for which it is intended, and the specific consequences for the individual, which are known to the agency, of providing or not providing the information. However documented permission for dissemination in the hands of the other agency or organization shall satisfy the requirement of this subdivision. The notice may be given on applications or other data collection forms prepared by data subjects.

3. Upon request and proper identification of any data subject, or of his authorized agent, grant the data subject or agent the right to inspect, in a form comprehensible to him:

a. All personal information about that data subject except as provided in subdivision 1 of § 2.2-3705.1, subdivision 1 of § 2.2-3705.4, and subdivision 1 of § 2.2-3705.5.

b. The nature of the sources of the information.

c. The names of recipients, other than those with regular access authority, of personal information about the data subject including the identity of all persons and organizations involved and their relationship to the system when not having regular access authority, except that if the recipient has obtained the information as part of an ongoing criminal investigation such that disclosure of the investigation would jeopardize

law-enforcement action, then no disclosure of such access shall be made to the data subject.

4. Comply with the following minimum conditions of disclosure to data subjects:

a. An agency shall make disclosures to data subjects required under this chapter, during normal business hours, in accordance with the procedures set forth in subsections B and C of § 2.2-3704 for responding to requests under the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) or within a time period as may be mutually agreed upon by the agency and the data subject.

b. The disclosures to data subjects required under this chapter shall be made (i) in person, if he appears in person and furnishes proper identification, or (ii) by mail, if he has made a written request, with proper identification. Copies of the documents containing the personal information sought by a data subject shall be furnished to him or his representative at reasonable charges for document search and duplication in accordance with subsection F of § 2.2-3704.

c. The data subject shall be permitted to be accompanied by a person of his choosing, who shall furnish reasonable identification. An agency may require the data subject to furnish a written statement granting the agency permission to discuss the individual's file in such person's presence.

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2009, I caused two copies of the foregoing Brief of Appellants to be served by first-class mail, postage prepaid, on each party through their counsel at the following addresses:

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No. 09-1615

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARK J. MCBURNEY, ROGER W. HURLBERT,
and BONNIE E. STEWART,
Plaintiffs-Appellants,

v.

HON. WILLIAM C. MIMS, Attorney General,
Commonwealth of Virginia,

HON. NATHANIEL L. YOUNG, JR., Deputy Commissioner and Director,
Division of Child Support Enforcement, Commonwealth of Virginia, and

SAMUEL A. DAVIS, Director, Real Estate Assessment
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Defendants-Appellees.

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

REPLY BRIEF OF APPELLANTS MARK J. MCBURNEY, ET AL.

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INTRODUCTION

Appellees' brief presents no valid legal rationale in support of the Virginia Freedom of Information Act's ("VFOIA") citizens-only provision. Instead, their principal attack is on McBurney's and Hurlbert's standing. In doing so, they make broad, unsubstantiated assumptions regarding the confidentiality of the documents McBurney requested and ignore evidence of both McBurney's and Hurlbert's ongoing injuries. As for Stewart, they overlook basic attributes of Virginia law and practice that show that the Attorney General has a "special relation" to the interpretation and enforcement of VFOIA and, thus, is a proper defendant in this action. When Appellees get to the merits, as we show below, they demonstrate a fundamental misunderstanding of Privileges and Immunities Clause doctrine and the anti-discrimination principles undergirding the dormant Commerce Clause.

ARGUMENT

I. APPELLANTS' INJURIES ARE REDRESSABLE AND THE ATTORNEY GENERAL IS A PROPER PARTY.

A. McBurney's Injury Is Redressable Because a Favorable Decision Could Result in the Production of Documents.

The parties agree that "[i]f the plaintiff's request *might result* in the production of documents, that is enough [to confer standing]." Appellees' Br. 20 (emphasis in original). A successful challenge to VFOIA *might result* in the production of

documents by the Division of Child Support Enforcement ("DCSE") because some of the documents McBurney requested were not confidential and were denied him solely because he is not a Virginian. Even if DCSE had determined that all the requested documents were confidential, were McBurney a Virginian, he would have had the right to a description of the withheld documents and a statutory right to challenge DCSE's confidentiality determination.

1. McBurney Requested Non-Confidential Records That Were Withheld Solely Because McBurney Is Not a Virginia Citizen.

Appellees' standing argument is premised entirely on their claim that all the documents requested by McBurney are exempt from disclosure under VFOIA—a determination that DCSE did not make when denying McBurney's requests and that is incorrect. Because both of McBurney's VFOIA requests asked for non-confidential information, and McBurney would be entitled to that information if VFOIA is found unconstitutional, McBurney's claims are redressable by this Court.

Despite Appellees' creative reading of DCSE's two-paragraph denial letter, Appellees' Br. 17–18, they cannot avoid the letter's first sentence, which states that "*[p]ortions* of the information [McBurney] requested cannot be sent . . . because [those portions are] confidential." JA at 44A (emphasis added). In denying access to the records, DCSE did not determine that *everything* McBurney requested was

confidential, as Appellees contend, and neither should this Court. DCSE's determination that only a portion of the requested records are exempt from disclosure is consistent with a careful reading of McBurney's VFOIA requests in which he requested non-confidential records—including general policies. Those records were withheld solely because McBurney is a non-Virginian. Appellees concede that copies of policies not specific to any individual child support case are not confidential. Appellees' Br. 19. They maintain, however, that the DCSE policies McBurney requested are confidential because they apply only to McBurney. *Id*. Policies, by definition, are not specific to any individual child support case. McBurney requested "[a]ny and all treaties, statutes, legislation, regulations, administrative guidelines or any other reference material that the DSS and/or DCSE relies upon in actioning or administering child support cases where *one parent is overseas*," JA at 46A (emphasis added), which would apply to any parent in McBurney's circumstances. In short, McBurney asked for general policies, not records specific to any particular child support case.

2. Even If Appellees Are Correct That All Documents Requested Were Withheld by DCSE as Confidential, McBurney Has Standing Because VFOIA Denies Him the Right to a Description of the Denied Records and to Challenge DCSE's Confidentiality Determinations.

VFOIA gives Virginians the right to a reasonably particular description of the volume and subject matter of requested records that have been withheld, VA. CODE ANN. § 2.2-3704(B)(1)–(2), and the right to challenge an agency's determinations in court, VA. CODE ANN. § 2.2-3713, while denying non-Virginians the same rights. A description of withheld materials and the grounds for denial gives the requester a reasonable basis to challenge an agency's withholding. Access to such a description would give McBurney valuable information needed to challenge DCSE's confidentiality determination. [1]

Like a reckless driver who justifies speeding by arguing that others are just as reckless, Appellees point to Virginia agencies' supposed failures to describe withheld documents with reasonable particularity in responding to their own citizens' requests—that is, the agencies' failure to follow the law—as justification for Virginia's discrimination against McBurney. Appellees' Br. 22. That Virginia public

[1] Appellees' comment that we failed to make this particular argument in support of our claim of standing to sue in the district court is irrelevant. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

bodies frequently violate their own citizens' statutory rights is irrelevant to whether Virginia law violates the Constitution by discriminating against non-Virginians. VFOIA did not require DCSE to give a reasonably particular description of denied requests to McBurney because he is a non-Virginian, and, for that reason alone, McBurney has standing to challenge that discrimination.

As for the right of judicial review, Appellees claim that VFOIA allows non-Virginians to challenge a Virginia agency's confidentiality determinations. But that argument is contradicted by VFOIA's plain language. Only claimants with "rights and privileges conferred by [VFOIA]" can challenge a denial of those rights. VA. CODE ANN. § 2.2-3713(A). Appellees' position also runs headlong into common sense. There would be no point in VFOIA providing non-Virginians the right to judicial review of agency decisions to deny access to *particular* records when the statute *categorically* excludes non-Virginians from its coverage. Therefore, McBurney also has a redressable injury because a favorable decision would allow him the right under VFOIA to challenge DCSE's unilateral determination that the records he seeks are confidential.[2]

[2]Appellees' argument that McBurney has a right to judicial review under VFOIA is a tacit admission that McBurney has standing to sue in Virginia state court precisely because he has suffered a procedural injury-in-fact. Appellees' Br. 21. Indeed, like federal courts, Virginia courts require a litigant to have a "personal stake in the outcome of the controversy." *Cupp v. Bd. of Supervisors of Fairfax County*, 318 S.E.2d 407, 412 (Va. 1984) (quoting *Duke Power Co. v. Carolina Envtl. Study Group*,

Undeterred by the presence of McBurney's procedural injuries, Appellees contend that because DCSE unilaterally determined that everything McBurney requested was confidential, his procedural injury is illusory. In other words, they ask this Court to *assume* that everything McBurney requested is confidential before that issue has been litigated. Appellees' Br. 19–20, 24, 25. It is unnecessary for this Court to decide whether McBurney ultimately will succeed in state court. In *Public Citizen v. Department of Justice*, that some of the information sought "*could* well fall outside FACA's exemptions" was enough to confer standing. 491 U.S. 440, 450 (1989) (emphasis added). There, the Supreme Court did not inquire into the probability of release; it was enough that some of the information sought might not be exempt from disclosure. *Id*. Not every document DCSE holds is a child support record. It is better left to state courts more familiar with VFOIA exemptions to determine which documents McBurney requested are confidential and therefore exempt from disclosure under VFOIA.

Inc., 438 U.S. 59, 72 (1978)). For this reason, Appellees have effectively conceded that McBurney has standing.

B. Hurlbert Has Adequately Alleged a Redressable, Ongoing Injury-in-Fact.

1. The Amended Complaint Alleges Ongoing Injury-in-Fact.

The factual allegations contained in the Amended Complaint, which must be accepted as true, *see Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)), demonstrate that Hurlbert suffers ongoing injury-in-fact sufficient to confer standing to seek an injunction. The Amended Complaint does not characterize Hurlbert's alleged injury as a "singular, wholly past injury." Appellees' Br. 26. To the contrary, all but one of Hurlbert's factual allegations are stated in present tense, forward-looking language. The Amended Complaint alleges that "Hurlbert *is barred* from pursuing any business stemming from Virginia public records," that "[t]he citizens-only provision . . . *denies* the Plaintiffs access to information," and that "the provision *bars* the Plaintiffs from participating in a range of economic, political, and social activities." JA 68A–69A (emphasis added). This kind of injury is appropriately redressed by declaratory and injunctive relief, not damages. Moreover, Virginia law presumes injury and permits review under VFOIA so long as future information requests would be futile, *cf. Hale v. Wash. County Sch. Bd.*, 400 S.E.2d 175, 177 (Va. 1991), a conclusion Hurlbert has sensibly reached because his request was denied solely because he was a noncitizen.

2. Hurlbert's Declaration and His Attorney's Letter to Henrico County Should Be Considered in the Standing Analysis.

The district court incorrectly refused to consider Hurlbert's declaration and his attorney's letter to Henrico County when ruling on Defendant Davis's motion for judgment on the pleadings. First of all, the district court should consider a plaintiff's affidavits and other submissions in opposition to a defendant's motion to dismiss for lack of standing. *Haase v. Sessions*, 835 F.2d 902, 907 (D.C. Cir. 1987). Second, Davis, the Director of Henrico County's Real Estate Assessment Division, filed a motion to dismiss Hurlbert's claims for lack of standing under Federal Rules of Civil Procedure 12(c) and 12(h)(3). JA at 54A–57A. Davis supported his motion with letters exchanged between Hurlbert's attorney (Kathryn Sabbeth) and Henrico County. *Id*. By submitting non-pleading materials with his motion, Davis expanded the scope of the standing inquiry beyond the logical sufficiency of the complaint to include factual evidence bearing on the truth of Hurlbert's allegations. *See Haase*, 835 F.2d at 906–07 (discussing scope of inquiry on a motion to dismiss for lack of standing and noting that, once inquiry proceeds to the fact-based stage, parties must be allowed to support or rebut allegations with non-pleading materials). Moreover, because Davis presented "matters outside the pleadings" with his Rule 12(c) motion, Rule 12(d) obligated the court to convert the proceeding into one for summary

judgment under Rule 56 and give "[a]ll parties . . . a reasonable opportunity to present *all* the material that [was] pertinent to the motion." FED. R. CIV. P. RULE 12(d) (emphasis added).

Hurlbert's declaration, in which he stated that he has been dissuaded from making further VFOIA requests since Henrico County denied his request is "pertinent to the motion" challenging his standing. JA at 49A–50A. Appellees misread Hulbert's declaration as insufficient to show ongoing injury-in-fact. Appellees' Br. 30. To the contrary, it underscores what Hurlbert had alleged in the Amended Complaint: that his injury is his ongoing inability to obtain records that potential clients would have him request through VFOIA, not Henrico County's one-time refusal of his VFOIA request. Similarly, Sabbeth's letter to Henrico County demonstrates the same ongoing injury because it states that Hurlbert "is concerned about . . . how his FOIA requests will be treated in the future." JA at 57A. The district court's decision not to formally convert the Rule 12(c) motion into one for summary judgment proceeding was not a material error because all relevant evidence was already before the court. However, its decision not to consider material demonstrating Hurlbert's ongoing injury-in-fact that was already in the record *was* material error and an abuse of the court's discretion because the court ultimately dismissed Hurlbert for lack of standing.

Contrary to Appellees' assertions, a court has an "independent obligation" to examine the plaintiff's standing. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1152 (2009). Appellees do not contest that the district court had the power to consider evidence outside the pleadings when ruling on Hurlbert's standing. Appellees' Br. 28. In this case, however, the district court exercised that power only with respect to Davis's record evidence outside the pleadings and refused to consider Hurlbert's record evidence demonstrating his ongoing injury-in-fact. JA at 84A; *see* JA at 48A–50A, 57A. In doing so, the district court abdicated its duty to consider counterarguments in the course of fully examining its jurisdiction over Hurlbert's claims. Moreover, the district court's decision to not consider Hurlbert's declaration served none of the purposes of pleading rules—both parties already had notice that Hurlbert's standing was at issue, and all parties had ample opportunity to submit their arguments to the court. *See* Doc. 19, McDonnell and Young Mem. of Law in Opp. to Hurlbert and McBurney Cross-Mot. for Prelim. Inj.; Doc. 21, Mem. of Law in Supp. of Davis Mot. to Dismiss; Doc. 27, McBurney and Hurlbert Mem. of Law in Opp. to Davis Mot. to Dismiss; JA at 3A–7A.

For these reasons, this Court should rule on Hurlbert's standing rather than remanding the issue to district court. All parties have thoroughly briefed and submitted record evidence pertaining to Hurlbert's standing to seek declaratory and

injunctive relief. Thus, no further factual development is needed, and the only issues remaining are questions of law.

C. The Attorney General Is a Proper Party Because He Has a Special Relation to the Enforcement of VFOIA.

We agree with Appellees that general authority to enforce the law, standing alone, is not sufficient to make government officials proper parties to litigation challenging a law. However, we disagree with their characterization of the Attorney General as having no role in VFOIA's enforcement and no special relation to the statute. The Appellees' position ignores the substantial role the Attorney General plays in the application of VFOIA by public bodies across the state.

First, we do not suggest, as Appellees contend (at 35–36), that the mere authority to issue advisory opinions creates the "special relation" required under *Ex Parte Young* to render an official a proper party. Rather, when the Attorney General affirmatively and frequently uses his authority to issue advisory opinions on the proper application of a particular statute, treated as binding by state agencies and officials, he has a special relation to the enforcement of that law. For this reason, holding that the Attorney General is a proper party under the particular facts here would not, as Appellees argue, open the floodgates and make the Attorney General a proper party in every suit challenging the constitutionality of a state statute.

Furthermore, as the Supreme Court explained in *Ex Parte Young*, the challenged statute need not itself place enforcement authority specifically in the hands of the defendant official to render that official a proper defendant: "The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specifically created by the act itself, is not material so long as it exists." 209 U.S. 123, 157 (1908).

Unlike the Governor in *Waste Management Holdings, Inc. v. Gilmore*, who only made political statements regarding the law and was not involved in its application, 252 F.3d 316, 331 (4th Cir. 2001), the Attorney General actively and officially opines on VFOIA's proper application. Since 1968, the Attorney General has issued over 250 VFOIA advisory opinions. *See* Virginia Coalition for Open Government, http://www.opengovva.org/foi-opinions/attorney-general-opinions-mainmenu-63 (last visited Oct. 27, 2009). In fact, since 1996, the Attorney General has issued nearly twice as many opinions on VFOIA than on any other statute. *See* Attorney General of Virginia, Official Opinions, http://www.oag.state.va.us/OPINIONS/index.html (last visited Nov. 2, 2009). And although those opinions are not binding on the courts, they are taken seriously and treated as binding by the state

agencies and officials that apply the law. *See* Appellants' Br. 32 (describing the *de facto* binding effect of Attorney General advisory opinions on state agencies).[3]

Appellees misunderstand our reliance on *Evans*. They contend (incorrectly) that we cite *Evans* for the proposition that general authority to issue official opinions renders the Attorney General a proper party. Appellees' Br. 38. Rather, *Evans* demonstrates the power of Attorney General advisory opinions as an enforcement tool. In *Evans*, the court took note of the advisory opinion relied on by the University as evidence of the Attorney General's responsibility to enforce the statute. *See Gay Lesbian Bisexual Alliance v. Evans*, 843 F.Supp. 1424, 1426 (M.D. Ala. 1993). In finding this enforcement authority, the court explained that "it is allegedly in reliance on an 'advisory opinion' from the Attorney General that [University] officials have continued their enforcement of [the statute] against the GLBA." *Id.* Our point here, which *Evans* supports, is that by issuing hundreds of opinions on VFOIA's application, the Attorney General is taking an important role in the statute's enforcement.

[3]The Attorney General has acknowledged that although his advisory opinions are not binding, they are entitled to "due consideration" by courts. Op. Va. Att'y Gen. 08-076 at 3 (2008). As the advisory opinion notes, "[t]he legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view." *Id.* (citation omitted).

Not only does the Attorney General issue advisory opinions, but he also has a special duty to participate in the interpretation, implementation, and resolution of disputes arising under VFOIA as a member of the Freedom of Information Act Advisory Council ("Advisory Council"). *See* 2008 VA. FREEDOM OF INFO. ADVISORY COUNCIL ANN. REP. 1–2, *available at* http://foiacouncil.dls.virginia.gov/2008ar.pdf ("2008 VFOIA ANN. REP."). Appellees contend that "the Attorney General has an even more attenuated connection with the statute due to the existence of the [Council]." Appellees' Br. 36. Yet, the existence of the Advisory Council—and the Attorney General's position on it—provides further evidence of the Attorney General's special relation to VFOIA.

First, the Attorney General (or his designee) sits as one of twelve members of the Council and is one of only five state officials required by law to do so. *See* 2008 VFOIA ANN. REP. at 2. As Appellees point out, the Advisory Council "issues official opinions specific to the FOIA context," Appellees' Br. 36, through which "the Council hopes to resolve disputes by clarifying what the law requires and to guide the future public access practices of state and local government agencies," 2008 VFOIA ANN. REP. at 2. The Council has even issued an opinion directly on the issue in dispute here. In a 2001 advisory opinion, the Council specifically advised that "FOIA requires that *[e]xcept as otherwise specifically provided by law, all public records*

shall be open to inspection and copying by any citizens of the Commonwealth. Therefore, the Commission need not provide public records to out-of-state citizens or corporations." *See* Op. VFOIA Advisory Council AO-37-01 (2001) (emphasis in original), *available at* http://foiacouncil.dls.virginia.gov/ops/01/AO_37.htm. If the Attorney General disagrees with this decision, he has the power to change this interpretation. Moreover, one is hard pressed to find another instance where the Virginia Attorney General (or his designee) sits as a member of an Advisory Council created specifically to facilitate compliance with a statute. The Attorney General's permanent, mandatory participation on the Council is yet another factor demonstrating his special relation to VFOIA.

Appellees also claim that "[i]ncluding the Attorney General as a named party does not have any impact at all on the advice the Office provides to other State agencies." Appellees' Br. 37. Not so. McBurney, Hurlbert, and Stewart seek to enjoin the Attorney General from advising, as he currently does, that VFOIA entitles only citizens of the Commonwealth to Virginia public records.

In light of all these circumstances, the Attorney General has more than "some connection" to the enforcement of VFOIA and is a proper party to this suit.

II. VFOIA'S CITIZENS-ONLY PROVISION IS UNCONSTITUTIONAL.

A. VFOIA's Citizens-Only Provision Violates the Privileges and Immunities Clause.

Without an anchor in Privileges and Immunities Clause jurisprudence, Appellees turn to a grab-bag of isolated instances and exceptions where a state may favor its own citizens under a variety of legal theories. *See* Appellees' Br. 43. The problem with that approach is that this case falls within the heartland of the Clause, which protects non-citizens from "the disabilities of alienage in other States" and "inhibits discriminating legislation against them by other States." *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978). VFOIA violates the Privileges and Immunities Clause by excluding non-Virginians from accessing public records essential to the right to pursue a common calling, the ability to effectively advocate for one's interests, and the ability to effectively use the court system. Specifically, VFOIA burdens Hurlbert's and Stewart's right to pursue a common calling and burdens McBurney's ability to advocate for redress of his grievances against DCSE. Because Appellees cannot demonstrate that VFOIA's citizens-only provision furthers a substantial state interest and is closely tailored to address an evil peculiar to non-citizens, *Toomer v. Witsell*, 334 U.S. 385, 398 (1948), *Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264,

267–68 (4th Cir. 1993), it is unconstitutional under the Privileges and Immunities Clause.

1. Hurlbert and Stewart Are Prevented From Pursuing Their Common Callings.

VFOIA is preventing Hurlbert and Stewart from conducting their respective trades. Appellees agree with the well-established principle that "[p]rivileges that are fundamental [under the Privileges and Immunities Clause] include practicing a trade or profession in a sister State." Appellees' Br. 42; *see id.* at 51, 55. Hurlbert makes his living by using his expertise in accessing property and tax records to acquire those records for clients who wish to purchase or develop property. JA at 48A–49A. Appellees agree that Virginia's refusal to allow non-Virginians access to property records while allowing Virginians access to those records would violate the Privileges and Immunities Clause. Appellees' Br. 46. And yet Hurlbert is being prevented from accessing property assessment records under VFOIA. Stewart, a journalism professor who uses FOIA requests to teach her journalism classes, is also being prevented from doing so by VFOIA.

Appellees suggest that not all aspects of conducting a trade, like an attorney sponsoring *pro hac vice* applicants, should be considered fundamental under the Privileges and Immunities Clause. *See* Appellees' Br. 56–57 (citing *Parnell v. Sup.*

Ct. of App. of W. Va., 110 F.3d 1077, 1079, 1081 (4th Cir. 1985)). However, they ignore that, unlike an attorney seeking to sponsor a *pro hac vice* applicant, accessing information is central to Hurlbert's and Stewart's trades.

Appellees argue that the plaintiffs must be physically within Virginia's borders when conducting their trades to be protected by the Privileges and Immunities Clause from Virginia's discrimination. Appellees' Br. 56. No court has ever suggested that one must be *physically* within a state's borders either to conduct business in that state or to feel the effects of its laws, and Appellees have cited no cases supporting its position. After all, the requested documents are within the state. Indeed, in the personal jurisdiction context, the Supreme Court recognized that "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). What is important under the Privileges and Immunities Clause is that Hurlbert and Stewart requested documents physically located in Virginia and were denied access solely because they are non-Virginians. It is the reach of the law and the effect it has on their trades, not physical presence, that determines whether Virginia's law violates the Constitution.

2. Equal Access to Information Is Basic to the Right to Advocate Freely for One's Interests.

Appellees acknowledge that equal access to some types of information is important under the Privileges and Immunities Clause. Appellees' Br. 46. But they would have the Court parse all of Virginia's public records to decide which are necessary to transact business. *Id*. Indeed, Appellees' suggestion that this Court assess the relative value of the documents cannot be squared with the basic pillar of the First Amendment that the government may not determine the value of information in the marketplace of ideas. *Fed. Commc'ns Comm'n v. Pacifica Foundation*, 438 U.S. 726, 745–46 (1978); *cf. Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (individuals have a First Amendment right to receive information and ideas regardless of the government's view of their social worth). Instead, we ask this Court to recognize, as did President Reagan, that "[i]nformation is the oxygen of the modern age," Alan Hamilton, *Reagan Sees Information as Key to Freedom*, THE TIMES (LONDON), June 14, 1989, and that states should not be allowed to choke the flow of information to noncitizens while allowing its citizens free access. As recognized by the Third Circuit in *Lee v. Minner*, equal access to information is basic to the well-being of the Union because it animates many other fundamental rights—from

advocating for one's interests, whether in public or in court, to conducting a trade. 458 F.3d 194, 199–200 (3d Cir. 2006).

VFOIA has impeded McBurney's ability to effectively advocate for his interests on substantially similar grounds as a Virginian. In the courts, McBurney is disadvantaged compared to Virginians when assessing the merits of his claims against DCSE; and, in the political arena, he is disadvantaged compared to Virginians when investigating potential government wrongs against him and those similarly situated. Appellees suggest that other avenues for advocacy still exist, Appellees' Br. 49, without recognizing that "information is the currency of democracy." JEFFERSON: WEBSTER'S QUOTATIONS, FACTS AND PHRASES 391 (2008) (quoting Thomas Jefferson). Absent information to populate Appellees' suggested alternative fora for advocacy, McBurney's letters to public officials and websites criticizing DCSE's policies would be blank, and his complaints would be silent. An abstract right to advocate for one's interests means very little when the state withholds the information needed to do so effectively.

Appellees are correct that the Privileges and Immunities Clause does not give *any* person, Virginian or non-Virginian, the right to "have a state facilitate . . . advocacy through compelled disclosures." Appellees' Br. 49 (emphasis omitted). We are not seeking to compel Virginia's General Assembly to require production of these

documents. It has already done so by enacting VFOIA, subject to the statute's exemptions. The Privileges and Immunities Clause does, however, compel Virginia to treat its citizens and non-citizens substantially alike. Virginia cannot give only its citizens the information needed to effectively advocate for their interests.

Furthermore, despite Appellees' contention that we are seeking state facilitation of document production, and that there are many documents we can access, Appellees' Br. 47, 49, 56, this case is about what the plaintiffs cannot already access through other channels. McBurney, Hurlbert, and Stewart have been *barred* from accessing Virginia records under VFOIA that are unavailable elsewhere. Stewart has not been able to access the contracts she was denied by Virginia Tech, McBurney has not been able to access the DCSE policies he seeks, and Hurlbert is being prevented from accessing real estate assessment records, held by the government, that are essential for his business. Where Virginia public bodies have exclusive control over the only records that contain the information the Plaintiffs seek, and VFOIA is the only avenue for obtaining those records, it is simply untrue that what Appellants seek is merely the state's facilitation of production of these records.

3. Keeping Public Documents Secret Is Not a Substantial State Interest, and Administrative Costs Are Not an Evil Peculiar to Non-Virginians.

Because VFOIA implicates the Privileges and Immunities Clause, Appellees must show that VFOIA's discrimination is based on a substantial state interest and tailored to meet an evil peculiar to non-Virginians. *Toomer*, 334 U.S. at 398; *Tangier Sound*, 4 F.3d at 266–67. Appellees attempt to do so by claiming that keeping documents from non-Virginians somehow advances VFOIA's purpose of keeping Virginia's citizens informed. Appellees' Br. 59. VFOIA was enacted to ensure that "[t]he affairs of government are not . . . conducted in an atmosphere of secrecy." VA. CODE ANN. § 2.2-3700(B). Restricting disclosures to exclude non-Virginians does not keep Virginians informed. If anything, wider dissemination of public records facilitates a more informed citizenry: the more people—citizens and noncitizens alike—who have information, the more likely that the information will be brought to the public's attention (including, of course, to the attention of citizens of Virginia).

Appellees also attempt to frame VFOIA's administrative costs as an evil peculiar to non-Virginians. But administrative costs are not unique to non-Virginians. "The Virginia General Assembly surely recognized the time spent responding to FOIA requests reduces the time Virginia public servants can spend engaged in other essential activities." Appellees' Br. 60. This is true of all requests under VFOIA, not

just requests from non-Virginians. That is exactly why Virginia "can recoup its copying and *administrative* costs associated with complying with a FOIA request." *Id.* (emphasis added); VA. CODE ANN. § 2.2-3704(F). Virginia can charge anyone making a VFOIA request with the cost associated with responding to the request.[4]

B. VFOIA's Citizens-Only Provision Violates the Commerce Clause.

Appellees' dormant Commerce Clause arguments appear calculated to deter the Court from applying the basic standards applicable to this case: Does the challenged law facially discriminate against interstate commerce? If so, does the challenged law advance some legitimate local concern that cannot be advanced in some other way? *Dep't of Revenue of Ky. v. Davis*, 128 S.Ct. 1801, 1808 (2008). Here, the answer to the first question is yes, and the answer to the second question is no.

1. VFOIA Discriminates Against Interstate Commerce.

Appellees misunderstand the appropriate inquiry for this dormant Commerce Clause challenge. That "government services are not commerce" is irrelevant, as is the fact that VFOIA "does not regulate commerce," at least not directly. Appellees' Br. 62, 63. Rather, the relevant concern is whether VFOIA facially discriminates

[4]The Advisory Council has taken the position that overhead employment costs such as medical benefits cannot be charged to VFOIA requesters. VFOIA Advisory Council, *Access to Public Records Under the Virginia Freedom of Information Act*, at 3, *available at* http://foiacouncil.dls.virginia.gov/ref/ RecordsHandout09.pdf. This limitation on collectible fees is not required by the statute. *See* VA. CODE ANN. § 2.2-3704(F).

against interstate commerce—regardless of whether the legislature intended such a result—while advancing no otherwise unattainable legitimate local interest. *See Granholm v. Heald*, 544 U.S. 460, 476 (2005); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 337 (1989).

Hurlbert is engaged in interstate commerce: He has clients in several states and conducts his public records business across state lines. JA 48A–49A. In addition to being facially discriminatory against noncitizens, VFOIA discriminates against interstate commerce because it gives in-state businesses similar to Hurlbert's access to prospective clients (those seeking records from Virginia localities) that Hurlbert and other noncitizens cannot serve. Consequently, VFOIA's citizens-only provision is "virtually *per se*" invalid under the dormant Commerce Clause, *see, e.g.*, *Granholm*, 544 U.S. at 476, and it can withstand a challenge only if Appellees demonstrate that it advances some legitimate, otherwise unattainable, local objective. *Or. Waste Sys., Inc. v. Dep't. of Envtl. Quality*, 511 U.S. 93, 101 (1994).

The balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), is irrelevant to this Court's determination of whether VFOIA advances some legitimate, otherwise unattainable local objective. Although Appellees acknowledge that we do not rely on *Pike*, Appellees' Br. 60 n.13, they fail to appreciate that *Pike* balancing only applies to statutes that regulate even-handedly, not those that are

facially discriminatory. *Pike*, 397 U.S. at 142. In other words, whether the impact on out-of-state interests is "only incidental" is a factor considered under *Pike*, but not in an action challenging a law, like VFOIA, that is facially discriminatory.

Appellees' arguments about VFOIA's impact on in-state interests are similarly misguided. Contrary to Appellees' assertions, we have identified in-state interests that benefit from VFOIA's discrimination against noncitizens: public records retrieval services like Hurlbert's that are located in Virginia. Appellants' Br. 51. Moreover, even if we had not identified such in-state interests, Appellees have not cited any binding authority indicating that the failure to identify an in-state interest benefited by the state's discrimination would be "fatal" to our dormant Commerce Clause claim. Appellees' Br. 64. To the contrary, the Supreme Court has held that a state law that has the practical effect of regulating commerce occurring wholly outside that state violates the dormant Commerce Clause, even absent any showing that the law benefits in-state interests. *Healy*, 491 U.S. at 336–37.

Appellees misapply *Davis* in arguing that VFOIA is immune from dormant Commerce Clause scrutiny because it is a "government function" or a "government service." Appellees' Br. 62–63. Although *Davis* did not apply the *same* dormant Commerce Clause scrutiny to Kentucky's tax exemption as it would a protectionist measure, the Court still applied *some* dormant Commerce Clause scrutiny. 128 S. Ct.

at 1810–11. Moreover, in upholding the state tax exemption for interest on state and local bonds, the Court was motivated by an additional factor not present here: that the discriminatory measure encouraged the funding of local public works that imparted direct local benefits. *Id*.[5]

2. Appellees Have Not Demonstrated That VFOIA Advances a Legitimate Local Objective That Cannot Be Achieved by Reasonable Nondiscriminatory Alternatives.

Appellees cite no legitimate objective served by keeping Virginia's public documents secret when the stated purpose of VFOIA is to prevent government secrecy. VA. CODE ANN. § 2.2-3700(B). Furthermore, Virginia has nondiscriminatory means at its disposal to address the administrative concerns raised in Appellees' brief short of completely barring all noncitizens from accessing public records.

Under dormant Commerce Clause analysis, the burden of demonstrating a legitimate local concern is squarely on the Appellees, *Maine v. Taylor*, 477 U.S. 131, 138 (1986), and Appellees have not met that burden. Appellees have not substantiated their claim that Virginia's interest in "providing efficient, timely, and effective" responses to its own citizens' VFOIA requests justifies completely barring

[5]*Martinez v. Bynum*, 461 U.S. 321 (1983), is likewise unhelpful to Appellees. In that case, the Court upheld the challenged residency requirement under the Equal Protection Clause, the Due Process Clause, and against a claim that the requirement violated the constitutional right to interstate travel. *Id.* at 328–29. However, the Court did not consider, much less decide, whether a residency requirement could ever violate the dormant Commerce Clause.

noncitizens' public records access. Appellees' Br. 59. They have pointed to no evidence, empirical or otherwise, suggesting that responding to noncitizens' VFOIA requests will undermine Virginians' access to information. Indeed, the fact that Virginia has, in this very litigation, recommended that out-of-state requesters simply circumvent VFOIA's citizens-only provision—by asking Virginia citizens to request the documents for them—effectively destroys its claim that the provision is necessary to preserve the interests of Virginians. Doc. 21, Mem. of Law in Supp. of Davis Mot. to Dismiss 17.

Yet even assuming there would be some administrative burden on Virginia public bodies from opening VFOIA to noncitizens, Appellees cannot make the required showing that there are no nondiscriminatory alternatives simply by throwing up their hands at the first sign of difficulty. Appellees have so far made no effort to rule out *any* nondiscriminatory alternatives to completely excluding noncitizens from access to Virginia public records, such as charging requesters for administrative costs. Appellees' failure to do so renders VFOIA's citizens-only provision invalid and thus unconstitutional under the dormant Commerce Clause.

3. The Market Participant Exception Does Not Apply to VFOIA.

By providing previously unreleased public records, Virginia public bodies engage in a core government function, not a market activity. Whether it is

"documents" or "information" that Virginia public bodies provide to citizens, Virginia is discriminating between citizens and noncitizens while performing a function that private actors cannot. *See White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 207 (1983). All of the purportedly analogous examples on which Appellees rely involve the state selling something—concrete, waste disposal services, timber, or fish—that non-state actors are also capable of providing. Appellees' Br. 66–68. Here, however, the relevant market is not some nebulous and over-inclusive category of "information" to which other sellers have access, but rather Virginia public bodies' records, which are usually created by the government and often previously unreleased. The fact that Stewart has been unable to obtain the information she seeks anywhere else demonstrates that Virginia public bodies are sometimes the only possible supplier of certain public records or information. When it comes to records that no one has yet requested, Virginia is not just the only *current* supplier—which would be a market monopoly—but also the only *possible* supplier.

Virginia discriminates in its distinct governmental capacity, not as a market monopoly, because it faces no threat of competition under VFOIA. Even Hurlbert, who accesses public documents for his clients, can only offer the *service* of document retrieval since he is not the holder or creator of the records sought. As explained in our opening brief, the basis for the market participant exception is that the dormant

Commerce Clause exists to prevent states from using measures unavailable to market actors to "imped[e] free trade in the national marketplace." Appellants' Br. 52 (quoting *White*, 460 U.S. at 207); *see also S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984) (stating generally applicable principle that state must be an economic *competitor* in the *relevant market* for market participant exception to apply). Although a market actor with a monopoly still must compete to prevent other market entrants, a government entity engaged in a uniquely governmental function is not a market monopoly because it faces no threat of competition.

Illustrating this distinction, the Second Circuit recently declined to apply the market participant exception because it found that the defendant government entity did not compete with private entities when building and maintaining roads. *Selevan v. N.Y. Thruway Auth.*, ___ F.3d ___, 2009 WL 3296659, at *7–*8 (2d Cir. Oct. 15, 2009). The court found that the market participant exception was inapplicable because the government was performing a distinctly governmental function, not acting as would a market actor. *Id*. Similarly, Henrico County, DCSE, and other Virginia public bodies provide Virginia citizens something that market actors are incapable of providing: previously unreleased governmental records. Virginia has not achieved "monopoly" status by acquiring its competitors or undercutting their prices, but rather by providing its citizens something that no private actor could provide. For

that reason, the market participant exception does not apply, and VFOIA violates the dormant Commerce Clause.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with directions that the district court declare the citizens-only provision of Virginia's Freedom of Information Act unconstitutional and enter judgment for Appellants.

Respectfully submitted,

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[*]Counsel gratefully acknowledge the substantial assistance of Andrew Deeringer, Sarah Liebschutz, and Jeremiah Nelson, all of whom are third-year law students at Georgetown University Law Center.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 6,433 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2009, I caused two copies of the foregoing Reply Brief of Appellants to be served by first-class mail, postage prepaid, on each party through their counsel at the following addresses:

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