

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARK J. MCBURNEY, ET AL. :

4 Petitioners :

5 v. :

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

7 COMMISSIONER AND DIRECTOR, :

8 VIRGINIA DIVISION OF CHILD :

9 SUPPORT ENFORCEMENT, ET AL. :

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11 Washington, D.C.

12 Wednesday, February 20, 2013

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14 The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States

16 at 10:19 a.m.

17 APPEARANCES:

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

19 Petitioners.

20 EARLE DUNCAN GETCHELL, JR., ESQ., Solicitor General of

21 Virginia, Richmond, Virginia; on behalf of

22 Respondents.

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1 P R O C E E D I N G S

2 (10:19 a.m.)

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

5 Mr. Gupta?

6 ORAL ARGUMENT OF DEEPAK GUPTA

7 ON BEHALF OF THE PETITIONERS

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

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

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

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

24 JUSTICE SCALIA: In the '60s.

25

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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