

MCBURNEY V. YOUNG: TESTING THE LIMITS OF CITIZENS-ONLY FREEDOM OF INFORMATION LAWS

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I. INTRODUCTION

In *McBurney v. Young*,¹ the Supreme Court of the United States will address important questions surrounding restrictions on open government access laws, which allow citizens to view and copy records held by their state government. At issue is Virginia's Freedom of Information Act (VFOIA), which limits records requests to Virginia citizens and certain qualified journalists.² Petitioners Mark McBurney and Roger Hurlbert joined together, alleging that VFOIA impermissibly discriminates against their rights under the Privileges and Immunities Clause.³ Additionally, Hurlbert, who makes his living retrieving property records for clients, argues that VFOIA stands in violation of the dormant Commerce Clause.⁴

McBurney presents an opportunity for the Court to define the ambiguous boundaries of the Privileges and Immunities Clause and the dormant Commerce Clause. Specifically, under the Privileges and Immunities Clause, the Court could address whether, as the Third Circuit decided, access to state records directly implicates one's ability to engage in the national political process.⁵ Additionally, this case asks whether, under the dormant Commerce Clause, the restricted distribution of public records impermissibly discriminates against interstate commerce and whether such records can be construed as

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1. *McBurney v. Young*, No. 12-17 (U.S. argued Feb. 20, 2013).

2. VA.CODE ANN. § 2.2-3704(A) (West 2013).

3. *McBurney v. Young*, 667 F.3d 454, 458 (2012), *cert. granted*, 133 S. Ct. 421 (U.S. Oct. 5, 2012).

4. *Id.*

5. See *Lee v. Minner*, 458 F.3d 194, 196 (3d Cir. 2006) (citation omitted) (internal quotation marks omitted). For a discussion on *Lee*, see *infra* Part III, section C.

articles of commerce.⁶ Every state, particularly those with noncitizen access restrictions, will be watching intently to see whether the Court will mandate open access to state records, regardless of state citizenship.

II. FACTS

A. *A History of Virginia's Freedom of Information Act*

In 1968, Virginia's General Assembly passed the Virginia Freedom of Information Act.⁷ The stated purpose of the statute is to provide 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."⁸ The statute provides, in relevant part:

Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any *citizens* of the Commonwealth 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.⁹

Virginia law provides that the State may recoup its cost of providing such records by "mak[ing] reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records."¹⁰ Although the State recoups some of the expenses associated with providing records, it claims that "a significant portion of the costs associated with the provision of public records is borne by the taxpayers of the Commonwealth, not by the requesters of public records."¹¹

B. *Background of McBurney's Case*

Mark McBurney, one of two petitioners in this case, is a resident of Rhode Island.¹² Prior to moving to Rhode Island, McBurney

6. Brief for Petitioners at 16–17, *McBurney v. Young*, No. 12-17 (U.S. Dec. 26, 2012).

7. 1968 Va. Acts 691.

8. VA.CODE ANN. § 2.2-3700(B), para. 1 (West 2013).

9. *Id.* § 2.2-3704(A) (emphasis added).

10. *Id.* § 2.2-3704(F).

11. Brief for Respondents at 2, *McBurney v. Young*, No. 12-17 (U.S. Jan. 24, 2013).

12. *McBurney v. Young*, 667 F.3d 454, 459 (2012), *cert. granted*, 133 S. Ct. 421 (U.S. Oct. 5, 2012).

resided in Virginia and maintains ties to Virginia through his divorce order, child custody order, and child support order.¹³ When McBurney's former wife failed to pay her child support obligations, he, while residing in Rhode Island, requested assistance from the Virginia Division of Child Support Enforcement (DCSE) to petition for the unpaid child support obligations.¹⁴ Although the DCSE filed the request, McBurney's child support payments were delayed by nine months.¹⁵ McBurney filed a VFOIA request with the DCSE "to get to the bottom of the agency's repeated mishandling of its responsibility to enforce child support obligations owed by his former wife, a Virginian, while McBurney was living [out of state]."¹⁶ McBurney argues that DCSE at least twice, and perhaps as many as four times, filed his petitions in courts that lacked jurisdiction.¹⁷ The State denied McBurney's first VFOIA request, claiming that the requested information was confidential and protected under Virginia law, and emphasizing that McBurney was not a Virginia citizen.¹⁸ McBurney made a second "substantively identical request" that the DCSE denied exclusively on the grounds that McBurney was not a Virginia citizen.¹⁹ McBurney later received some requested information under Virginia's Government Data Collection and Dissemination Practices Act, but did not receive the general information he sought about how the DCSE handles claims like his.²⁰

C. Background of Hurlbert's Case

Roger Hurlbert is a California resident whose business involves obtaining property records from state and local governments for various clients throughout the United States, including Virginia.²¹ Hurlbert obtains these documents "by making requests under state

13. *Id.*

14. *Id.*

15. *Id.*

16. Brief for Petitioners, *supra* note 6, at 13.

17. *Id.*

18. *McBurney*, 667 F.3d at 459; *see* VA. CODE ANN. § 63.2-102 ("[N]o record, information or statistical registries concerning applicants for and recipients of . . . child support shall be made available except for purposes directly connected with the administration of such programs. Such purposes include establishing eligibility, determining the amount of . . . child support, and providing social services . . ."); *see also id.* § 63.2-103 ("Information pertaining to actions taken on behalf of recipients of child support services may be disclosed to the recipient and other parties pursuant to Board regulations.").

19. *McBurney*, 667 F.3d at 459.

20. Brief for Petitioners, *supra* note 6, at 14.

21. *Id.* at 12.

open-records statutes and negotiating with officials for their release.”²² In 2008, Hurlbert filed a VFOIA request in order to obtain property records for certain estate parcels in Virginia.²³ The State denied Hurlbert’s request because he is not a citizen of Virginia.²⁴

D. Procedural History

Joining together as plaintiffs, McBurney and Hurlbert filed a 42 U.S.C. § 1983 action seeking declaratory and injunctive relief against various state and local officials in Virginia.²⁵ The district court held that McBurney and Hurlbert failed to show that the citizens-only provision of VFOIA burdened a fundamental right under the Privileges and Immunities Clause.²⁶ Further, the district court held that VFOIA did not violate Hurlbert’s rights under the dormant Commerce Clause.²⁷ The Fourth Circuit affirmed the district court’s holdings on both grounds.²⁸

III. LEGAL BACKGROUND

A. The Arduous Task of Defining Privileges and Immunities of State Citizenship

The Supreme Court has observed that the Privileges and Immunities Clause “is not one the contours of which have been precisely shaped by the process and wear of constant litigation and judicial interpretation over the years since 1789.”²⁹ The Clause simply states: “The Citizens of each State shall be entitled to all Privileges

22. *Id.*

23. *Id.*

24. *McBurney*, 667 F.3d at 460.

25. *McBurney v. Mims*, No. 03:09-CV-44, 2009 WL 1209037, at *1 (E.D. Va. May 1, 2009), *aff’d in part, rev’d in part sub nom.* *McBurney v. Cuccinelli*, 616 F.3d 393 (4th Cir. 2010). A third plaintiff (a journalist) was present in the district court and on appeal at the Fourth Circuit, but she was not, however, listed as a plaintiff during the briefing to the United States Supreme Court. The district court initially dismissed all parties from the suit on jurisdictional grounds—an issue not relevant to the present appeal. *Id.* at *7. The Fourth Circuit affirmed in part and reversed in part that dismissal, holding that the parties had standing to sue. *McBurney*, 616 F.3d at 403–04 (4th Cir. 2010). The district court then addressed the case once again before it was appealed to the Fourth Circuit and the Supreme Court. *McBurney v. Cuccinelli*, 780 F. Supp. 2d 439, 446 (E.D. Va. 2011), *aff’d sub nom.* *McBurney v. Young*, 667 F.3d 454 (4th Cir. 2012), *cert. granted*, 133 S. Ct. 421 (U.S. Oct. 5, 2012).

26. *McBurney*, 780 F. Supp. 2d at 446.

27. *Id.* at 452.

28. *McBurney*, 667 F.3d at 458.

29. *Baldwin v. Fish and Game Comm’n of Mont.*, 436 U.S. 371, 379 (1978).

and Immunities of Citizens in the several States.”³⁰ The traditional meaning of the Clause comes from *Corfield v. Coryell*,³¹ which states that privileges and immunities “are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union.”³² Essentially, the Privileges and Immunities Clause “prevents a State from discriminating against citizens of other States in favor of its own.”³³

The Court articulated a two-step inquiry in *Supreme Court of Virginia v. Friedman*³⁴ (the *Friedman* test) to decide whether a state’s “citizenship or residency classification offends privileges and immunities protections.”³⁵ First, “the activity in question must be sufficiently basic to the livelihood of the Nation as to fall within the purview of the Privileges and Immunities Clause.”³⁶ The purview of the Privileges and Immunities Clause is limited to significant discrimination involving “important economic liberties” and constitutional rights.³⁷ Second, the Court will invalidate a law that deprives nonresidents of a protected privilege “only if [it] conclude[s] that the restriction is not closely related to the advancement of a substantial state interest.”³⁸

The Court has interpreted the Privileges and Immunities Clause to prevent a state from imposing unreasonable burdens on citizens of other states in: (1) pursuing a common calling within the state; (2) owning or disposing of privately held property within the state; (3) accessing the courts of the state; and (4) obtaining medical services.³⁹ As a result, the Court has, *inter alia*, declared unconstitutional state laws requiring nonresidents to pay more for trading licenses,⁴⁰ requiring nonresident commercial fishermen to pay significantly more

30. U.S. CONST. art. IV, § 2.

31. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (opinion of Washington, J.).

32. *Id.* at 551.

33. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 511 (1939).

34. 487 U.S. 59 (1988).

35. *Id.* at 64.

36. *Id.* (citation omitted) (internal quotation marks omitted).

37. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 481 (4th ed. 2011). Indeed, the Court has never applied the Privileges and Immunities Clause in cases outside of these two categories. *Id.*

38. *Friedman*, 487 U.S. at 65 (citing *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985)).

39. *McBurney v. Young*, 667 F.3d 462–63 (2012), *cert. granted*, 133 S. Ct. 421 (U.S. Oct. 2, 2012).

40. *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 419 (1870).

for commercial fishing licenses,⁴¹ limiting admission to the bar to residents,⁴² and giving preference to residents over nonresidents with respect to employment in oil and gas leases.⁴³

Despite such prohibitions, states still may use state citizenship or residency to distinguish among persons, such as for purposes of suffrage or qualification for an elective office in the state.⁴⁴ Additionally, the Court has been mindful to distinguish recreational activities from activities that are a “means of a livelihood,” providing protection only to the latter category under the common calling justification.⁴⁵ Indeed, in *Baldwin v. Fish and Game Commission of Montana*,⁴⁶ the Court refused to strike down a Montana law that charged non-residents more than residents for an elk-hunting license.⁴⁷ The Court decided that an “interest in sharing this limited resource on more equal terms with Montana residents simply does not fall within the purview of the Privileges and Immunities Clause.”⁴⁸ It reasoned that “[e]quality in access to Montana elk is not basic to the maintenance or well-being of the Union.”⁴⁹

B. Awakening the Dormant Commerce Clause

The dormant Commerce Clause—a judicially created doctrine derived from Congress’s Article I, Section 8 commerce power⁵⁰—provides that state and local laws cannot place an undue burden on interstate commerce.⁵¹ The threshold question under the dormant Commerce Clause is whether a state or local law affects interstate commerce, such as by regulating an article of commerce that travels interstate.⁵²

41. *Mullaney v. Anderson*, 342 U.S. 415, 420 (1952).

42. *Piper*, 470 U.S. at 274 (1985).

43. *Hicklin v. Orbeck*, 437 U.S. 518, 534 (1978).

44. *See Baldwin v. Fish and Game Comm’n of Mont.*, 436 U.S. 371, 383 (1978) (“Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States.”).

45. *See Piper*, 470 U.S. at 279 (describing elk hunting as “recreation” and not as a “means of a livelihood”).

46. 436 U.S. 371 (1978).

47. *Id.* at 391.

48. *Id.* at 388.

49. *Id.*

50. U.S. CONST. art. I, § 8.

51. CHEMERINSKY, *supra* note 37, at 430.

52. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“[I]t is clear that the appellants’ order does affect and burden interstate commerce, and the question then becomes whether it does so unconstitutionally.”).

If the law affects interstate commerce, then the inquiry transitions into a two-tiered analysis.⁵³ The first tier asks whether the state or local law, read on its face, discriminates against out-of-staters.⁵⁴ By “discrimination,” the Court “simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”⁵⁵ If a law discriminates on its face, it is “virtually *per se* invalid.”⁵⁶ For a facially discriminatory law to be constitutional, the state must show “that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”⁵⁷ The review the Court undertakes is akin to a very strict version of strict scrutiny.⁵⁸

If a law is not facially discriminatory, the Court moves to a second tier, which it articulated in *Pike v. Bruce Church, Inc.*⁵⁹ (the *Pike* test), to determine if the law is discriminatory to out-of-staters as applied. The *Pike* test dictates that nondiscriminatory regulations are valid “unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.”⁶⁰ The *Pike* test weighs the benefits of a law against the burdens it imposes on interstate commerce.⁶¹ Most relevant to *McBurney* are cases involving laws limiting out-of-staters’ access to in-state resources and laws requiring use of local businesses. In *City of Philadelphia v. New Jersey*,⁶² the Court struck down a New Jersey law that restricted landfill use to in-state waste under the dormant Commerce Clause.⁶³ The Court held that New Jersey could have reduced landfill use in a less restrictive manner by “slowing the flow of *all* waste . . . even

53. *Id.*

54. *United Haulers Ass'n v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

55. *Id.*

56. *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality of State of Or.*, 511 U.S. 93, 99 (1994).

57. *Id.* at 101.

58. *See Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (“At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.”).

59. 397 U.S. 137 (1970).

60. *Id.* at 142; *see also* note 67, *infra* (discussing how some Justices think that balancing should not be used in evaluating dormant Commerce Clause cases).

61. *See Pike*, 397 U.S. at 142 (“Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”).

62. 437 U.S. 617 (1978).

63. *Id.* at 629.

though interstate commerce may incidentally be affected.”⁶⁴ Further, in *Pike*, the Court invalidated an Arizona regulation that required cantaloupes grown in the state to also be packaged within the state.⁶⁵ The effect of the law would have been to force growers in the state to build packing facilities in the state.⁶⁶ Even though balancing has remained the usual approach, some are critical of the test and recommend abandoning it because “the interests on both sides are incommensurate.”⁶⁷

C. Circuit Split(?): The Third Circuit’s Decision in *Lee v. Minner*

In *Lee v. Minner*,⁶⁸ the Third Circuit considered whether Delaware could restrict access to state records to its own citizens.⁶⁹ There, an out-of-state journalist desired access to various state records and filed an open records request that the State subsequently denied. The Court held that the citizens-only provision in the Delaware Freedom of Information Act (DFOIA) was unconstitutional because “access to public records is a right protected by the Privileges and Immunities Clause.”⁷⁰ The court reasoned that access to public records is necessary to engage in political advocacy, “an ‘essential activity’ which ‘bear[s] upon the vitality of the Nation as a single entity.’”⁷¹ In this sense, the court held that DFOIA was “facially discriminatory insofar as it limits access to information to those individuals who are citizens of the [s]tate.”⁷² Additionally, the court held that because DFOIA precluded noncitizens from obtaining any DFOIA information, its burden on noncitizens was substantial.⁷³ Because the Third Circuit

64. *Id.* at 626–27.

65. *Pike*, 397 U.S. at 146.

66. *Id.* at 140.

67. *See Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 898 (1988) (Scalia, J., concurring) (advocating for the elimination of the *Pike* test and arguing that the default rule should be: “a state statute is invalid under the Commerce Clause if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose”); *see also CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring) (“[S]uch an inquiry is ill suited to the judicial function and should be undertaken rarely if at all.”); Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1106 (1986) (arguing that in dormant Commerce Clause cases not involving the movement of goods, the Court has not engaged in open-ended balancing and instead has certain limited goals beyond economic protectionism).

68. 458 F.3d 194 (3d Cir. 2006).

69. *Id.* at 195.

70. *Id.* at 200.

71. *Id.* (quoting *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 387 (1978)).

72. *Id.*

73. *Id.*

focused its holding on the right to engage in political advocacy, it did not decide whether DFOIA unconstitutionally burdened the challenger's right to engage in the common calling of journalism on equal footing with journalists in Delaware.⁷⁴

D. State Records under the Commerce Clause

A central question of the *McBurney* case is whether state records themselves are articles of commerce and whether the retrieval of such records affects interstate commerce. As the Court has held, “[a]ll items of interstate trade merit Commerce Clause protection.”⁷⁵ Relatedly, such items and activities are subject to dormant Commerce Clause restrictions.⁷⁶ The Court has not directly held that all state public records constitute interstate commerce. However, the Court has held, in *Reno v. Condon*,⁷⁷ that “drivers’ personal, identifying information is . . . an article of commerce.”⁷⁸ The Court noted that the “sale or release of [such records] into the interstate stream of business is sufficient to support congressional regulation.”⁷⁹ Likewise, the Court has not directly held that the service of disseminating or retrieving public records is commerce,⁸⁰ yet the Court has recognized that the Commerce Clause extends to both the sale of actual goods and to services.⁸¹

IV. ARGUMENTS

A. Petitioners’ Arguments

The thrust of the Petitioners’ arguments is embodied in the unifying notion of horizontal federalism: the Privileges and Immunities Clause and the Commerce Clause work together to

74. John Paul Jones & Afsana Chowdhury, *Administrative Law*, 47 U. RICH. L. REV. 7, 38 (2012). For a further discussion on this, see Part V, *infra*.

75. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622 (noting that even “valueless waste” merits constitutional scrutiny).

76. *See Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 574 (1997) (“The definition of ‘commerce’ is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation.”).

77. 528 U.S. 141 (2000).

78. *Id.* at 141–42.

79. *Id.*

80. *Id.*

81. *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994) (“[T]he article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.”); *Camps Newfoundland/Owatonna*, 520 U.S. at 577 n.10 (1997) (“We have long noted the applicability of our dormant Commerce Clause jurisprudence to service industries.”).

“avoid[] friction and help[] ‘fuse into one Nation a collection of independent, sovereign States.’”⁸² Indeed, the common origin of the Privileges and Immunities Clause and the Commerce Clause in Article IV of the Articles of Confederation demonstrates the Framers’ intent that the two clauses “secure and perpetuate” the “mutual friendship and intercourse among the people of different states.”⁸³ Because the Articles of Confederation did not provide for a federal enforcement mechanism, “Article IV was routinely flouted by the states, many of which passed laws giving ‘preference to their own citizens.’”⁸⁴ This history supports Petitioners’ argument that the two provisions mutually reinforce Constitutional rights: the Privileges and Immunities Clause acts as a “direct restraint” and the Commerce Clause acts as an “implied restraint.”⁸⁵ Together, the provisions inform the principle of nondiscrimination on the basis of state citizenship—a concept Petitioners argue is fundamentally at odds with VFOIA’s citizens-only restriction.⁸⁶

Petitioners advance four points in support of their Privileges and Immunities argument. First, they contend that VFOIA violates Hurlbert’s right to pursue a common calling by denying him the ability to collect, synthesize, and distribute records for a profit solely on the basis of his state citizenship.⁸⁷ Second, Petitioners argue that Hurlbert’s access to property records is a fundamental right protected by the Privileges and Immunities Clause.⁸⁸ Because the Privileges and Immunities Clause protects the right to “take, hold, and dispose of property” across state lines,⁸⁹ Petitioners argue that access to property records is a “necessary corollary” and thus a right protected by the Privileges and Immunities Clause.⁹⁰ Third, Petitioners contend that

82. Brief for Petitioners, *supra* note 6, at 19–20 (quoting *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)).

83. *Id.* at 20 (quoting ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1).

84. *Id.* (quoting 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 317 (Farrand, ed., 1911)).

85. See Brief for Petitioners, *supra* note 6, at 23 (quoting *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 220 (1984)).

86. *Id.* at 23–24.

87. *Id.* at 36.

88. *Id.* at 39. Going back to 1789, Virginia law barred “‘any county surveyor’ from ‘withholding’ copies of land surveys from ‘any person,’ but extended this right to ‘any person or persons, not resident within this state,’ provided they had paid the required copying fees or given adequate security.” *Id.* (emphasis added) (quoting 12 HENING’S STATUTES AT LARGE 589–90 (1787)).

89. *Id.* at 41 (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825) (opinion of Washington, J.)).

90. *Id.* at 41–42 (citing *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 387

McBurney's requested public records implicate his right to access public proceedings.⁹¹ Without being able to access information about how administrative proceedings are conducted, the right to access such proceedings is frustrated.⁹² Thus, by precluding informational access, VFOIA is essentially precluding access to the public proceeding itself.⁹³ This violates the Constitutional principle that a state cannot restrict access to the courts based on state citizenship.⁹⁴ Lastly, Petitioners contend that the Fourth Circuit construed the scope of the Third Circuit's decision in *Lee v. Minner* too narrowly.⁹⁵ Petitioners do not contend that there is a "constitutional right to have access to particular government information," but rather that Virginia cannot discriminate on the basis of state citizenship, absent good reasons, as to who can access such information.⁹⁶

With respect to the dormant Commerce Clause, the Petitioners argue that VFOIA discriminates against out-of-state economic interests both on its face and in effect. As a threshold matter, Petitioners argue that state public records are "articles of commerce" under the Commerce Clause as supported by the Court's decision in *Reno v. Condon*, which recognized that public records containing drivers' information are "articles of commerce" because they are "released, sold, compiled into databases, and resold for various commercial purposes."⁹⁷ Accordingly, Petitioners further argue that the business of retrieving records for compensation is in itself commerce.⁹⁸

Addressing the first-tier of the dormant Commerce Clause analysis, Petitioners argue that VFOIA facially discriminates against

(1978)).

91. *Id.* at 44 ("The Privileges and Immunities Clause should not be read to allow states to bar citizens of other states from equal access to their administrative proceedings, which necessarily includes basic information about how those proceedings are conducted.").

92. *Id.*

93. *Id.*

94. *Id.* at 42. The Clause "secures citizens of one state the right to resort to the courts of another, equally with the citizens of the latter state." *Id.* (quoting *Mo. Pac. R. Co. v. Clarendon Boat Oar Co.*, 257 U.S. 533, 535 (1922) (internal quotation marks omitted)).

95. *Id.* at 46.

96. *Id.* (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion) (internal quotation marks omitted)).

97. *Id.* at 26 (quoting *Reno v. Condon*, 528 U.S. 141, 148-49 (2000) (internal quotation marks omitted)).

98. *Id.*; see also *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 ("[T]he article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.").

out-of-state economic interests because it expressly reserves access to public records to Virginia citizens, which in turn prohibits out-of-state citizens from engaging in the commercial activity of retrieving records for compensation.⁹⁹ Even if VFOIA were not facially discriminatory, Petitioners contend, under the *Pike* analysis, that VFOIA's burden on interstate commerce is clearly excessive in relation to the benefits created.¹⁰⁰ Petitioners rely on *C&A Carbone, Inc. v. Town of Clarkstown*¹⁰¹ to advance the argument that Virginia "reserves the 'initial processing step' of record retrieval to local businesses, denying out-of-state businesses primary access to the market for Virginia record retrieval just like the flow control ordinance in *Carbone* denied out-of-state haulers entry into the market for the initial processing [of] the town's garbage."¹⁰²

Petitioners also contend that Virginia's justification that the costs associated with giving non-Virginians access to public records would reduce resources available to Virginians is factually wrong because Virginia law authorizes the State to recoup administrative costs through fees.¹⁰³ Petitioners argue there is "no basis for concluding the burden of processing out-of-state record requests would be greater than the burden of supervising out-of-state lawyers . . . or processing out-of-state fishing licenses."¹⁰⁴ As a result, Petitioners suggest there are less restrictive means available—and that the "purported goal of avoiding administrative burdens has nothing to do with the requesters' citizenship."¹⁰⁵

B. Respondents' Arguments

Respondents frame the Privileges and Immunities question narrowly: "whether a statutorily created right to an at or below cost

99. Brief for Petitioners, *supra* note 6, at 25.

100. *Id.* at 28. Respondents argue that Petitioners failed to adequately address a second-tier *Pike* challenge in the Fourth Circuit Briefing. Brief for Respondents, *supra* note 11, at 38 & n.9 ("Although petitioners claim to have given fair notice of a *Pike* argument in their summary of the argument in their Fourth Circuit brief . . . a fair reading of that argument discloses only a first-tier discrimination challenge." (citation omitted) (internal quotation marks omitted)). The Fourth Circuit held that Hurlbert waived any challenge to the district court's holding on the *Pike* analysis. *McBurney v. Young*, 667 F.3d 454, 467 (2012), *cert. granted*, 133 S. Ct. 421 (U.S. Oct. 2, 2012) ("Hurlbert has waived any challenge to that component of the district court's analysis by not raising it in his opening brief." (citing Fed. R.App. P. 28(a)(9)(A))).

101. 511 U.S. 383 (1994).

102. Brief for Petitioners, *supra* note 6, at 29 (quoting *Carbone*, 511 U.S. at 392).

103. *Id.* at 47.

104. *Id.* at 50–51 (citations omitted).

105. *Id.* at 53.

search of government records is a fundamental privilege for purposes of the Clause.”¹⁰⁶ Respondents argue VFOIA’s purpose is political, not economic: “[I]t is . . . intended to increase transparency in the political process . . . [and it] is logically and properly bestowed on those directly affected by that political process—i.e., citizens—and on media with a Virginia presence.”¹⁰⁷ Under this umbrella, Respondents advance five arguments addressing Petitioners’ Privileges and Immunities claims.

First, with respect to Hurlbert’s common calling argument, Respondents differentiate between cases that involve explicit bans or discriminatory monetary penalties on nonresidents performing work in a state and VFOIA’s “remote . . . incidental effect on whatever business model [Hurlbert] chooses.”¹⁰⁸ Second, responding to Hurlbert’s property argument, Virginia argues that “records required by law to be maintained by the clerks of the courts” are exempt from VFOIA.¹⁰⁹ Further, documents, including title documents, judgment liens, tax liens, and financial statements, are “open to inspection” and copying “by any person.”¹¹⁰

Third, addressing McBurney’s “public proceedings” argument, Respondents argue that McBurney was denied only of “some undefined portion of the pre-suit discovery which he wanted the government to perform on his behalf”—assistance that “has never been thought to be a fundamental right protected by the Privileges and Immunities Clause.”¹¹¹ Fourth, Respondents contend that an equal right to access government information has never been deemed fundamental under the Privileges and Immunities Clause.¹¹² Although Respondents do not directly reference the Third Circuit’s decision in *Lee*, they attempt to show that any right of access to public documents was not recognized at common law anywhere in the United States at the time of the Framing and is “not sufficiently uniform or generous to give rise to any equal right of access which could be deemed

106. Brief for Respondents, *supra* note 11, at 18.

107. *Id.* at 19.

108. *Id.* at 20.

109. *Id.* at 21.

110. *Id.* (citations omitted).

111. *Id.* at 22–23.

112. *Id.* at 23. Respondents argue that the Court should look no further than the original meaning of “Privileges and Immunities”—protecting nonresidents from “the disabilities of alienage.” *Id.* at 24 (quoting *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 380–81 & n.19 (1978)) (internal quotation marks omitted).

fundamental for purposes of the [Clause].”¹¹³ Fifth, Respondents argue that “practices and procedures directed to the performance of state governmental functions may distinguish between citizens and noncitizens.”¹¹⁴ Respondents base their argument on the fact that there is no fundamental right to access public information and a state may therefore distinguish between citizens and noncitizens when providing access.¹¹⁵ As a result of its unprotected status, Respondents argue that it does not carry the burden of demonstrating a substantial relationship between the ends and means of VFOIA.¹¹⁶

Respondents contend that the dormant Commerce Clause is not even implicated here because VFOIA is purely an exercise of a governmental noncommercial function, whereby the State makes records “potentially available to certain requesters, its citizens, who might or might not put them into interstate commerce.”¹¹⁷ Respondents argue that Petitioners’ reliance on *Condon* for the proposition that state records are “articles of commerce” is misplaced and that Virginia, “in discharging a governmental noncommercial function,” has simply made records available to its citizens who may choose to put them into interstate commerce.¹¹⁸ This, Respondents argue, is a “governmental noncommercial function.”¹¹⁹ If Congress desired to regulate the dissemination of state records through the active Commerce Clause, Respondents argue that the Court would be inclined to examine the effects of a citizens-only restriction.¹²⁰ However, because Congress does not regulate the dissemination of state records, Respondents do not engage in the two-tier dormant Commerce Clause analysis, believing that the threshold requirement was not satisfied.¹²¹

113. *Id.* at 30–31.

114. *Id.* at 32.

115. *Id.* at 36.

116. *Id.*

117. *Id.* at 39 & n.11.

118. *Id.* at 39. On *Condon*, Respondents argue that “[t]he actual holding . . . was that Congress had the power to enact the Driver’s Privacy Protection Act under the active Commerce Clause because States were engaged in traditional interstate commerce by selling certain records in the interstate markets.” *Id.*

119. *Id.*

120. *Id.* at 39–40.

121. *Id.* at 37.

V. ANALYSIS

The Court's holding in this case will most strongly affect noncitizens, journalists, advocacy groups, academics, and professional records collectors. In reviewing the federal Freedom of Information Act,¹²² the Court has noted that the purpose of open records acts is "to open agency action to the light of public scrutiny."¹²³ In addition to the federal open records law, all fifty states have codified freedom of information laws.¹²⁴ A holding favoring Petitioners under either the Privileges and Immunities Clause or the dormant Commerce Clause could greatly expand the meaning of open records laws in the few states that have noncitizens access restrictions. Although such laws currently serve the primary function of ensuring government accountability and transparency, the Court could read in a commercial component to these statutes. Accordingly, states would be forced to provide records on an equal basis to in-state and out-of-state citizens and corporations or not provide records to anyone. Furthermore, two other states enforce some form of a citizen-only access restriction like Virginia's: Arkansas¹²⁵ and Tennessee.¹²⁶ In addition to the successful challenge of Delaware's Freedom of Information Act,¹²⁷ Tennessee's open access statute recently faced a challenge at the district court level and is currently awaiting review by the Sixth Circuit.¹²⁸

122. 5 U.S.C.A. § 552 (West 2013).

123. *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

124. Shannon E. Martin & Jessica Brophy, *Industries' Proprietary Information and the Freedom of Access to State-Held Information: A Review of the Law and its Implications for Special Interest Businesses*, 58 S.C. L. REV. 831, 832 (2007).

125. ARK. CODE ANN. § 25-19-105(a)(1)(A) (West 2013) ("Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records.").

126. TENN. CODE ANN. § 10-7-503(2)(A) (West 2013) ("All state, county and municipal records shall, at all times during business hours . . . be open for personal inspection by any citizen of this state and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law."); *see infra* note 128.

127. *See Lee v. Minner*, 458 F.3d 194, 201–02 (3d Cir. 2006) (upholding DFOIA).

128. *See generally Jones v. City of Memphis*, 868 F.Supp.2d 710 (W.D. Tenn. 2012). In *Jones*, an out-of-state resident brought suit against various Tennessee authorities challenging the constitutionality of the Tennessee open records statute. *Id.* at 715. The challenger was a volunteer for the National Action Network and resided in Ohio. *Id.* He sought the release of records regarding state contracts. *Id.* The State denied his petition on the ground that he was not a citizen of Tennessee. *Id.* On the State's motion for summary judgment, the District Court held that a noncitizen's volunteer activities in a civil rights organization did not amount to a "common calling" protection under the Privileges and Immunities Clause. *Id.* at 721. The District Court also held that the Tennessee law violated neither the Privileges and Immunities Clause nor the dormant Commerce Clause. *Id.* at 727–28. The plaintiff in *Jones* filed an appeal with the Sixth Circuit, but the Sixth Circuit has stayed all proceedings until a decision in

A. *Privileges and Immunities Clause*

Even armed with strong policy justifications, this case will be an uphill battle for the Petitioners under the Privileges and Immunities Clause given the limited group of recognized fundamental rights under the Clause and the particularized nature of each Petitioner's requests.¹²⁹ McBurney's case is arguably much weaker than Hurlbert's because his request concerns an individual child support claim. The Third Circuit in *Lee v. Minner* explicitly noted that the right at issue must involve "matters of both *national* political and economic importance."¹³⁰ Indeed, the Supreme Court has held that States must accord citizens and noncitizens equal treatment only with respect to those privileges and immunities "bearing on the vitality of the Nation as a single entity."¹³¹ Because McBurney's requested information is arguably of personal, rather than of national, importance, the Court will likely find that his request does not implicate the Privileges and Immunities Clause. Additionally, McBurney's assertion that the denial of his VFOIA request burdens his right to access courts is weak at best. McBurney's request does not concern access to a court proceeding, but rather access to "documents to help decide whether he should file a lawsuit."¹³² The Court will likely follow the Fourth Circuit's holding that the Clause does not protect "a mechanism for pre-lawsuit discovery."¹³³

On the other hand, Hurlbert's case has a higher chance of success. The Court could hold that VFOIA directly interferes with Hurlbert's

McBurney comes from the Supreme Court. Order to Stay Appellate Proceedings Pending the Resolution of *McBurney v. Young, Jones v. City of Memphis*, No. 12-5558 (6th Cir. 2012).

129. Indeed, the difficulty of prevailing on the Privileges and Immunities argument became fairly apparent at oral argument. *See generally* Transcript of Oral Argument, *McBurney v. Young*, No. 12-17 (U.S. 2012) (including repeated questions by the Justices regarding how the purpose of VFOIA could extend beyond general government accountability, and failing to discuss the specific facts of McBurney's claim with respect to the Privileges and Immunities Clause); *see also* Lyle Denniston, *Argument recap: Agnosticism as an argument*, SCOTUS BLOG (Feb. 20, 2013, 2:37 PM), <http://www.scotusblog.com/2013/02/argument-recap-agnosticism-as-an-argument/> ("Before [Respondents] took the lectern, it was quite obvious that the case was going [their] way. Although [Petitioners'] woes could easily be exaggerated by making too much of Justice Scalia as a determined adversary, neither of [Petitioners'] basic arguments was working very well for [them].").

130. *Lee*, 458 F.3d at 196 (emphasis added) (citation omitted) (internal quotation marks omitted).

131. Supreme Court of *Va. v. Friedman*, 487 U.S. 59, 65 (1988)

132. *McBurney v. Young*, 667 F.3d 454, 467 (2012), *cert. granted*, 133 S. Ct. 421 (U.S. Oct. 2, 2012) (quoting *McBurney v. Cuccinelli*, 780 F.Supp.2d 439, 449 (E.D. Va. 2011)) (internal quotation marks omitted).

133. *Id.* at 467 (quoting *Friedman*, 487 U.S. at 65).

right to pursue a common calling.¹³⁴ *Lee* does not provide much guidance on the potential success of such an argument, however, because the *Lee* Court explicitly declined to address whether DFOIA substantially burdened the challenger's right to pursue a common calling.¹³⁵ Thus, the Third Circuit did not balance *Lee*'s right to pursue his common calling with the relative burden DFOIA imposed. The Supreme Court will be left to compare Hurlbert's case to a limited set of common calling cases where states explicitly banned or significantly burdened out-of-staters' abilities to conduct business in a particular state.¹³⁶

A holding in favor of *McBurney* and *Hurlbert* only under the Privileges and Immunities Clause would have a limited effect on the dissemination of public records because the Privileges and Immunities Clause applies only to individuals, not corporations.¹³⁷ As several amici point out, “[a] decision of this Court striking down the Virginia statute as a violation of the Privileges and Immunities Clause alone leaves states free to attempt to bar out-of-state corporations from access to Virginia public records while affording that access to Virginia corporations.”¹³⁸ Additionally, a narrow holding under only the Privileges and Immunities Clause could leave Virginia's out-of-state media exception unclear. VFOIA provides that “representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth” shall have access to public records.¹³⁹ However, this provision notably leaves out Internet media organizations, including those that have substantial readership in

134. Such a holding would be similar to the Court's handling of other common calling cases. *See, e.g.,* *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 219 (1984) (finding that a state statute violated a noncitizen's right to a common calling); *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) (same); *Toomer v. Witsell*, 334 U.S. 385, 385 (1948) (same); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870) (same).

135. *See Lee*, 458 F.3d at 199 (“Because we conclude that the second right asserted by *Lee*—the right to ‘engage in the political process with regard to matters of national political and economic importance’—is protected under the Privileges and Immunities Clause, we need not address [the common calling argument].” (citation omitted)).

136. *See, e.g.,* *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 288 (1985) (holding that a state cannot restrict bar admission to state citizens); *Toomer*, 334 U.S. at 152 (holding that a state cannot restrict commercial shrimp fishing activities to state citizens).

137. *Paul v. Virginia*, 75 U.S. (7 Wall.) 168, 178 (1869) (holding that a corporation did not constitute a citizen for purposes of the Privileges and Immunities Clause).

138. Brief for The Coalition for Sensible Public Records Access et al. as Amici Curiae Supporting Petitioners at 9, *McBurney v. Young*, No. 12-17 (U.S. Jan. 2, 2013).

139. VA. CODE ANN. § 2.2-3704 (West 2013).

Virginia.¹⁴⁰ As one amicus notes, “[a] straightforward reading of VFOIA’s media exception would leave out online media as they do not circulate in a tangible print form similar to magazines or broadcast over the air similar to television news.”¹⁴¹

B. Dormant Commerce Clause

Petitioners advance a strong and convincing argument that state records fall under the purview of the dormant Commerce Clause. First, the actions of collecting, trading, buying, selling, and aggregating state records simply sound like commerce. Individuals like Hurlbert engage in the for-profit practice of collecting and aggregating state records in order to sell them.¹⁴² The service Hurlbert provides does not seem too attenuated from that of a manufacturing company that manufactures a product in-state and then distributes it to retail locations around the globe.

Second, public records can be understood as articles of commerce. Petitioners hope that the Court will look to its holding in *Reno v. Condon*—that public records containing drivers’ information are “article[s] of commerce”—and expand it to say that all public records are articles of commerce.¹⁴³ There is good reason for the Court to do just that. For one, private sector companies “have relied upon public records to obtain personal information about individuals for marketing purposes.”¹⁴⁴ Additionally, for decades states “have been selling their public records to the highest bidder.”¹⁴⁵ Numerous companies across the country have amassed these public records—in 2004, there were more than 165 companies offering public records information on the Internet,¹⁴⁶ a number that may be even higher today. If companies are in the business of gathering the types of

140. See Brief for The Reporters Committee for Freedom of the Press et al. as Amici Curiae Supporting Petitioners at 22, *McBurney v. Young*, No. 12-17 (U.S. Jan 2, 2013) (“An out-of-state journalist desired access to various state records and filed an open records request.”).

141. *Id.* at 22.

142. *McBurney v. Young*, 667 F.3d 454, 463 (2012), *cert. granted*, 133 S. Ct. 421 (U.S. Oct. 2, 2012).

143. Brief for Petitioners, *supra* note 6, at 28 (quoting *Reno v. Condon*, 528 U.S. 141, 148 (2000)).

144. Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 MINN. L. REV. 1137, 1149 (2002).

145. *Id.* at 1150. Solove notes that the state practice of selling drivers’ information was largely restricted when Congress passed the Driver’s Privacy Protection Act, the subject of the constitutional inquiry in *Condon*. *Id.* at 1150–51; see also *Condon*, 528 U.S. at 148–49.

146. Solove, *supra* note 144, at 1152–53.

records available to Virginia's citizens under VFOIA, then these records are "articles of commerce."¹⁴⁷

Petitioners have the best chance of success under the first tier of the dormant Commerce Clause analysis. The largest hurdle Petitioners have to overcome is convincing the Court that VFOIA affects interstate commerce.¹⁴⁸ If the Court accepts this, Petitioners simply have to show that VFOIA treats in-state and out-of-state interests differently, to the benefit of in-state interests.¹⁴⁹ On its face, VFOIA explicitly draws a distinction between in-state and out-of-state citizens.¹⁵⁰ If the Court has recognized that VFOIA affects interstate commerce and that public records are "articles of commerce," the Court will likely hold this statute to be discriminatory under the first tier of the dormant Commerce Clause analysis. If the Court does not accept the first-tier analysis, Petitioners will be left in the land of the unpredictable *Pike* test.¹⁵¹ The biggest challenge Petitioners face here is overcoming the argument that, at best, VFOIA is not a regulation of commerce, but rather a state practice that has an "incidental effect [that] may be disproportionate."¹⁵² Given the unpredictability of the effects test under *Pike*, the Court could do one of two things: It could find that the small burden VFOIA places on Hurlbert outweighs any possible financial or administrative benefit to the State, or it could find that the burden on Hurlbert is not *clearly excessive* in relation to the benefits to the State.¹⁵³ Ultimately, the Commerce question is really two questions for the Court to decide: Is

147. See *Condon*, 528 U.S. at 148 (holding that drivers' records were articles of commerce that trigger dormant Commerce Clause review).

148. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (noting that once a statute is found to affect or burden interstate commerce, the inquiry becomes whether it discriminates on its face).

149. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

150. VA. CODE ANN. § 2.2-3704(A) (West 2013).

151. See *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (commenting that *Pike* balancing "is more like judging whether a particular line is longer than a particular rock is heavy").

152. See Transcript of Oral Argument, *supra* note 129, at 11 (noting that VFOIA "is not a regulation of Commerce" but rather it only has an incidental effect on commerce).

153. See *Regan*, *supra* note 67, at 1106 (noting that *Hunt* offers a "strict" balancing test while *Pike* offers a "weak" balancing test). Compare *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977) ("[T]he burden falls on the State to justify [the discrimination] in terms of the local benefits flowing from the statute and the *unavailability* of nondiscriminatory alternatives adequate to preserve the local interest at stake." (emphasis added)), with *Pike*, 397 U.S. at 142 (finding that the statute will be upheld unless the burden it imposes on commerce is "clearly excessive" in relation to the benefits).

this commerce, and does VFOIA discriminate—either on its face or in effect? Thus, *McBurney* presents the Court with an opportunity to answer these questions and perhaps even clarify the dormant Commerce Clause doctrine.

V. CONCLUSION

Petitioners in this case certainly face an uphill battle. The Court has yet to recognize a right to “engage in the political process with regard to matters of both national political and economic importance” as explicitly as the Third Circuit did in *Lee*, let alone recognize a relationship between accessing state records and participating in the national political process.¹⁵⁴ Ultimately, however, the Privileges and Immunities argument proves most difficult because at its core, the Clause protects only the rights “basic to the maintenance or well-being of the Union.”¹⁵⁵ In *McBurney*’s case, an individual’s records request for personal purposes does not appear to satisfy this high threshold. Hurlbert’s challenge is stronger because it concerns commerce, both on the level of the Privileges and Immunities Clause and the dormant Commerce Clause. Here, the Court is faced with a statute that squarely discriminates between citizens and noncitizens. If Hurlbert is able to overcome the challenge of proving that state records constitute articles of commerce, he will likely prevail under the first-tier dormant Commerce Clause analysis. Regardless of its outcome, *McBurney* presents the Court with a significant opportunity to clarify the relationship between the Privileges and Immunities Clause and the dormant Commerce Clause and to better define the contours of each respective provision.

154. See *Lee v. Minner*, 458 F.3d 194, 196 (3d Cir. 2006) (citation omitted) (internal quotation marks omitted).

155. *Baldwin v. Fish and Game Comm’n of Mont.*, 436 U.S. 371, 388 (1978).