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IN THE SUPREME COURT OF THE UNITED STATES

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MARK J. MCBURNEY, ET AL. :

Petitioners :

v. :

NATHANIEL L. YOUNG, DEPUTY : No. 12-17

COMMISSIONER AND DIRECTOR, :

VIRGINIA DIVISION OF CHILD :

SUPPORT ENFORCEMENT, ET AL. :

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Washington, D.C.  
Wednesday, February 20, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:19 a.m.

APPEARANCES:

DEEPAK GUPTA, ESQ., Washington, D.C.; on behalf of  
Petitioners.

EARLE DUNCAN GETCHELL, JR., ESQ., Solicitor General of  
Virginia, Richmond, Virginia; on behalf of  
Respondents.

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P R O C E E D I N G S

(10:19 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning first in Case 12-17, *McBurney v. Young*.

Mr. Gupta?

ORAL ARGUMENT OF DEEPAK GUPTA

ON BEHALF OF THE PETITIONERS

MR. GUPTA: Thank you, and may it please the Court:

All 50 States have public records laws. 47 of those States make access available to residents and nonresidents on equal terms. Virginia, by contrast, enforces a discriminatory access policy, and, because commercial requesters make up the vast majority of records requesters, out-of-State businesses bear the brunt of Virginia's policy.

JUSTICE SCALIA: When -- when was the first of those laws enacted? Do you know? I think it's -- I think it's in my adult lifetime that Florida was the first to enact a sunshine law. Is that -- am I correct about that?

MR. GUPTA: That's right. All of these laws --

JUSTICE SCALIA: In the '60s.

1                   MR. GUPTA: In the '60s and the early '70s. The  
2 Virginia law was enacted in 1968. And we don't deny  
3 that --

4                   JUSTICE SCALIA: And you say that's a  
5 fundamental -- that's a fundamental right covered by  
6 Privileges and Immunities Clause, which nobody had until  
7 the 1960s?

8                   MR. GUPTA: Well, to be clear, the modern  
9 transparency laws are new, but they sit on top of  
10 well-established common-law right -- rights to access  
11 that are based, not on modern notions of transparency,  
12 but on the right to secure property and other basic  
13 interests --

14                   JUSTICE SCALIA: But those -- those rights  
15 still exist in this State, don't they? Cannot you get  
16 records of deeds and whatever the common law would have  
17 covered?

18                   MR. GUPTA: Well, it's true that -- that  
19 Virginia's law exempts deeds from its Freedom of  
20 Information law, but, if I understand their position  
21 correctly, they would be entitled, as a constitutional  
22 matter, under their theory, to preclude people from  
23 other States from accessing even deeds.

24                   JUSTICE SCALIA: Well, I'll ask them -- I  
25 didn't understand that to be their position, but -- but

1 I guess we can ask them. MR. GUPTA: Well, my  
2 client, Mr. Hurlbert,  
3 is in the business of gathering property records for his  
4 clients. Now, it's true that, in Virginia, he could get  
5 the deed, but what he can't get and what he principally  
6 gathers for his clients are real estate tax assessment  
7 records, and those are a much richer storehouse of  
8 property-related information than simply the deed.

9 JUSTICE GINSBURG: Can you -- can you  
10 explain that business a little more fully than you did  
11 in the briefs? He's in the business of collecting  
12 records from all the States about tax assessments.

13 MR. GUPTA: That's right.

14 JUSTICE GINSBURG: And he -- and he does  
15 that for a client who could very well ask himself. So  
16 what is the service that's being performed?

17 MR. GUPTA: Well, he -- you know, he doesn't  
18 just do the routine request. The -- the large data  
19 companies are the ones who hire him. And they -- if  
20 they're routine requests, they can do them themselves;  
21 although if they're not based in Virginia, they would  
22 still have to hire a Virginian to do it.

23 But they bring him in when there's some flaw  
24 in the -- the routine process where the -- the State is  
25 being recalcitrant or the local official is being

1       recalcitrant. And he's an expert in being able to gather  
2 these -- these records and knowing the process is  
3 knowing what he's allowed to do and what he's not  
4 allowed to do.

5                   CHIEF JUSTICE ROBERTS: All -- all he has to  
6 do is get somebody from -- from Virginia to ask for him,  
7 right?

8                   MR. GUPTA: Well, he could hire someone from  
9 Virginia to do that, but that's -- you know, that's sort  
10 of precisely what the --

11                   CHIEF JUSTICE ROBERTS: Well, but you don't  
12 have to pay the person too much, he just has to write a  
13 letter saying, give me these documents, right?

14                   MR. GUPTA: He would still have to hire  
15 someone, and that would be an increased cost. And -- for

16                   CHIEF JUSTICE ROBERTS: Well, an increased  
17 cost of -- I don't know how much -- 100 bucks, right?  
18 Go -- write a letter, say you want these documents, and,  
19 when they come to your house, give them to me.

20                   MR. GUPTA: Yeah. For the large data  
21 companies -- you know, they will hire someone other than  
22 him to perform this service. They will -- if you're  
23 talking about routine requests. But even -- you know,  
24 even for them, if you're talking about a -- a request  
25 that isn't routine, if he has to do something further to

1       enforce the rights, he's going to have to do that in his own  
2 name, or the data company will have to hire someone  
3 other than him, someone based in Virginia, to do that  
4 for them. And then he will lose that business.

5               So the lower you go down in the food chain  
6 of the data industry, the bigger the effect of  
7 Virginia's policy.

8               JUSTICE GINSBURG: How much -- how much of  
9 an impact, in fact, does it have on his business? I  
10 mean, there are 47 States who will provide this  
11 information.

12              MR. GUPTA: Well, for -- for him, in the  
13 Virginia market, it completely forecloses him from doing  
14 access -- business in the Virginia market.

15              And, if other States were to have policies  
16 like this, he wouldn't be able to do business in those  
17 States as well. So if -- if the focus is on him and his  
18 business in Virginia, it completely cuts him off.

19              If the focus is on -- on what the effect is  
20 in the aggregate, on the market as a whole, because most  
21 public records requests are commercial requests, it's  
22 going to have an effect on most commercial requesters  
23 who are out-of-State. And --

24              JUSTICE SCALIA: Mr. Gupta, I -- I  
25 understand that the -- the reasoning of Virginia in not

1 allowing out-of-State people to -- to get these FOIA requests  
2 is the following: That the purpose of these --  
3 these laws -- and I remember it when the first ones were  
4 enacted -- government in the sunshine. The purpose of  
5 it was not to enable people to get information, per se;  
6 it was to enable people to see how their government is  
7 working, so that they could attend to any malfeasance  
8 that is occurring in the process of government.

9 It seems to me entirely in accord with that  
10 purpose of these laws to say it's only Virginia citizens  
11 who -- who are concerned about the functioning of  
12 Virginia government and ought to be able to get whatever  
13 records Virginia agencies have.

14 What's -- what's wrong with that reasoning?

15 MR. GUPTA: A few responses, Justice Scalia.

16 First, transparency was one purpose, but, as  
17 I said, these laws also carried forward the much more  
18 longstanding rights to access based on personal  
19 interests and property interests. Also, even at the  
20 time that these laws were enacted --

21 JUSTICE SCALIA: But -- but you don't need  
22 any personal or property interest under these laws. You  
23 can just -- just out of curiosity, if you -- if you were a  
24 Virginian, at least, in Virginia, even though you have  
25 no interest in the matter at all, you can ask the agency



1       for records about this or that.                               It -- it can't be  
2 based on -- on the  
3 traditional property interest. It's based on the  
4 ability of the citizens of the State to find out what  
5 the -- what the government of the State is up to.

6                       MR. GUPTA: Even -- even at the time that  
7 these laws were enacted in the -- in the '60s, it was  
8 well-understood that they were going to have a big  
9 commercial impact. The property records industry was in  
10 full swing by the end of the late 19th Century.

11                      JUSTICE GINSBURG: But the point is that  
12 FOIA is tied to, as Justice Scalia said, the citizens  
13 should know what their government is doing. And you  
14 don't have to give any reason at all, if you were a part  
15 of that political community. Now, Virginia doesn't  
16 allow people from out-of-State to vote. They're not  
17 part of Virginia's political community.

18                      So why isn't this -- if you're not part of  
19 the political community, then you don't fall under FOIA,  
20 which is a peculiar statute, in that everybody who is  
21 covered by it can get whatever they want, and they don't  
22 have to give any reason for it.

23                      MR. GUPTA: Right. Well, elections just  
24 simply don't work if you -- if you allow noncitizens to  
25 participate in elections or if you can't wall off the

1 State in that respect. But what the State can't say is,  
2 simply because one purpose of this law is that we want  
3 to constitute ourselves as a political community, that  
4 we can exclude activities that have a big commercial  
5 effect.

6 And -- you know, when we're looking under  
7 the Dormant Commerce Clause or under the Privileges and  
8 Immunities Clause, this Court's cases have said  
9 repeatedly you don't look to uncover the original  
10 legislative purpose, you look to whether there is  
11 discrimination, which there is here, on its face, and  
12 you look to whether there is a discriminatory effect.

13 One example of how this policy is actually  
14 being --

15 JUSTICE KAGAN: And is the only thing that's  
16 necessary -- excuse me -- is the only thing that's  
17 necessary that the law affect a few people commercially?  
18 I mean, how much -- how many of the requesters have to  
19 be engaged in some kind of commercial activity in order  
20 for your arguments to work?

21 MR. GUPTA: Well, what this Court has said  
22 is that there is no de minimis exception, if there's  
23 discrimination against commerce, but, here, what's going  
24 on is anything, but de minimis. Virginia does not deny  
25 that the -- the vast majority of the requesters are

1 commercial requesters -- the vast majority of out-of-State  
2 requesters are commercial requesters.

3 Their -- the amicus brief supporting their  
4 side, the Local Government Attorneys of Virginia amicus  
5 brief, at page 30, explains the way this policy --  
6 policy is being implemented, is that noncommercial  
7 requests are typically honored, but out-of-State  
8 requests by data miners are being categorically denied  
9 under the policy.

10 CHIEF JUSTICE ROBERTS: But this -- this is  
11 not -- this is not a regulation of commerce. It's a  
12 State practice that may have an incidental effect on  
13 commerce, and the incidental effect may be  
14 disproportionate, depending upon whether you're State or  
15 local, but it's not a regulation of commerce.

16 MR. GUPTA: But that's -- that was the  
17 Fourth Circuit's theory, and I think incidental can mean  
18 a few different things, and I think in -- in their  
19 opinion, it -- it does mean at least three different  
20 things. So maybe it would be helpful if I try to unpack  
21 that.

22 If it means incidental in terms of the  
23 effect on my client's business, I think, as I've  
24 explained, it's anything, but incidental; it completely  
25 forecloses him from the market. If it means incidental

1 in terms of the -- the aggregate effect of this statute,  
2 again, it's not incidental because the vast majority  
3 of -- of affected parties under this policy are  
4 out-of-State commercial requesters, particularly data  
5 companies.

6 And -- you know, if it means incidental  
7 compared to the purpose of the statute, as I've said,  
8 transparency was one purpose of the modern FOIA laws,  
9 but they also subsumed and sit on top of all of the  
10 longstanding rights of public access that have been  
11 around since the -- the first settlements in the United  
12 States -- or before the United States, when, in order to  
13 have a functioning property system, we recognized that  
14 you've got to have records of who owns what and -- and  
15 those records have to be made available to anyone in  
16 order to exercise property rights.

17 CHIEF JUSTICE ROBERTS: What if the State of  
18 Virginia says, as a policy, we want to help Virginia  
19 businesses, and so we're going to open a business  
20 training, best practices institute, where you're going  
21 to learn how to be a better business person, but the  
22 only people who can come in are -- are Virginia  
23 businesses.

24 MR. GUPTA: Right.

25 CHIEF JUSTICE ROBERTS: Under your theory,

1       because that will have an effect -- an incidental effect   on  
2   commerce in a way that's discriminatory, is -- is  
3   that unconstitutional?

4               MR. GUPTA:  I don't think so.  And there are  
5   a couple of distinctions.

6               First, that's not something that the State  
7   exclusively is able to provide.  It's not like the  
8   courthouse or the public archives across the street or  
9   the road that runs between them that only the -- the  
10   State is able to provide.

11              Anyone can provide a business training  
12   institute, so the State is just one player among many.  
13   Also -- running a

14              JUSTICE SCALIA:  But that -- that just goes  
15   to the extent of the impact, not -- not on the  
16   principle.  And you say extent doesn't matter.  You say  
17   there's no such thing as a de minimis exception.

18              MR. GUPTA:  No --

19              JUSTICE SCALIA:  So that -- that explanation  
20   doesn't -- doesn't seem, to me, to hold water.

21              MR. GUPTA:  Well, maybe I didn't explain it  
22   very well.  To be clear, I think it's more than just a  
23   difference in degree; it's a difference in kind.  These  
24   are fundamentally different when -- when you're talking  
25   about running the courthouse or running the public

1 archives, nobody else can do that. Nobody else  
2 can collect -- you know, make  
3 tax assessments, collect those records, and keep the  
4 official public archive of those things. That --

5 JUSTICE SCALIA: So what? So what? Except  
6 to the extent that that bears upon how much of a -- an  
7 imposition this is upon interstate commerce. It seems,  
8 to me, that's the only relevance of that point.

9 MR. GUPTA: Well --

10 JUSTICE SCALIA: And -- and you dismiss that  
11 relevance. You say it doesn't matter how extensive the  
12 impact is on -- on interstate commerce.

13 MR. GUPTA: Well, to the extent that you --  
14 you think it does matter, I mean, that -- that  
15 distinction doesn't matter in this case because the  
16 impact is -- is great. The principal impact is an  
17 impact on out-of-State commerce.

18 But let me --

19 CHIEF JUSTICE ROBERTS: Is that -- when  
20 you're talking about impact, is that a Pike analysis?

21 MR. GUPTA: No. I think this -- if you were  
22 in -- in the dormant Commerce Clause, this would be the  
23 per se rule of invalidity. You have facial  
24 discrimination. The -- the --

25 CHIEF JUSTICE ROBERTS: Well, I thought, if

1       it was facial discrimination, you're not concerned about  
2       impact.

3                   MR. GUPTA: That's right. That's right.

4                   CHIEF JUSTICE ROBERTS: I thought a question  
5       of talking about the effects on interstate commerce,  
6       that's the -- you know, the Pike analysis.

7                   MR. GUPTA: No. What this Court has said is  
8       that -- that the first -- sort of first-tier scrutiny,  
9       the per se rule is -- is for cases where there's  
10      discrimination on its face or discrimination in effect.  
11      And then you've got this other category for the -- the  
12      Pike analysis, where the State regulates evenhandedly.

13                  JUSTICE KENNEDY: What's your closest case  
14      in support of the proposition that this is impermissible  
15      as a discrimination against interstate commerce? What's  
16      your best case?

17                  MR. GUPTA: When you say, "this," you mean  
18      the -- that public records access is commerce?

19                  JUSTICE KENNEDY: If -- if you -- you are  
20      arguing, as one of your arguments here, that this is  
21      discriminatory as to -- as to interstate commerce, as I  
22      understand your argument, what is the best case you have  
23      to support your position? What's the closest case?

24                  MR. GUPTA: Well, I think if you're -- if  
25      you're -- if the question is about whether or not

1 records access is commerce, there's Reno v. Condon this  
2 Court's unanimous decision --

3 JUSTICE KENNEDY: Well, my question is  
4 what's the best case you have for your argument?

5 MR. GUPTA: Well, I think -- you know, this  
6 Court's unanimous decision in Reno v. Condon held that,  
7 because people buy public records and sell them in  
8 interstate commerce, that's, indisputably, interstate  
9 commerce. So we --

10 JUSTICE KENNEDY: But that wasn't a  
11 discrimination. That wasn't a --

12 MR. GUPTA: That's right.

13 JUSTICE KENNEDY: That's just -- that goes  
14 to the question whether or not this is commerce.

15 MR. GUPTA: That -- that's right.

16 JUSTICE KENNEDY: What -- what is your best  
17 case to show that this is discriminatory in violation of  
18 our precedence?

19 MR. GUPTA: Well, Virginia doesn't deny that  
20 there's discrimination on its face, so I take your  
21 question to be asking -- you know, what about the  
22 commerce aspect? And in Reno v. Condon --

23 JUSTICE KENNEDY: Now -- if I have  
24 to write the opinion, what case do I put down? I'm  
25 waiting.



1                   MR. GUPTA: Yeah, I mean, you -- okay. So you  
2 can also look to Camps Newfound, which, I think --  
3 you know, was much -- much more attenuated to commerce.  
4 There, you had a generally applicable law, a property  
5 tax law --

6                   JUSTICE BREYER: If I only have time to read  
7 one case --

8                   MR. GUPTA: Yeah.

9                   JUSTICE BREYER: -- or possibly two, which  
10 would you like me to read? I think that's, basically,  
11 the question.

12                   (Laughter.)

13                   MR. GUPTA: Yeah. I mean -- you know, look.  
14 There's no case that's -- that's entirely on all fours,  
15 but --

16                   JUSTICE BREYER: Okay. But I assume you  
17 don't want me --

18                   JUSTICE KENNEDY: That's why you're here.

19                   (Laughter.)

20                   MR. GUPTA: So right. So -- so -- okay. So  
21 the Camps Newfound case is -- is a case where you had a  
22 generally applicable law. It was a property tax law.  
23 It exempted -- you know, charities that served primarily  
24 in-State residents.

25                   It was -- there is no evidence that the

1 State of Maine intended that to be a -- you know, a  
2 discrimination against commerce and, obviously, swept  
3 more broadly and affected both commerce and  
4 non-commerce. But this Court said that -- you know, you  
5 had facial discrimination against commerce because there  
6 were people operating these summer camps, and they were  
7 treated differently --

8 JUSTICE BREYER: I'll look at those. But I  
9 think the Commerce Clause, basically, has, as its  
10 objective, insofar as it's dormant, to prevent a  
11 legislature or decisionmaker within its State  
12 discriminating in favor of their own State producers.

13 MR. GUPTA: Right.

14 JUSTICE BREYER: Now, it's pretty hard for  
15 me to put this case into that mold.

16 MR. GUPTA: Well, I mean, one -- you know,  
17 one piece of evidence, Justice Breyer, is the media  
18 exception to the Virginia statute. It -- this -- this  
19 makes it clear that Virginia was aware that people who  
20 were requesting information for commercial purposes were  
21 going to use this statute and they exempted the press --

22 JUSTICE SCALIA: It's just Virginia media,  
23 though, isn't it? Isn't it only media that --

24 MR. GUPTA: That's right, Justice Scalia.  
25 So it's --

1 JUSTICE SCALIA: -- exists or is broadcast into  
2 Virginia?

3 MR. GUPTA: That's right. So it's --  
4 it's --

5 JUSTICE SCALIA: Well, that's consistent  
6 with their purpose, that this statute is meant to assure  
7 good, honest government in Virginia.

8 MR. GUPTA: Well, if this is a statute, it's  
9 a pretty unusual statute that discriminates among  
10 newspapers, so it says --

11 JUSTICE BREYER: If it does what the -- I  
12 had exactly the same question for both parts of your  
13 argument, that what it's their -- am I right in thinking  
14 that anyone can get any information -- anyone in any  
15 State can get any information that pertains to him or  
16 her? Is that right or not?

17 MR. GUPTA: There is a separate Virginia --

18 JUSTICE BREYER: Is that right or not?

19 MR. GUPTA: Yes. There is a  
20 separate Virginia statute that allows this.

21 JUSTICE BREYER: Okay. That's what I wanted  
22 to know, whether it's separate or not.

23 MR. GUPTA: That's right.

24 JUSTICE BREYER: Anyone from Alaska to  
25 Hawaii can get any information that pertains to him or

1 her. Second, that this has nothing to do with  
2 judicial records, there is a different statute that  
3 makes judicial records public.

4 MR. GUPTA: That's correct.

5 JUSTICE BREYER: Okay. So we're, now,  
6 talking about the class of information, other than the  
7 two classes I've mentioned.

8 And I then ended up -- and I'd like you to  
9 add something to this, if you can, that, really, this is  
10 about -- since getting information involves usually a  
11 benefit to the recipient, but, sometimes, harm to the  
12 person the information is about, that willing to run  
13 that harm and risk of harm is the interest in State good  
14 government, okay?

15 MR. GUPTA: Uh-huh.

16 JUSTICE BREYER: Now, if that's the  
17 interest, that's an interest that probably a State has  
18 the right, just as it has the right to say other people  
19 can't vote in State elections, if that's the interest,  
20 then I guess it could take reasonable measures related  
21 to that interest.

22 All right. Now, that is the -- the argument  
23 or the position that I would appreciate your addressing.

24 MR. GUPTA: Sure. You know, that -- we  
25

1 don't deny that that's an interest that the State has, but  
2 then you have to see whether the -- the interest is  
3 reasonably furthered by the statute. And, here, you  
4 have a resource that is not finite, and the statute  
5 allows the State to recoup its expenses.

6 So nothing is lost to Virginians. There  
7 isn't any loss in transparency to Virginians by  
8 extending access to out-of-State data companies.

9 JUSTICE GINSBURG: But if it costs for  
10 Virginia -- Virginia has to take care of its own, and,  
11 if it has to service FOIA requests from all over, it's  
12 going to cost the State. It's going to have to hire  
13 people to do this. They're going to have to spend many  
14 hours going through these records, so the State  
15 doesn't -- it wants to conserve its resources for its  
16 own people.

17 MR. GUPTA: But -- but there's no loss in  
18 resources, Justice Ginsburg, because the statute allows  
19 Virginia to fully recoup any administrative expenses.

20 JUSTICE SOTOMAYOR: Counsel, I'm having --

21 JUSTICE SCALIA: But they -- but they just  
22 don't want out -- they -- they don't want outlanders  
23 mucking around in -- in Virginia government. It's  
24 perfectly okay for good old Virginians to do that, but  
25 they don't want outlanders to do it. Why -- why is that

1 unreasonable? MR. GUPTA: Yeah. That -- that is  
2 certainly

3 their interest. But you've got to see whether the  
4 policy serves -- serves -- you know, the interest,  
5 and -- and this is a statute that is supposed to promote  
6 transparency. It actually makes it less transparent.

7 JUSTICE SOTOMAYOR: Counsel, I'm -- I --  
8 there is underlying your argument a sort of fundamental  
9 belief that you are entitled to relief -- pardon the  
10 alliteration -- simply because the statute discriminates  
11 between citizens and noncitizens. Is that your  
12 position?

13 MR. GUPTA: No, not at all, I mean --

14 JUSTICE SOTOMAYOR: So if it's not, what are  
15 the two rights that you -- or what rights are it that  
16 you're claiming have been violated? You say privileges  
17 and immunities. What's the privilege or immunity?

18 MR. GUPTA: It's the privilege or immunity  
19 of pursuing a common calling across State borders. So  
20 there's no dispute here that Mr. Hurlbert's common  
21 calling is -- is gathering data. In fact, those are the  
22 principal users of public records laws.

23 JUSTICE SOTOMAYOR: So is this -- is this an  
24 as-applied challenge to the --

25 MR. GUPTA: That's right.

1 JUSTICE SOTOMAYOR: All right. MR.

2 GUPTA: That's right.

3 JUSTICE SOTOMAYOR: So this is an as-applied  
4 challenge?

5 MR. GUPTA: Yes. So -- so it's an  
6 as-applied challenge with respect to Mr. Hurlbert's  
7 common calling. There's no -- there's no dispute that  
8 that is his common calling and that this law has the  
9 effect of completely cutting him off from pursuing his  
10 common calling in the Virginia market and that 47 other  
11 States --

12 JUSTICE GINSBURG: Then you would be doing  
13 something very strange with this statute because you  
14 would be saying Hurlbert has a right to this because  
15 it's his business. But the statute, the character of  
16 this statute is it doesn't matter what you want the  
17 information for.

18 But you're saying the out-of -- the  
19 in-Stater, it doesn't matter. Out-of-Stater, is it your  
20 argument that, if this out-of-Stater has a good reason  
21 for getting this and it's related to the out-of-State's  
22 business, so you -- you're changing the character of a  
23 FOIA statute, which is it doesn't matter what you want  
24 it for.

25 MR. GUPTA: Right. I mean, you would -- you

1 know, we would -- we would ask that you rule that the statute  
2 is unconstitutional, as applied to him, and then  
3 Virginia would have the choice, if it has a --

4 JUSTICE SOTOMAYOR: I -- I'm having a  
5 problem, and then I think it's Justice Ginsburg's  
6 problem, which is, absent the statute, he can't demand  
7 that Virginia provide him with this information because  
8 that's how he wants to work, correct?

9 So what's the added value that gives him a  
10 right to demand it merely because a statute exists? He  
11 doesn't have a right to the information.

12 MR. GUPTA: Well, he's -- all he's asking  
13 for is information that's available in the public  
14 archives on equal terms with Virginians. In the same  
15 way that -- that someone who --

16 JUSTICE BREYER: He -- he has a very  
17 reasonable request in my view, but the question isn't  
18 the reasonableness of his request. The question's --  
19 you know, whether they can do it. And the -- the way --  
20 the work -- the thing that's bothering me on the work  
21 part is this: It seems that the work is sort of  
22 tailored to the statute.

23 It's in this way. I -- I have a job, and my  
24 job is to study election processes. And I write  
25 reports, and I find amazing things about differences



1 among States. They're truly amazing. And I say  
2 -- you know, it would help me a  
3 lot if I was actually a voter in each of these States.  
4 That would help my job. It would lend authenticity, and  
5 I could learn things that I probably couldn't learn  
6 otherwise.

7 Now, does that add anything to the argument?  
8 I mean, I don't think so, but it sounds a little bit  
9 like you're making that kind of argument --

10 MR. GUPTA: No.

11 JUSTICE BREYER: -- and -- and they either  
12 do have the right or they don't. And I don't know that  
13 it helps that I -- that I say, well, I really want it  
14 for my work.

15 MR. GUPTA: Right. But this is -- this is a  
16 profession that has existed since the founding era. I  
17 mean, we've -- you know, we've cited cases in our  
18 opening brief of -- of people hiring professionals to  
19 search the records for them before engaging in property  
20 transactions. By the late 19th Century, you had an  
21 enormous industry that was designed to do this.

22 So this isn't -- Mr. Hurlbert isn't someone  
23 who's making up some profession. He's part of a very  
24 large industry that has done this for a very long time.  
25 And that industry, yes, like lawyers depend on

1 courthouses or truckers depend on roads, his industry depends  
2 on access to the public archives.

3 And -- you know, it's true that -- that now  
4 you have these modern public records laws, but I -- I  
5 think Virginia's argument would be the same if you were  
6 just talking about can -- can they bar the doors to the  
7 archives building? Can they bar the doors to the  
8 property records? So there's no -- I don't see any  
9 distinction in kind --

10 CHIEF JUSTICE ROBERTS: Is this -- is this  
11 your Privileges and Immunities argument or your dormant  
12 Commerce Clause argument?

13 MR. GUPTA: You know, I think the logic of  
14 both arguments are similar, but I think it, most  
15 clearly, is illustrated in the Privileges and Immunities  
16 context where --

17 CHIEF JUSTICE ROBERTS: So then it's not  
18 enough that this is a big deal to your client. It has  
19 to be something that is essential to hold the country  
20 together as a national unit. And it seems, to me, it's  
21 a bit of a stretch to say somebody gathering records  
22 about commercial -- under FOIA fits that description.

23 MR. GUPTA: I don't think it's a stretch at  
24 all, Justice -- Chief Justice. The -- the aggregators  
25 of records make possible mortgage origination, credit

1 reporting, insurance adjustment. The -- the economy -- and  
2 you have an amicus brief --

3 CHIEF JUSTICE ROBERTS: No, but, see,  
4 they're just to get into those. Again, I think a lot of  
5 those examples you -- you do have access under other  
6 statutes. You're talking about mortgage rules and all  
7 that. Aren't those all --

8 MR. GUPTA: No, no. Not to this kind of  
9 information. The -- the information that Mr. Hurlbert  
10 is gathering, tax assessment information, is essential  
11 to -- to mortgage origination and credit reporting. The  
12 people who hire him are large data companies, and the --  
13 the data industry brief explains the uses of this  
14 information.

15 That -- that information is essential to  
16 these activities. And Virginia, virtually alone among  
17 the States, is -- is erecting this barrier to access  
18 that market and reserving the right to access that  
19 market to only people who live in the State.

20 And -- and -- you know, this would be no  
21 different if it were just talking about the archives  
22 that -- that include all the information that the --  
23 yes, it's true that Virginia has exempted of the title  
24 itself, but I don't see that the logic of their position  
25 allows them to make that distinction. I mean, that's

1 just a feature of their -- of their statute.

2 JUSTICE SOTOMAYOR: Could I -- I'm still trying to  
3 tease out what your claim is. Let's suppose Virginia  
4 passes a statute that says, We'll let nonresidents have  
5 access, but they have to pay all the costs.  
6 Nonresidents don't.

7 Would that satisfy you as valid?

8 MR. GUPTA: I think that would be a closer  
9 question, but I think that presents some problems as  
10 well. I mean, so, in your hypothetical, it's free to  
11 the citizens of the State, but they're just passing the  
12 cost on to out-of-Staters.

13 And -- you know, this -- this Court, in  
14 cases like Toomer and Mullaney, have said that at  
15 least -- you know, where the State can show that the  
16 nonresidents pose some unique evil, that the -- the  
17 State is entitled to pass the costs on.

18 JUSTICE SOTOMAYOR: Why isn't it just -- you  
19 just being costs them more?

20 MR. GUPTA: Right.

21 JUSTICE SOTOMAYOR: That was Justice  
22 Ginsburg's point, which is every time you've put in a  
23 request, you're costing them more money.

24 MR. GUPTA: Right. But -- but that would be  
25 discriminating against non as -- noncitizens solely

1     because they're noncitizens. So, if there's some particular  
2     --

3                   JUSTICE SOTOMAYOR: Well, why? You were  
4     costing them more.

5                   MR. GUPTA: Right. Well, that's -- that's  
6     precisely the rationale that -- that in  
7     Justice Kennedy's opinion for the Court in *Barnard v.*  
8     *Thorstenn*, this Court rejected. This -- the Virgin  
9     Islands wanted to say if we open up our bar to people  
10    from all over the country, it's going to increase the  
11    administrative resources. And this Court said, no,  
12    that's not a good enough reason. That's just  
13    discriminating on the basis of citizenship.

14                   But if, for example, the State could show  
15    that there was -- you know, there were shipping costs  
16    that were uniquely posed by nonresidents and they wanted  
17    to assess a \$5 shipping fee for all nonresidents, that  
18    might be permissible.

19                   And, if there are no further questions, I'd  
20    like to reserve my time.

21                   CHIEF JUSTICE ROBERTS: Thank you, counsel.  
22                   General Getchell?

23                   ORAL ARGUMENT OF EARLE DUNCAN GETCHELL, JR.,

24                   ON BEHALF OF THE RESPONDENTS

25                   MR. GETCHELL: Mr. Chief Justice, and may it

1 please the Court: The --

2 JUSTICE SOTOMAYOR: I'm not sure how you  
3 save administrative costs under this statute. They  
4 could go to any Virginia resident, it's not illegal, and  
5 probably will, it'll cost them something more, but not  
6 you, and get the very same information.

7 So how do you justify this discrimination?  
8 Because it's so easily -- the administrative cost is  
9 going to be imposed anyway.

10 MR. GETCHELL: I would -- would suggest that  
11 the purpose of the statute, which is political, not  
12 commercial, left the State with the position that it was  
13 going to subsidize with tax dollars this function  
14 because we can't recover our overhead; we can over --  
15 only recover the actual cost.

16 JUSTICE SOTOMAYOR: So you want to give more  
17 businesses to Virginia citizens who will now charge  
18 out-of-State residents money to process their FOIA  
19 requests?

20 MR. GETCHELL: No, Your Honor. I don't  
21 think anybody was thinking about businesses of any sort.  
22 I think they were saying that we have a political  
23 hygiene statute. They were very much the fad. It  
24 happened in -- in my lifetime, too. I remember when

25

1       they were adopted. Nobody thought they were commercial in  
2 nature.

3                   And I do want to -- want to repel the notion  
4 that there is even substantial discrimination in this  
5 case because Mr. Hurlbert, in his admission that this is  
6 an as-applied challenge, has a difficulty with  
7 substantial equality of access, because it turns out  
8 that Mr. Hurlbert, in his reply brief, when he teed up  
9 the 1786 statute, which does give access -- did give  
10 access, he focused his argument on that statute.

11                   And if you run that statute, you will find  
12 that between 1830 -- 1813 and 1840, that you did not  
13 have general access. They went back to having to show a  
14 particular interest. But that -- from 1840, '41 until  
15 today, through the codes of 1819 and -- and up until the  
16 present code, Section 17.1208, he has the right of  
17 access to tax assessment records.

18                   CHIEF JUSTICE ROBERTS: So the -- if I  
19 understood your answer to Justice Sotomayor, the only  
20 reason you don't let out-of-Staters get these records is  
21 because of the added overhead costs?

22                   MR. GETCHELL: No, Your Honor. It's just  
23 not part of the interests the State was trying to serve.  
24 The State --

25                   CHIEF JUSTICE ROBERTS: Well, I know.

1 But -- but -- so why don't you do it anyways? Just -- just  
2 as I asked your friend, it doesn't seem like that  
3 big a deal. It doesn't seem like that big a deal for  
4 you either. If you can recoup overhead costs from  
5 people who request -- and I'd assume you would be able  
6 to -- why don't other people -- people from West  
7 Virginia may have interest in how Virginia government  
8 operates, too.

9 And -- and, again, if -- what cost is there to  
10 you, other than overhead? You don't want to keep how  
11 Virginia government operates quiet from outsiders when  
12 you let in -- its citizens get the access, do you?

13 MR. GETCHELL: The -- we are here to defend  
14 the decisions of the two lower courts that apply  
15 existing doctrine. And, under existing doctrine, only  
16 if we discover that this is a fundamental right, do I  
17 have to justify --

18 CHIEF JUSTICE ROBERTS: Well, that's under  
19 the Privileges -- the Privileges and Immunities  
20 argument.

21 MR. GETCHELL: That's correct.

22 CHIEF JUSTICE ROBERTS: Okay. But what  
23 about the Dormant Commerce Clause?

24 MR. GETCHELL: Under the Dormant Commerce  
25 Clause, we would first have to have a regulation of



1 commerce that's discriminatory. And I would say that a --  
2 that this is a governmental function. I would say  
3 that --

4 CHIEF JUSTICE ROBERTS: No, I know -- I  
5 understand your argument. I'm just asking you why  
6 bother? I mean, what -- what's the -- and that's  
7 certainly pertinent to some of the Commerce Clause  
8 analysis. And I haven't heard anything, other than the  
9 overhead costs. And I think you can recoup that from  
10 the requesters.

11 MR. GETCHELL: I cannot, Your Honor.

12 CHIEF JUSTICE ROBERTS: Why not?

13 MR. GETCHELL: Mr. Chief Justice, the  
14 statute says I cannot recoup the cost of maintaining and  
15 generating the database, which is, by definition,  
16 overhead. I cannot --

17 CHIEF JUSTICE ROBERTS: Well, you've got to  
18 maintain and generate the database, anyway, for Virginia  
19 citizens who are going to ask for it. This is not an  
20 added cost. It's an added cost if you  
21 have to hire an additional person to handle -- as far as  
22 I can tell, just these two people.

23 MR. GETCHELL: It's an added burden, too.

24 It's not all --

25 JUSTICE SCALIA: But the Virginia citizens

1 pay for that database, right? MR. GETCHELL: They  
2 do. This is a  
3 taxpayer --

4 JUSTICE SCALIA: And the out-of-Staters  
5 don't pay for the database.

6 MR. GETCHELL: This is a taxpayer-subsidized  
7 system.

8 JUSTICE SCALIA: And, besides, do -- do  
9 you -- is it the law that -- that the State of Virginia  
10 cannot do anything that's pointless?

11 Only -- only the Federal Government can do  
12 stuff that's pointless?

13 (Laughter.)

14 MR. GETCHELL: The -- there is a  
15 burden -- there is a non-financial burden as well  
16 because, as one who is subject to FOIA requests, we have  
17 a finite number of officials and employees who have to  
18 address these things. And that --

19 JUSTICE SOTOMAYOR: You keep making that  
20 argument. But you don't stop residents for asking for  
21 the information from someone else. I mean, that's one  
22 of the points of your law, which is they can hire a  
23 Virginia resident to get it for them. Most of the big  
24 people are doing that already.

25 So you're not saving any money if they can

1 get the information simply by paying someone in Virginia to  
2 get it for them.

3 MR. GETCHELL: In -- in fact, the State of  
4 Virginia has made the policy decision to give this  
5 information to its citizens and not to inquire behind it  
6 to see whether or not somebody's doing it for an  
7 out-of-Stater. And not --

8 JUSTICE SCALIA: Or even for commercial  
9 purposes. Don't you think if -- if those who created  
10 these government in the sunshine laws could have drafted  
11 them in such a way that inquiries for commercial  
12 purposes would not be allowed, but only those inquiries  
13 that are intended to look into the workings of State  
14 government and produce government in the sunshine, don't  
15 you think that they probably would have excluded  
16 commercial inquiries, if they could?

17 But you can't tell which ones are commercial  
18 and which aren't.

19 MR. GETCHELL: And we don't -- and we don't  
20 try. We have a policy decision that we want to have a  
21 very simple system that allows our citizens to make  
22 inquiries without a demonstrated need or cause because  
23 we want there to be sunshine.

24 CHIEF JUSTICE ROBERTS: It's no more  
25 complicated a system if you let out-of-Staters have

1 access, too. You say we want a simple system. It's going to  
2 be the same system, whether you win or lose.

3 MR. GETCHELL: The thing that is of -- of  
4 great concern -- why do we care, why do we bother -- is  
5 the principle that when a government is providing a  
6 taxpayer-subsidized service of recent origin to its  
7 citizens, that it does not have to explain its choice,  
8 either under the Privileges and Immunities Clause or  
9 under the Dormant Commerce Clause.

10 It is very important that we not find  
11 ourselves with lawsuits that say, "services." Voluntary  
12 services are, in fact, things that, now, have to be  
13 justified under those two provisions of the  
14 Constitution.

15 JUSTICE BREYER: Well, that -- that's where  
16 he comes in with his argument because I -- I agree, you  
17 can -- you don't have -- let's say the most fabulous  
18 reason for doing this, but you have a reason.

19 (Laughter.)

20 JUSTICE BREYER: And so the question is,  
21 does it have to be better than that? And -- and they  
22 are saying yes. And, as I heard it, this -- what I  
23 would characterize as a strong argument -- this sort of,  
24 first of all, strikes me as a stronger argument, is  
25 that, look, if we go back into history, out-of-State

1 real estate people could always get information about  
2 property -- let's say they had a client who wanted to  
3 buy it.

4 Now, you've protected that. But, in today's  
5 world, it's important that we get statistics about this,  
6 too, because our economy is national. If we understand  
7 how States are taxing their real estate, we will know to  
8 what extent they increase the value, to what extent they  
9 increase the rate, to what extent they really get the  
10 money they are supposed to, to what extent they might  
11 get money or not get money in the future.

12 And all of those things are nationally  
13 important, so that people can put them together and  
14 make -- better than we have done in the past --  
15 predictions about what is likely to happen to States  
16 and, hence, the national economy. All right.

17 That's -- that's the kind of argument he's  
18 making. And he says, so, therefore, there is a national  
19 interest in the flow of this information. And that  
20 means you have to have a better than "uh-huh" kind of  
21 rationale. That's -- that's what he's saying, I think.

22 MR. GETCHELL: But it's very difficult for  
23 Mr. Hurlbert to make that fairly expansive argument  
24 because it turns out --

25 JUSTICE BREYER: Well, to be fair, I -- I

1 was sort of expanding it. (Laughter.)

2 MR. GETCHELL: But, in point of fact,  
3 because he is entitled to the tax assessment data in the  
4 clerk's office, in the case of Henrico County, where he  
5 went, you go in the same building and -- if you're  
6 Mr. Hurlbert, you turn in one direction, you go to the  
7 clerk's office.

8 And, if somebody in Virginia and wants to --  
9 for whatever reason, get it from the tax assessor's  
10 book, instead of from the clerk's book, you turn in the  
11 other direction.

12 JUSTICE KAGAN: But you don't deny that, in  
13 general, this does affect out-of-State data collectors,  
14 people who are engaged in the kind of business that  
15 Justice Breyer was talking about, is that right?

16 MR. GETCHELL: I have no idea in this record  
17 because we were on summary judgment -- cross motions for  
18 summary judgment, and the district court and the court of  
19 appeals, both in our judgment, correctly ruled that  
20 there's a two -- two-step inquiry.

21 And the first step is whether or not  
22 there is a fundamental right. And in the absence  
23 of a --

24 JUSTICE SOTOMAYOR: It's only in his  
25

1 Privileges and Immunities Clause claim. MR.

2 GETCHELL: Well --

3 JUSTICE SOTOMAYOR: He claims that the  
4 dormant Commerce Clause has been effected because he  
5 reads this statute as saying only Virginia recording  
6 companies have access; out-of-State can't. And it's a  
7 fair reading of the statute. It only permits Virginia  
8 residents, which include commercial and noncommercial,  
9 to access the information.

10 So assume, hypothetically, that the statute  
11 reads "only Virginia commercial businesses have access  
12 to this information" --

13 MR. GETCHELL: If -- if, in fact, you want  
14 to rewrite the statute to -- subject to -- it to attack,  
15 obviously, that would then raise questions about a  
16 nongovernmental protectionist intent, but that's not the  
17 way this statute was written. It's not how it was  
18 crafted. It -- it has nothing to do with commerce.

19 JUSTICE SOTOMAYOR: Well, that's the  
20 question I'm -- I'm raising the best argument for your  
21 adversary, okay?

22 MR. GETCHELL: Right.

23 JUSTICE SOTOMAYOR: Because we could call it  
24 a direct -- he calls it direct discrimination because  
25 commercial businesses are being permitted in Virginia,

1 but not noncommercial. You say it's indirect. How do we  
2 draw the line between direct and indirect, when the  
3 bottom-line consequence is the same?

4 MR. GETCHELL: I would -- I would have about  
5 three answers to that. The first -- the first one is  
6 that we don't trigger the dormant Commerce Clause  
7 analysis, unless we are exercising the police power of a  
8 State to regulate commerce. And that means -- it does  
9 mean that not every statute a State passes triggers an  
10 inquiry, even if it has an indirect effect on commerce.

11 Whereas, here, we have a statute that has a  
12 solely political intent, the fact that -- that now that  
13 the amici want to tell us about this great burgeoning  
14 enterprise, they -- they want the Court to take that  
15 into account.

16 JUSTICE KENNEDY: Are you -- are you telling  
17 us that there is simply no commercial consequences to  
18 this statute at all, that Virginians find this to be of  
19 no commercial value, in any instance?

20 MR. GETCHELL: I am totally agnostic on this  
21 record because we don't have any data on that.

22 JUSTICE KENNEDY: Well, you were the one  
23 with summary judgment. Now, maybe -- maybe they didn't  
24 come forward with the information, but we interpret  
25 summary judgment in favor of -- of the losing party.



1                   And you're -- so you say you are totally  
2 agnostic. I am concerned that you are preventing them,  
3 by the summary judgment, from showing that there -- even  
4 with Virginians, there is a commercial value frequently  
5 to this information.

6                   MR. GETCHELL: All right.

7                   JUSTICE KENNEDY: It's not just political.

8                   MR. GETCHELL: On this -- on this record --  
9 on this record, the position that was accepted by the  
10 two courts below, entirely in accordance with this  
11 Court's existing doctrine, was the first inquiry under  
12 Privileges and Immunities, was whether there was a  
13 fundamental right. If there -- if there is not, then we  
14 make no further inquiry.

15                   JUSTICE KENNEDY: Let's talk about -- let's  
16 talk about the Commerce Clause. You are saying you are  
17 agnostic. You have no idea whether or not there might  
18 be some commercial value to this information. I would  
19 think, as an officer of the State of Virginia or as a  
20 matter of judicial notice, we could -- we could take  
21 notice that there is.

22                   MR. GETCHELL: I'm saying that, under this  
23 record, that never came up, nor should it have come up,  
24 because what the court said on dormant Commerce Clause,  
25 both of the courts below, was this is not a regulation

1 of commerce, it is a governmental action --

2 JUSTICE GINSBURG: But it has -- it has --

3 JUSTICE SCALIA: You are saying that it's no  
4 more necessary for you to show that there's no  
5 commercial value to allowing out-of-Staters to do this  
6 than it is necessary for you to show that there is no  
7 commercial value to your not allowing out-of-Staters to  
8 hunt deer in Virginia.

9 MR. GETCHELL: I believe --

10 JUSTICE SCALIA: You say that it's up  
11 to Virginia --

12 MR. GETCHELL: Correct, Your Honor.

13 JUSTICE SCALIA: -- whether -- whether  
14 out-of-Staters can hunt for Virginia game.

15 MR. GETCHELL: Correct.

16 JUSTICE SCALIA: And it's up to Virginia  
17 whether out-of-Staters can have access to the State's  
18 records, that they have no interest in, personally,  
19 under -- under this law. It seems, to me, perfectly  
20 logical.

21 MR. GETCHELL: But, remember, they do --  
22 they do have access to this information, both Hurlbert  
23 and McBurney.

24 JUSTICE KENNEDY: Of course, that assumes  
25 the question as to whether or not there is a general

1 commercial interest in these -- in these -- in these  
2 documents. And you say, oh, you are agnostic. At least  
3 that means you are open to the possibility that there  
4 might be a commercial interest.

5 (Laughter.)

6 MR. GETCHELL: Well, here's the problem in  
7 this case is because I think that we are not at  
8 first-tier analysis, because there is no regulation of  
9 commerce that is discriminatory --

10 JUSTICE SCALIA: I didn't understand -- if  
11 that's your argument on it, I reject it as Justice  
12 Kennedy does. I -- I didn't understand you to be  
13 arguing that there is no commercial value.

14 MR. GETCHELL: I'm trying to explain why it  
15 doesn't matter.

16 JUSTICE SCALIA: Yes, that's what I thought.

17 (Laughter.)

18 MR. GETCHELL: It doesn't -- it doesn't  
19 matter because if -- if, on the threshold inquiry, we  
20 don't have a discriminatory regulation of commerce, but  
21 just an ordinary governmental function, then only  
22 Pike-Church analysis could possibly --

23 JUSTICE SCALIA: You -- you can't say  
24 discriminatory regulation. What about a tax? I mean,  
25 you can't tax discriminatorily, and I wouldn't call

1       taxation, in and of itself, a regulation of commerce, would  
2   you?

3                   MR. GETCHELL:  The -- the fact of the matter  
4   is that it has been -- taxes have been found to be both  
5   violations of privileges and immunities and dormant  
6   Commerce Clause, where there were -- there was unequal  
7   taxation of commerce.

8                   JUSTICE SCALIA:  Well, even though it's --  
9   even though it's not a regulation of commerce?

10                  MR. GETCHELL:  Okay.  Well, I --

11                  JUSTICE SCALIA:  Okay.  I mean, I guess  
12   that's your argument, then.

13                  MR. GETCHELL:  I apologize I chose a word  
14   that is not as apt as it should have been, but a  
15   regulation or taxation centering around commerce  
16   intended to affect and actually affecting commerce, it  
17   just -- this just isn't that kind of activity.

18                  JUSTICE KAGAN:  Well, General, can I-- just  
19   indulge me with a hypothetical.  Suppose that the background  
20   for these statutes was different.  The statutes were the  
21   same, but, in addition to talking about people's right  
22   to know about how their government works, the people  
23   spend a lot of time also talking about the economic  
24   benefits of a free flow of information in our country.

25                  Would that -- if that were true -- and I

1 want to put myself on record as not remembering when these  
2 statutes were passed -- you know.

3 (Laughter. )

4 JUSTICE KAGAN: But, if that were true,  
5 would this case be different? Or would you still be up  
6 here saying the same thing?

7 MR. GETCHELL: If -- if I had -- if I had a  
8 statute which, on its face, dealt with -- with  
9 commerce --

10 JUSTICE KAGAN: The statute does exactly the  
11 same thing. I'm just suggesting that there might be two  
12 interests behind the statute. One is about knowing the  
13 way your government operates, and the other is about  
14 free flows of information in our economy.

15 And, if both of those things had gone into  
16 the mix to create statutes of this kind, would you  
17 be up here saying the same thing or not?

18 MR. GETCHELL: I would be saying something  
19 at least slightly different, if I had different facts  
20 that I had to deal with, but I think, in principle, I  
21 would be arguing the power of the State to pass this  
22 kind of act without having to submit to the dormant  
23 Commerce Clause, at least first-tier dormant Commerce  
24 Clause analysis.

25 JUSTICE GINSBURG: What else -- what else

1 can Virginia do besides -- I don't know if there are elks in  
2 Virginia, but besides -- to reserve for its  
3 own -- for its own people? You say, this is -- good  
4 government in Virginia is for Virginians. Big game  
5 hunting, scarce resource can be reserved for in-State  
6 people.

7 What else can Virginia do?

8 MR. GETCHELL: Well, Virginia can -- can do  
9 things including have in-State tuition. It can have --  
10 it can subsidize its own businesses, either by training  
11 programs or even by other direct subsidy from public  
12 FISK. It limits welfare payments to residents of the  
13 Commonwealth.

14 When the Commonwealth is just acting as a  
15 government and not as a regulator or taxer of interstate  
16 commerce, it has the status of a coequal sovereign that,  
17 in its own sphere, is allowed to do its own policy  
18 choices.

19 JUSTICE KAGAN: I think the thing, General,  
20 that I was trying to get at, it seems to me you have a  
21 very good case that these statutes were -- were meant  
22 for a different purpose. But, in fact, it seems as  
23 though your friends there have a good case that these  
24 statutes have been taken over, to a large extent, across  
25 the country by economic enterprises doing economic

1 things. And, at that point in time, Virginia's --  
2 and -- you know, you are only one of two States --  
3 Virginia's maintenance of this kind of -- no, it's  
4 Virginians -- you know, Virginia information for  
5 Virginians, looks very different from what it might have  
6 looked like when the statute was originally passed.

7 MR. GETCHELL: If -- if we were going to  
8 say, if you were going to say that -- that this is an  
9 inquiry that needs to be made under the Commerce Clause,  
10 this would be a particularly poor vehicle for doing it  
11 because the Fourth Circuit held that the Pike analysis  
12 of the district court was not appealed, and, therefore,  
13 this case could not be sent back on remand to develop a  
14 burden analysis of a record --

15 JUSTICE KENNEDY: But Pike is not relevant  
16 here. Pike involves -- the Southern Pacific v. Arizona  
17 the -- where there were -- where there were melons --  
18 where there were melons, and Arizona wanted to make sure  
19 that you had labels and packing of the melons in  
20 Arizona. That was -- that was discriminatory against --  
21 against interstate -- against interstate commerce.

22 That's not -- that's not dormant Commerce  
23 Clause, but that is discrimination, and there is  
24 discrimination here.

25

1                   MR. GETCHELL: Well, there's -- there's  
2 discrimination, only in the sense that we discriminate  
3 against people who we don't let vote because they don't  
4 live in the Commonwealth as well. I mean, we -- this  
5 statute has a function. It's a legitimate function  
6 and --

7                   JUSTICE KENNEDY: You -- you could say the  
8 same thing, we don't discriminate against Californians  
9 who want to come and pack their melons in Arizona.

10                  MR. GETCHELL: Well, I would say that --  
11 that whether or not somebody can deal with an item in  
12 commerce is -- is -- raises Commerce Clause questions.  
13 And just, like in *Reno v. Condon*, where the State of  
14 South Carolina was choosing to take its records and sell  
15 them into the stream of commerce, there, the Court held  
16 that -- that they thereby became a thing in commerce.

17                  The records of the tax assessor of the  
18 County of Henrico, which are available through the  
19 clerk's office to Mr. Hurlbert, are not things or  
20 persons in commerce, nor are they --

21                  JUSTICE KENNEDY: It -- it would surprise me  
22 if an out-of-State investor, who was thinking of putting  
23 a large plant in Virginia, had absolutely no interest in  
24 Virginia's tax policies.

25                  MR. GETCHELL: But they are available. They



1 are publicly available. They are not just not available  
2 through this adjunct service. All -- all FOIA is, is a  
3 device where you don't have to go and look. There has  
4 always been public access for these -- these records.

5 JUSTICE BREYER: So -- so suppose -- I mean,  
6 I think they have an argument, saying, of course, this  
7 information would be useful for gathering national  
8 statistics and helping the national economy. I think  
9 that's true.

10 On the other hand, you say, well, but, look,  
11 there must be something left that the States can reserve  
12 to their own citizens, there must be something. They  
13 can't protect their own commerce; that's clear. They  
14 can't discriminate against people who want to come here  
15 and live here. That's clear.

16 They can't do this and that and the other  
17 thing, but, gee, there must be something. I mean, can't  
18 they reserve at least their -- their beaches for their  
19 own citizens? No. Parking near their beaches? Well,  
20 maybe. And -- and maybe deer. And, if not this, what?  
21 That's the end. Okay?

22 So that's, basically, what you are saying.  
23 This is just an interest in trying to find out how State  
24 institutions work, and the voters have the main interest  
25 there, and this is other -- so you say the other one is

1       attenuated, but not non-existent. He says the other is  
2 important, though he recognizes States should be able to  
3 do something.

4                       So if you were me, how would you decide?  
5 How would you choose?

6                       (Laughter.)

7                       JUSTICE BREYER: What is the standard,  
8 because you know the -- the Privileges and Immunities  
9 Clause is -- is considerably opaque, and there are very  
10 few cases on it. And so what -- how would you tell me  
11 to -- to resolve that -- that tension because there is a  
12 tension.

13                      MR. GETCHELL: I -- I think there that --  
14 that the important policy issue in this case for us is  
15 precisely as you articulated. There -- there is  
16 residual sovereign power in the State to act, and we  
17 have to violate the Constitution, clearly, before we  
18 lose that authority.

19                      And, under existing privileges and  
20 immunities doctrine, the privileges and immunities  
21 are -- are few; they are -- they have been enumerated in  
22 the courts, they are similar in character, having to do  
23 with commerce, not governmental action. So I would say  
24 you would not extend privileges and immunities.

25                      JUSTICE SCALIA: We are talking about

1 State-owned documents, aren't we? MR. GETCHELL:

2 Yes, Your Honor.

3 JUSTICE SCALIA: There is not much that's as  
4 close to the sovereignty of the State as the possession  
5 and right to exclude people from its own records and its  
6 own documents, right?

7 MR. GETCHELL: I agree, Your --  
8 Justice Scalia.

9 JUSTICE SCALIA: So the -- the issue is can  
10 the State allow its own citizens, for purposes of seeing  
11 that the government is -- is being run on the up-and-up,  
12 have access to those documents, without letting the  
13 whole world?

14 MR. GETCHELL: Yes, Your Honor, that is our  
15 position.

16 JUSTICE SOTOMAYOR: So why doesn't the  
17 dormant Commerce Clause affect the hypothetical I laid  
18 out? Because, directly, this permits Virginia  
19 commercial businesses to get something that  
20 out-of-Staters can't. The State is putting this  
21 instrument into commerce. You say, I don't know that.  
22 But make the assumption that we think the record's clear  
23 enough on that point.

24 I know you want to fight me on that, but  
25 it's hard -- it's a fight with no legs because you have

1 to know that commercial enterprises in Virginia seek these  
2 records.

3 MR. GETCHELL: I am -- I am arguing that, of  
4 course, I think we say in our brief that -- that they  
5 can be put into commerce. They are put into commerce,  
6 but we don't put them into commerce. And we have -- in  
7 the architecture of our bill -- our act has nothing to  
8 do with commerce.

9 And if a State can't deal with --

10 JUSTICE SOTOMAYOR: Tell us, under our  
11 jurisprudence -- the dormant Common Commerce  
12 jurisprudence -- and I have some colleagues who don't -- who  
13 don't believe it should exist. Take that argument out.  
14 Why is this not a dormant Commerce Clause case?

15 MR. GETCHELL: Because it is not an exercise  
16 of the State police power to regulate commerce. The  
17 documents in the -- in the tax assessor's office of the  
18 County of Henrico are not things or persons in commerce,  
19 nor are they channels or instrumentalities of commerce.  
20 They are just the records of the sovereign, which we  
21 will allow our citizens to obtain.

22 Unless the Court has further questions, I  
23 think this argument has been developed from our  
24 standpoint.

25 CHIEF JUSTICE ROBERTS: Thank you, General.

1 Mr. Gupta, you have three minutes remaining.

2 REBUTTAL ARGUMENT OF DEEPAK GUPTA

3 ON BEHALF OF THE PETITIONERS

4 MR. GUPTA: Thank you. Just a few quick  
5 points: First, I just want to clear up, on the statute,  
6 I want to make it clear that this statute does allow the  
7 State to fully recoup its costs, including  
8 administrative costs, and the State hasn't said  
9 otherwise.

10 And, secondly, the suggestion has been  
11 made --

12 JUSTICE SCALIA: Excuse me. The -- I -- I  
13 think what he's saying is you don't have to pay the  
14 costs of developing and maintaining those records, which  
15 costs are paid by the citizens of Virginia, which gives  
16 them an additional interest in being able to get to  
17 those documents.

18 You -- you don't claim that -- that you pay  
19 for the development and the maintenance of those  
20 records. You just pay for the incremental costs of  
21 giving it to you, right?

22 MR. GUPTA: That -- that's right,  
23 Justice Scalia --

24 JUSTICE SCALIA: And Virginians pay for all  
25 the rest?

1 MR. GUPTA: That -- that's right, Justice Scalia,  
2 and that's true of other things, like roads and  
3 courthouses. And I think this gets to -- Justice Breyer  
4 asked for our test, to try to differentiate this from  
5 other services, and I'd like to try to provide one.

6 I think, at least where you've got a  
7 function that is reserved to the State -- only the State  
8 can do it, only the State can run the archives -- it's  
9 necessary as a channel to -- to commerce. And in the --  
10 in the modern economy, this is as much part of the  
11 information infrastructure as transportation is, like  
12 courthouses, like archives, like roads.

13 It would not stretch limited resources. It  
14 would not cost the State additional money, and it would  
15 not jeopardize important local traditions or  
16 institutions --

17 JUSTICE GINSBURG: Are you leaving out --

18 MR. GUPTA: -- that I think you can feel  
19 comfortable --

20 JUSTICE GINSBURG: Are you leaving it --  
21 you -- you switched now to-- and you were led there, but  
22 you switched to the dormant Commerce Clause. What about  
23 your other client, McBurney? He doesn't have any  
24 dormant Commerce Clause claim.

25 MR. GUPTA: Right. And I -- I think the

1 test that I just laid out would work for both clauses. It's a  
2 limiting principle on the justification side.

3 But -- but that's right, Mr. McBurney does not have a  
4 dormant Commerce Clause claim. His claim is based on  
5 equal access to proceedings.

6 He wanted to get recovery of child support  
7 that he was owed. So he is a creditor seeking to pursue  
8 a debt on equal terms with people in the State of  
9 Virginia, and the State set up a process. As one step  
10 along the way to court, you go to the agency, you ask  
11 the agency to enforce. The -- the agency has unique  
12 enforcement tools.

13 It can suspend someone's driver's license,  
14 for example. It can -- it can intercept income tax  
15 refunds, and it can go to court on your behalf. And all  
16 he's asking for is the rules of the game. He wants to  
17 know what procedures apply to that process. And at  
18 least where a -- an agency has a process that directly  
19 affects a non-stater in the pocketbook, all we are  
20 saying is that equal access to the proceedings means  
21 equal access to the information governing those  
22 proceedings.

23 And, finally, I would just like to close by  
24 saying that -- you know, what I don't think we heard on  
25 the justification side from the State was really any

1 justification because the State can recoup its costs. And so  
2 they are not saying that this will cost them  
3 anything more, which was the only justification they  
4 pressed in -- in the courts below.

5 And so they are left with the position that  
6 they can discriminate simply because they think they  
7 can. And, if you look at the Privileges and Immunities  
8 Clause, it sits right next to the Full Faith and Credit  
9 Clause, which indicates, if anything, that the framers  
10 thought that the movement of public records across State  
11 lines was important to interstate comity.

12 They changed the Articles of Confederation  
13 version, which did not include public records; it only  
14 referred to judicial records. They added a mention of  
15 judicial records -- nonjudicial records and saw that  
16 that was important to -- to comity across State lines.

17 But -- but their position is about the step  
18 before that. It's about whether you get the records in  
19 the first place.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 The case is submitted.

23 (Whereupon, at 11:16 a.m., the case in the  
24 above-entitled matter was submitted.)  
25



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