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No. 12-17

In The Supreme Court of the United States

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

NATHANIEL YOUNG, JR., Deputy Commissioner and Director, Division of Child Support Enforcement, Commonwealth of Virginia, and THOMAS C. LITTLE, Real Estate Assessment Division, Henrico County, Commonwealth of Virginia,
Respondents.

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

BRIEF OF *AMICI CURIAE* LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC., VIRGINIA ASSOCIATION OF COUNTIES, VIRGINIA MUNICIPAL LEAGUE, AND VIRGINIA SCHOOL BOARD ASSOCIATION SUPPORTING RESPONDENTS

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January 31, 2013

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QUESTION PRESENTED

May the sovereign Commonwealth of Virginia permissibly restrict non-citizens' ability to demand that government officials identify and produce public records?

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Amici are the Local Government Attorneys of Virginia, Inc., the Virginia Association of Counties, the Virginia Municipal League, and the Virginia School Boards Association.[1]

The **Local Government Attorneys of Virginia, Inc.** ("LGA") is a non-profit non-stock corporation formed and existing under the laws of the Commonwealth of Virginia. Its active members include the cities, counties, towns, and school districts of the Commonwealth of Virginia. For more than 35 years, LGA has worked to improve the expertise and professionalism of the attorneys who represent local governments. The Virginia General Assembly and

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[1] Pursuant to Rule 37.3 of the Rules of this Court, letters of consent to the filing of this brief have been submitted to the Court. Pursuant to Rule 37.6 of the Rules of this Court, counsel for *amici* state that no counsel for either party to this matter authored the brief in whole or in part. Further, no persons or entities, other than *amici* and their counsel, contributed monetarily to the preparation or submission of this brief. Henrico County, as an active member of LGA, and the Commonwealth of Virginia, as an associate member of LGA, pay regular dues to LGA, which are used for its general operating expenses, but they have not earmarked or otherwise designated any of their dues to fund preparation or submission of this brief. Henrico County is also a dues-paying member of both VACo and VML, which dues are used for the general operating expenses of those *amici*, but none of those dues are earmarked or otherwise designated to fund preparation or submission of this brief.

agencies of the Commonwealth regularly ask LGA to offer legal advice on matters of state policy and to recommend knowledgeable attorneys to serve on legislative study committees and commissions. LGA promotes the continuing legal education of local government attorneys, provides information to those local government attorneys to enable them better to perform their duties, provides a forum for the exchange of ideas and experience, and on occasion initiates, supports, or opposes legislation of significance to local governments.

The **Virginia Association of Counties** (VACo) is a non-profit non-partisan statewide association organized in 1934 for the purpose of representing, promoting, and protecting the interests of its member counties. Pursuant to Va. Code Ann. § 15.2-1303, VACo is an instrumentality of the 94 Virginia counties that comprise its membership.

The **Virginia Municipal League** (VML) is an association of political subdivisions of the Commonwealth of Virginia, formed and maintained pursuant to Va. Code Ann. § 15.2-1303 for the purpose of promoting the interest and welfare of its members as may be necessary or beneficial. VML consists of 39 cities, 156 towns, and 10 counties. VML is an instrumentality of its member political subdivisions.

The **Virginia School Boards Association** (VSBA) is a voluntary non-partisan organization whose

primary mission is the advancement of K-12 education in Virginia. VSBA promotes the quality of education by providing services to every local school board in Virginia. The association and its members have a strong interest in the effective implementation of school board policies, including policies that implement the constitutional authority of local school boards to efficiently and effectively govern their school divisions.

Amici's active members receive and respond to requests under the Virginia Freedom of Information Act (VFOIA), Va. Code Ann. §§ 2.2-3700 to 2.2-3714, on a daily basis. Those requests concern every facet of local government. By virtue of their daily processing of VFOIA requests, they are more familiar with VFOIA than any other entity or group.

These members administer and comply with VFOIA, while at the same time carrying out their other important assigned governmental functions. LGA, VACo, VML, and VSBA have a strong interest in upholding all provisions of VFOIA, and thus file this brief in support of the Respondents, urging affirmance of the Court of Appeals for the Fourth Circuit's unanimous ruling that the challenged portions of VFOIA are constitutional.

SUMMARY OF ARGUMENT

Amici urge this Court to affirm the unanimous decision of the Court of Appeals, holding that VFOIA's reasonable restrictions on access to the public records of the Commonwealth and its local governments do not violate the United States Constitution.

VFOIA is aimed at providing information and educating Virginia's citizens. Its purpose is to "ensure[] *the people of the Commonwealth* [have] ready access to public records." Va. Code. Ann. § 2.2-3700(B) (emphasis added). It implicates no fundamental right under the Privileges and Immunities Clause. U.S. Const. art. IV, § 2.

VFOIA is in no way targeted at any sort of business or commercial venture; it regulates no profession or common calling. Instead, it reflects the Virginia General Assembly's careful statutory balancing of its citizens' interest in open government with the substantial and compelling interest of the Commonwealth in providing efficient and effective governmental services.

Because VFOIA is not an economic regulation, it does not implicate the dormant Commerce Clause of the United States Constitution. Thus, the mere fact that Petitioner Hurlbert has chosen to try to make a living requesting and then selling certain data

acquired from freedom of information law requests does not mean that VFOIA is constitutionally infirm.

ARGUMENT

I. No fundamental right recognized under the Privileges & Immunities Clause of the United States Constitution requires government employees to search for, and produce, all records of a government upon request by any person.

Petitioners assert a fundamental right under the Privileges & Immunities Clause to require state and local government employees to search for, and produce, certain records maintained by those governments. Petitioners, one of whom is a paid plaintiff, Cir. Ct. App. 71A, 72A, and 100A, assert that this right belongs to every person. The asserted right comes in the context of requests from two out-of-state citizens to Virginia governments to compile, and mail to the requesters, local tax assessment records and documents dealing with a state agency's policies regarding child support allegedly due a requester. Cir. Ct. App. 11A at ¶¶ 11–12, 12A at ¶¶ 15–16, 36A at ¶¶ 11 and 15, and 47A at ¶ 5.

A. Fundamental rights protected by the Clause are limited to those rights of longstanding duration and of crucial importance to the existence of the Union.

The Privileges and Immunities Clause of the Constitution protects a very limited set of fundamental rights. Fundamental rights are those that are "sufficiently basic to the livelihood of the Nation," *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 388 (1978), and are "important to the 'maintenance or well-being of the Union,'" *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 281 (1985) (quoting *Baldwin*, 436 U.S. at 388)).

For 190 years, it has been well established that "sufficiently basic" rights are confined to those belonging "to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230).[2]

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[2] To the extent that *Corfield* is read to inquire about rights in "free governments" outside the United States, the spread of freedom of information laws internationally is even more recent than their emergence in the United States, discussed *infra*. Nearly half of the world's existing comprehensive freedom of information acts have been adopted within the past fifteen or so years. David Banisar, Privacy Int'l, Freedom of Information Around the World 2006: A Global Survey of Access of Government Information

With respect to such fundamental rights, this Court has said that the Clause forbids only citizenship distinctions that "hinder the formation, the purpose, or the development of a single Union of those States." *Baldwin*, 436 U.S. at 383.

The Clause does not require that every privilege, immunity, or right that a state affords its citizens must be provided to citizens of all other states. "Special privileges enjoyed by citizens in their own States are not secured in other States by this provision." *Paul v. Virginia*, 75 U.S. (8 Wall) 168, 180 (1868). States are lawfully permitted to provide their citizens or bona-fide residents with "special privileges" in a whole host of areas, including the ability to plant oysters in the tidewaters of a state, *McCready v. Virginia*, 94 U.S. 391, 397 (1876); the ability to hunt elk for a reduced fee, *Baldwin*, 436 U.S. at 388; the ability to take part in a state-administered program providing financial assistance toward the pursuit of a professional education, *Kuhn v. Vergiels*, 558 F. Supp. 24, 28 (D. Nev. 1982); and discounted tuition at in-state public schools, *Johns v. Redeker*, 406 F.2d 878, 883 (8th Cir. 1969), *cert. denied sub nom. Twist v. Redeker*, 396 U.S. 853 (1969) (rejecting Privileges & Immunities challenge

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Laws at 6 (2006), http://www.freedominfo.org/ documents/ global_survey2006.pdf. Thus, in light of this "growing recognition" of freedom of information policies, *id.* at 8–9, it cannot fairly be said that a basic right of access to all public records has existed for all persons in democratic societies.

to higher tuition for nonresidents). *See also Vlandis v. Kline*, 412 U.S. 441, 442, 452–53 (1973) (although not ruling on constitutionality of higher non-resident tuition and fee rates, recognizing state's right to allow "its own bona fide residents to attend [public colleges and universities in the state] on a preferential tuition basis").

B. No blanket right of access by all persons to public records has been long-recognized, regardless of the persons' interest in the records; instead, the several states and federal government have crafted differing access laws.

There is no longstanding right of all persons to access public records. Petitioners point to no broad common-law right that forces governmental bodies to stop their ordinary functions and respond to a host of requests for records.

The histories of Virginia and the United States show that, while relatively broad freedom of information laws have been determined by modern legislatures to be important, they do not meet the tests enunciated in *Corfield* and *Baldwin*. Regardless of the desirability or wisdom of freedom of information laws in today's society, the broad-ranging right asserted by Petitioners is not a right of long existence.

Virginia's right of access to public records is a statutory right created through the legislative

process. Although Virginia is one of the original colonies and has a long and storied history, VFOIA was not enacted until 1968, 1968 Va. Acts ch. 479, two years after the federal government first enacted its own freedom of information law, Pub. L. No. 89-554, 80 Stat. 378 (1966), and nearly 200 years after adoption of the United States Constitution.[3]

Before the federal freedom of information law was passed, "[p]revailing law . . . offer[ed] citizens no clear avenue of access" to information from many federal agencies. Wendy R. Ginsberg, Cong. Research Serv., Access to Government Information In the United States at 1 (2009), http://fas.org/

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[3] Moreover, the Tenth Amendment of the United States Constitution reserves to Virginia and its citizens the power to define the breadth and contours of its freedom of information law. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). "The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). VFOIA is a "respon[se], through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times . . . ." *Id.* "In providing for a stronger central government, . . . the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *New York v. United States*, 505 U.S. 144, 166 (1992). "[T]he Court has consistently respected this choice," *id.*, and the Court should afford the same respect to the Virginia General Assembly's public records and open government policy as expressed through VFOIA.

sgp/crs/secrecy/97-71.pdf. The federal freedom of information act was "the first law requiring public access to executive branch information" and was enacted in response to limitations on access. *Id.* at 2.

Various state legislatures have conducted balancing acts to craft their respective freedom of information laws. That balancing establishes certain burdens and requirements on governmental bodies in an effort to help ensure an informed citizenry, while imposing reasonable limitations on the requests for public records.

The rights granted by VFOIA and similar laws in other states and at the federal level are products of the legislative process. The various states differently define which "public records" are subject to production under such freedom of information acts. Andrea G. Nadel, Annotation, *What are "Records" of Agency Which Must be Made Available Under State Freedom of Information Act*, 27 A.L.R.4th 680 §2[a] (1984) (noting that "definitions of 'public records' as contained in state freedom of information acts vary widely"); Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 Geo. Wash. L. Rev. 720, 722, 733–36 (1981) (recognizing that "each state FOI law differs in varying degree from both the federal law and other state FOI statutes"). For example, the real estate assessment data sought by Hurlbert, Cir. Ct. App. 12A at ¶¶ 15–16 and J.A. 47A at ¶ 5, might or might not be a "public record," depending on the specific contours of his request and a particular

state's definition of "public records." *Compare DeLia v. Kiernan*, 293 A.2d 197, 198 (N.J. Super. Ct. App. Div. 1972) (holding that property record cards possessed by tax assessor were not public records, although citizen with pending tax appeal had "sufficient interest" to examine them), *with Attorney General v. Board of Assessors of Woburn*, 378 N.E.2d 45, 46–47 (Mass. 1978) (concluding that field assessment cards were public records required to be disclosed under state's public records law). Those differences support the argument that there is no longstanding "fundamental right" of access to "public records," however defined.

Many states did not enact freedom of information laws until the 1970s, after passage of VFOIA. *Freedom of Information in the United States*, SunshineReview.org, http://sunshinereview.org/index.php/Freedom_of_Information_in_the_United_States (last visited Jan. 21, 2013) ("A number of states passed their open records legislation in the 1970s in the wake of Watergate."). Even the modern freedom of information laws like VFOIA contain a wealth of ever-growing exceptions. *See Swift v. Campbell*, 159 S.W.3d 565, 571–72 (Tenn. Ct. App. 2004) (noting increasing number of specific exemptions and exceptions added to Tennessee Public Records Act); W. Wat Hopkins, Mass Communication Law in Virginia 92 (2nd ed. 1999) (recognizing that FOIA "is becoming increasingly complex as lawmakers attach provisos, limitations and exceptions"). As recently as about 30 years ago,

at least a third of the states had citizens-only restrictions in their freedom of information statutes. *See* Braverman & Heppler, *supra*, at 727.

Prior to the enactment of state laws, common-law rights "sometimes allowed inspection by the public of all public records, sometimes bestowed such privileges only on a limited class of persons, and other times opened only specific types of documents to public view," but generally required demonstrable interest and applied only to records "required to be kept" by state law. *Id.* at 723. Such restrictions "place[d] many documents beyond the common-law reach." *Id.* at 724.

The differences between states' understanding of access rights, both at common law and statutorily today, underscore that the right of access to records is not a fundamental one. Even jurisdictions that recognized a common-law right to access limited such a right to those persons with a demonstrable interest in the matter, not the broad right of unfettered access asserted by appellants. *See C. v. C.*, 320 A.2d 717, 723–24 (Del. 1974) (finding no absolute right of public to inspect public records); *Excise Comm'n of Citronelle v. State* ex rel. *Skinner*, 60 So. 812, 813 (Ala. 1912) ("[T]he public generally have no absolute right of access or inspection. And one who demands that right can be properly required to show that he has an interest in the document which is sought, and that the inspection is

for a legitimate purpose."). *See also* Nadel, *supra*, §2[b] ("[A]t common law, a person requesting inspection of a public record was required to show an interest therein which would enable him to maintain or defend an action for which the document or record sought could furnish evidence or necessary information . . . .").

These requirements of particularized interests at common law are consistent with the citations provided by Petitioners. *See Clay v. Ballard*, 13 S.E. 262, 262–63 (Va. 1891) (concluding that a "legally qualified voter . . . having an interest in" voter registration books may inspect and copy them); *Preston v. Bowen*, 20 Va. (6 Munf.) 271, 272 (1819) (finding plaintiff who requested surveys recorded in county surveyor's office "for the purpose of enabling him to enter and locate the lands circumscribed and included by the said surveys" entitled to receive same).

This historical backdrop shows that the right asserted by Petitioners is not a longstanding one, not being one which has "at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." *Corfield*, 6 F. Cas. at 551. Rather, the increase in open government laws underscores that the right of access is a relatively recent one, perhaps spurred by the policy goals identified by Petitioners and their *amici*. However,

modern public policy does not create a fundamental right.

VFOIA's restriction on the scope of requesters—Virginia citizens and members of the media—is a reasonable limitation adopted by the Virginia General Assembly. Other states have chosen other limitations, including Arizona and Rhode Island's attempts to limit the use of public records for commercial purposes such as those advanced by Petitioner Hurlbert. *See* Ariz. Rev. Stat. Ann. § 39-121.03 (2012); R.I. Gen. Laws § 38-2-4(e) (2012). These and other restrictions underscore that modification of freedom of information laws is best handled by legislative initiative rather than by judicial declaration of a heretofore unknown "fundamental right."

C. A wholesale right of access is not crucial to the existence and continuation of the country as a whole.

The ability of a resident of California to obtain copies of real estate assessment data of Henrico County, Virginia does not "'bear[] on the vitality of the Nation as a single entity.'" *Piper*, 470 U.S. at 279 (*quoting Baldwin*, 436 U.S. at 383). The ability of a Rhode Islander to obtain copies of child support agency policy documents does not threaten the continuance of the country. The inability of Virginia citizens to acquire similar documents from other

states also would not call into question whether the country can survive as a cohesive entity.

Not every state law that has some effect on another state can be fairly considered to affect the vitality of the Union. The test is much higher than that, and does not depend on whether a business interest is present. *Baldwin* in fact involved a hunting guide who offered his services to customers who were the out-of-state plaintiffs in the case. 436 U.S. at 372. Yet, the guide's commercial interest was not considered by the Court to convert a personal interest in the activity of hunting elk into one that implicated the very ability of the United States to function as one entity. Only state laws imposing burdens so great that enforcement of those laws would shatter the unity of our country meet that test.

In-state tuition benefits, a common feature throughout the country, have not caused the Union to fail. These benefits reflect a policy similar to that of VFOIA—that state citizens, who provide tax dollars to support state institutions, ought to have preferential benefit from those institutions. Likewise, residency-based restrictions on public employment have not caused the Nation to cease functioning as a single unit. *See Salem Blue Collar Workers Ass'n v. City of Salem*, 33 F.3d 265, 269–70 (3d Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995) (rejecting claim that city ordinance requiring

municipal employees to reside in city was fundamental right implicating Privileges and Immunities Clause). As noted earlier, until about 30 years ago, a significant number of states imposed citizenship limitations on access to public records, *see* Braverman & Heppler, *supra*, at 727, and the Union withstood those many years.

In light of such permissible preferences and limitations, it cannot be said fairly that a broad right to access public documents was a right contemplated by the Founding Fathers that is required to maintain the unity of the United States.

II. VFOIA does not implicate the dormant Commerce Clause because it is not a regulation of commerce.

The dormant Commerce Clause is concerned with "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988)). The purpose of the Clause is "to 'prevent a State from retreating into . . . economic isolation.'" *Davis*, 553 U.S. at 338 (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996)).

As the Court has recognized, states and local governments have the responsibility to protect their citizens' health, safety, and welfare. *Davis*, 553 U.S.

at 340. In fact, this is one of the primary objectives and most important functions of state and local government, and "laws favoring . . . States and their subdivisions may 'be directed toward any number of legitimate goals unrelated to protectionism.'" *Id.* (quoting *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007)). This principle applies when a statute or ordinance addresses a subject that is "both typically and traditionally a [state or] local government function." *Id.* (quoting *United Haulers*, 550 U.S. at 344). By its very nature, providing access to state or local records is, to the extent such access is afforded, traditionally and exclusively a function of the state or local government that is the custodian of those records. VFOIA is concerned only with this traditional government function, and seeks to inform citizens, in part to help those citizens protect their welfare.

"[A] government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors." *Davis*, 553 U.S. at 341 (citing *United Haulers*, 550 U.S. at 343). Like waste disposal, *United Haulers*, 550 U.S. at 344, and issuance of municipal bonds, *Davis*, 553 U.S. at 341–42, public records access is a "quintessentially public function." *See Davis*, 553 U.S. at 341–42.

The Virginia General Assembly, in enacting VFOIA, was motivated by the legitimate objective to "ensure[] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees," because "[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government." Va. Code. Ann. § 2.2-3700(B). This goal, which recognizes that Virginia citizens are the beneficiaries and watchdogs of Virginia state and local governmental activities, bears no relation to economic protectionism.

VFOIA does not come within the scope of the dormant Commerce Clause. Its reasonable limitations on public records access effect no forbidden discrimination, because VFOIA addresses a traditional government function and has the legitimate, non-economic objective of promoting open government.

III. The Virginia General Assembly has made the permissible policy decision that VFOIA should benefit the citizens who bear the burden of its unrecoverable costs.

By its express language, VFOIA is intended to benefit "the people of the Commonwealth." Va. Code. Ann. § 2.2-3700(B). As such, "citizens of the Commonwealth" are guaranteed access to non-

exempt public records. *Id.* § 2.2-3704(A).[4] However, the Virginia General Assembly has vested discretion in the public bodies that administer VFOIA to deny certain requests, including requests from non-citizens of Virginia. *Id.* § 2.2-3704(B)(1); *see id.* § 2.2-3700(B) ("Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, . . . all public records shall be available for inspection and copying upon request.").

Public bodies may not recoup all of the costs of responding to VFOIA requests. Section 2.2-3704(F) allows public bodies to "make reasonable charges not to exceed [their] *actual cost* incurred in accessing, duplicating, supplying, or searching for the requested records." *Id.* (emphasis added). However, public bodies are not permitted to "recoup the general costs associated with creating or maintaining records or transacting the general business of the public body," *id.*, even when these costs are "actual costs" of responding to VFOIA requests. Thus, many of the costs that public bodies necessarily incur in complying with VFOIA are not recoverable from requesters.

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[4] The Virginia General Assembly has also guaranteed access to a broad swath of media entities, being all "representatives of newspapers and magazines with circulation in the Commonwealth[] and representatives of radio and television stations broadcasting in or into the Commonwealth," *id.* § 2.2-3704(A), which access is not at issue in this case.

The Virginia Freedom of Information Advisory Council (the "Council"), *see id.* §§ 30-178(A) and 30-179(1) (empowering the Council to "[f]urnish, upon request, advisory opinions or guidelines, and other appropriate information regarding the Freedom of Information Act"), has interpreted § 2.2-3704(F) to permit public bodies to make reasonable charges for the actual cost of staff time expended in responding to a request. *See* 2001 Virginia Freedom of Information Advisory Opinion 21 (Mar. 27, 2001), http://foiacouncil.dls.virginia.gov/ops/01/AO_21.htm. The Council recognizes that "[c]learly there are other actual costs to a public body for creating and maintaining public records as well as 'overhead' costs such as rent, utilities, and equipment." 2002 Virginia Freedom of Information Advisory Opinion 05 (May 24, 2002), http://foiacouncil.dls.virginia.gov/ops/02/AO_05.htm.

Though a responding employee's salary may be recoverable, costs related to that employee's benefits are not, as the Council classifies benefits as "a general cost associated with transacting the general business of the public body." *Id.* (citing Va. Code Ann. § 2.2-3704(F)). Other unrecoverable costs include "the time of people supervising those that responded to the request" and time spent "explaining or discussing disputed charges." 2004 Virginia Freedom of Information Advisory Opinion 04 (Mar. 19, 2004), http://foiacouncil.dls.virginia.gov/ops/04/AO_04_04.htm. The net effect of all these provisions

is that the base salary for a lower-level employee's time searching for and responding to a request may be recoverable, but benefits, and the salaries of others who review and analyze requests, such as lawyers and supervisors, are not.

Though substantial public resources must be diverted to respond to each request, public bodies cannot directly recover all "actual costs" expended in responding to requests. The citizens of Virginia bear the general costs associated with transacting the general business of local government entities in Virginia. Through their tax dollars, Virginia citizens pay for the unrecoverable "actual costs" and overhead costs of VFOIA compliance. The Virginia General Assembly has made a legitimate legislative decision to limit the benefits of VFOIA to the very people whose tax dollars directly support the unrecoverable costs of VFOIA compliance—Virginia citizens.

This limitation operates on the same premise as domicile requirements for in-state tuition at Virginia's public colleges and universities, Va. Code Ann. § 23-7.4, and residency restrictions for voting in Virginia's elections, *id.* §§ 24.2-101 and 24.2-400, or obtaining a Virginia motor vehicle operator's license, *id.* § 46.2-323.1. In each of these cases, citizens of the Commonwealth are the beneficiaries of government functions but also must bear the burden of their costs. These are not examples of

discrimination in favor of Virginia citizens or against non-citizens; they are simply transactions of the general business of the Commonwealth and its political subdivisions, for which Virginia citizens pay the general costs. *See* Va. Code Ann. § 2.2-3704(F).

The Virginia General Assembly, which sets the public policy of the Commonwealth, has made a valid legislative decision to place certain limitations on VFOIA, including limiting the pool of requesters. The statute's current structure and limitations ensure that those who benefit from VFOIA also bear the burden of its unrecoverable costs of compliance. If VFOIA were expanded to allow requests by anyone, the citizens of Virginia would bear an increased burden while deriving no additional benefit from the law. The public bodies serving these citizens would spend more in taxpayer money and public employees' time in responding to VFOIA requests, and the citizens who fund and rely upon government services would suffer from public bodies' decreased efficiency and increased costs.

VFOIA embodies the public policy of the Commonwealth that government affairs should be conducted in the open to the greatest practicable extent. Where other interests weigh against this policy, the General Assembly has created discretionary exemptions that public bodies may invoke to deny a request. *See* Va. Code Ann. § 2.2-3700(B) (providing that records exemptions are

discretionary); *see, e.g.*, *id.* §§ 2.2-3705.1 to 2.2-3705.7 (describing exemptions that apply to certain categories of records). On a daily basis, public bodies, such as those that compose *amici*, weigh these competing interests, much as they do when making other decisions that affect citizens' health, safety, and welfare (*e.g.*, zoning, budgeting, provision of utilities, school lunch menus). While Petitioners and their *amici* may wish that the General Assembly had made different policy decisions, the fact remains that the method it chose is within its discretion. "That [Virginia] might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional." *Baldwin*, 436 U.S. at 390 (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976)).

IV. Data from Virginia's public bodies provides support for the Virginia General Assembly's policy decision to include reasonable limitations on public records access.

Amici include local government entities of various types and sizes across Virginia, all of which must comply with VFOIA. Many of them are small, and they all have limited budgets from which to hire employees. Many of the entities still maintain many of their records in paper format, which must be searched manually to determine whether they are responsive to a VFOIA request.

The governments all have only a certain amount of time in which to perform the necessary and proper functions of government. Each minute spent on a VFOIA request for an out-of-state citizen is a minute that cannot be spent on a VFOIA request from a Virginia citizen, or on providing other important governmental services to Virginia citizens who fund the state and local government. VFOIA compliance, which must be accomplished within short time limits, Va. Code Ann. § 2.2-3704(B), imposes burdens on them that are not insignificant, including unrecoverable costs.

A wide range of local government entities supplied the following information about the realities and challenges of compliance with VFOIA as it is currently written. This data provides helpful context about how the statute functions and shows how an increase in its scope would increase the burdens on both the public bodies who administer it and the Virginia citizens who fund it.

A. City of Virginia Beach

Virginia Beach is the largest city in Virginia, with a population of 437,994. Weldon Cooper Center for Public Service, 2010 Census Data (Jan. 30, 2012), http://www.coopercenter.org/sites/default/files/node/13/July_2011_PopulationEstimates_UVACooperCenter-rev.xls. The Virginia Beach City Attorney's Office operates a Freedom of Information Office, Mark D. Stiles, City Attorney's Office for City of Va. Beach,

2011 Annual Report at 4 (Jan. 31, 2012), http://www.vbgov.com/government/departments/city-attorney/Documents/2011annualreport.pdf, and maintains annual records of its VFOIA compliance.

From 2008 to 2011, an average of nearly 600 requests were processed through the Office each year, with almost 27,000 documents copied and provided each year. *Id.* at 8; Mark D. Stiles, City Attorney's Office for City of Va. Beach, 2010 Annual Report at 8 (Jan. 31, 2011), http://www.vbgov.com/government/departments/city-attorney/Documents/2010annualreport.pdf; Mark D. Stiles, City Attorney's Office for City of Va. Beach, 2009 Annual Report at 6 (Jan. 29, 2010), http://www.vbgov.com/government/departments/city-attorney/Documents/2009annualreport.pdf; Leslie L. Lilley, City Attorney's Office for City of Va. Beach, Fiscal Year 2008 Annual Report at 2 (2008), http://www.vbgov.com/government/departments/city-attorney/Documents/2008annualreport.pdf. The Office facilitated the inspection of thousands more documents each year.

B. School Board of City of Hampton[5]

The City of Hampton School Division has approximately 21,000 students. It employs one public relations officer who also serves as VFOIA officer, exercising primary responsibility for reviewing VFOIA requests. In some circumstances, the School Board Attorney also becomes involved in reviewing those requests. From July 2011 to October 2012, she participated in the review of 34 requests. Of these, three were identifiable as coming from an out-of-state requester. Seven of the requests came from the same household. Eleven more came from requesters who identified themselves as members of various media outlets.

Documents were provided in response to twenty of the 34 requests. Three requests were denied because they came from out-of-state requesters. Three requests were for information already available online. Estimates were provided for two requests, and the requesters did not respond. For five requests, no documents were available. One request was revised before documents were provided.

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[5] *See* Sheri A. Hiter, *Summary of Reported Local Government VFOIA Data*, 38 Bill of Particulars: The Reporter of the Local Government Attorneys of Virginia, Inc. 315 (Steven G. Friedman ed., Dec. 2012) (summarizing VFOIA data from School Board of City of Hampton, Virginia).

C. Town of Purcellville[6]

The Town of Purcellville, with a population of about 7,727, *see* Town of Purcellville, 2011 Comprehensive Plan Update at 1, www.purcellvilleva.gov/DocumentView.aspx?DID=2084, receives approximately 150 to 200 requests per year. Ninety percent of these come from the same small group of requesters.

The Town Attorney spends approximately half her time responding to VFOIA requests, displacing other legal tasks and Town business. While the Town is able to recover the costs of copying and some staff time spent preparing responses, it also incurs thousands of dollars a year in unrecoverable overhead costs. The sheer volume of requests and the time spent to research and respond make VFOIA compliance a substantial burden for the Town.

D. Accomack County[7]

Accomack County has a population of 33,164, *see* Cooper Center, *supra*. A typical VFOIA request presented to the County asks for all documents regarding:

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[6] *See id.* at 316 (summarizing VFOIA data from Town of Purcellville, Virginia).

[7] *See id.* at 316 (summarizing VFOIA data from Accomack County, Virginia).

> the indexes that reflect and/or the written proffers the governing body of Accomack County and/or the Accomack County Board of Supervisors has proffered since 1634 to date . . . that says what form of County government Accomack County operates under.

The requester responsible for this request made more than a dozen requests in 2012 alone. Several of these requests exceeded fifty pages in length, with a few spanning more than one hundred pages. The Office of the County Attorney expends considerable time dealing with these frequent, burdensome requests.

E. Chesterfield County[8]

Chesterfield County has about 316,236 residents, *see* Cooper Center, *supra*, making it the fourth largest municipality in Virginia. The Assistant County Attorney has handled VFOIA requests for the County for 25 years. He identifies requests to which VFOIA exemptions might apply; reviews requests that, due to their scope, may require lengthy search time or high cost of compliance; and reviews requests dealing with controversial issues in the County. On average, he spends about five to six hours per week on this task. This function takes up

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[8] *See id.* at 316–17 (summarizing VFOIA data from Chesterfield County, Virginia).

a significant and increasing portion of his time. As compared to five or six years ago, VFOIA requests make up three to five times as much of his workload.

Routine requests are often handled directly by individual departments. The Assistant County Attorney handles non-routine requests, and these more complicated matters amount to approximately eight to ten requests per week. He also handles all requests that come into the County's Police Department and its Emergency Communications Center, amounting to eight to twelve requests per week (or about 40 to 50 per month), and these are generally routine.

When the Assistant County Attorney determines that a request seeks non-exempt information, he directs the appropriate department to generate the relevant records. Department staff retrieve files from storage and consult with other employees who might have responsive documents. For the Police Department in particular, employees may spend two or three times as much time compiling responsive documents as the Assistant County Attorney spends initially reviewing requests.

The County at times receives requests from out-of-state requesters, which can be divided into four main categories. First are "due diligence" requests, which ask for documents such as code compliance information about in-state real property that an individual seeks to purchase. These documents are

typically provided, as the requester has a personal interest in the subject matter. Second are requests from out-of-state data mining companies asking for entire categories of data, such as all building permits for a certain time period. These requests are denied under the citizens-only provision. Third are "status requests" on items like outstanding bonds, escrow funds, or letters of credit held by the County. These are denied under the citizens-only provision. Finally, some requests are more specific, *e.g.*, a party to a child custody dispute asking about 911 calls to a particular residence, or an out-of-state police department seeking arrest records for an applicant for employment. Non-exempt documents are generally provided to these requesters, who demonstrate an individualized interest in the subject.

F. Warren County[9]

Warren County, with about 37,575 citizens, *see* Cooper Center, *supra*, provided available VFOIA data from 2007 through October 2012. Routine VFOIA requests are generally handled by County departments themselves and are not tracked by the Office of the County Attorney.

A small number of requesters submit frequent requests for broad categories of documents. In 2007,

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[9] *See id.* at 317–18 (summarizing VFOIA data from Warren County, Virginia).

the County Attorney dealt with five requests from the same citizen. One request asked for about 11,500 emails, but it was abandoned after the requester learned of the estimated charge. The County received three requests in 2009, including one broad request encompassing 6,908 pages of responsive documents. 2010 brought six requests, 2011 saw eight requests, and in the first ten months of 2012, ten requests were received.

From 2007 to 2010, one requester made seven requests, accruing $46.55 in unpaid charges, and another made two requests, accumulating an unpaid bill of $377.43. Further requests from these individuals were denied for nonpayment. However, this requires the County Attorney to track all outstanding charges, disseminate this information to County departments, and cross-reference this list against new requests received. These VFOIA payment records have themselves been the subject of VFOIA requests.

The County was involved in a lengthy lawsuit dealing with Department of Social Services VFOIA requests from 2007 to 2011. These requests required production of four boxes of documents. Department staff were pulled away from other duties to identify which documents were responsive and then to compile and redact these documents. Information technology (IT) staff from three different public bodies were needed to retrieve electronically stored

documents. Thousands of pages of documents had to be copied, and a location had to be arranged for inspection of other records. The County Attorney spent hours in court and preparing for court. Unrecoverable expenses for this litigation were in the thousands of dollars, including copy costs, staff time, court time, meetings, searches by IT personnel, a forensic search performed by the Sheriff's Office, and attorney fees for the services of outside counsel.

Warren County has no dedicated VFOIA officer. Employees from the various departments must take time away from other job duties to retrieve and compile documents. The County Attorney's other job functions are displaced while he reviews requests, collects responses from other departments, and coordinates with IT personnel for the retrieval of electronic documents. He is also responsible for training the departments on proper response procedures, including how to estimate costs before sending out large responses.

Requests frequently span several departments, requiring the County Attorney and other employees to expend additional time corresponding, coordinating, collecting, and compiling data under time pressure. Because multiple departments are involved, it is difficult to track requests, responses, and payment of charges, and the Office of the County Attorney does not have the manpower to handle all requests itself. Moreover, most

departmental jobs require public availability and involve constant interruption (*e.g.*, answering phones, staffing front desks), which complicates employees' ability to track time spent on responses.

The foregoing local government data illustrates the already-significant workload that VFOIA imposes on public bodies. It also shows the challenges inherent in VFOIA compliance that result in substantial unrecoverable costs borne by Virginia citizens. While the system is not perfect, the Virginia General Assembly has made a policy determination that, on balance, the benefits to Virginia citizens justify the burdens and occasional misuse of the statute.

Expansion of VFOIA would increase the workload of Virginia's public bodies at the expense of other governmental functions and resources, as well as efficiency. The Virginia General Assembly's valid legislative balancing of the benefits and burdens of Virginia's open records law passes constitutional muster, and its reasonable and well-reasoned limitations should be allowed to stand.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to conclude that there is no broad "fundamental right" of access to information in the form of mandatory searches and disclosure of all public records of the Commonwealth and its many

local governments, no matter the identity of the requester, and that Virginia's freedom of information law addresses a traditional government function with legitimate public objectives bearing no relation to the economic protectionism with which the dormant Commerce Clause is concerned. For these reasons, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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January 31, 2013