

McBurney v. Young
133 S. Ct. 1709 (2013)

Justice Alito delivered the opinion of the Court.

In this case, we must decide whether the Virginia Freedom of Information Act violates either the Privileges and Immunities Clause of Article IV of the Constitution or the dormant Commerce Clause. The Virginia Freedom of Information Act (FOIA), provides that "all public records shall be open to inspection and copying by any citizens of the Commonwealth," but it grants no such right to non-Virginians.

Petitioners, who are citizens of other States, unsuccessfully sought information under the Act and then brought this constitutional challenge. We hold, however, that petitioners' constitutional rights were not violated. By means other than the state FOIA, Virginia made available to petitioners most of the information that they sought, and the Commonwealth's refusal to furnish the additional information did not abridge any constitutionally protected privilege or immunity. Nor did Virginia violate the dormant Commerce Clause. The state Freedom of Information Act does not regulate commerce in any meaningful sense, but instead provides a service that is related to state citizenship. For these reasons, we affirm the decision of the Court of Appeals rejecting petitioners' constitutional claims.

I

Petitioners Mark J. McBurney and Roger W. Hurlbert are citizens of Rhode Island and California respectively. McBurney and Hurlbert each requested documents under the Virginia FOIA, but their requests were denied because of their citizenship.

McBurney is a former resident of Virginia whose ex-wife is a Virginia citizen. After his ex-wife defaulted on her child support obligations, McBurney asked the Commonwealth's Division of Child Support Enforcement to file a petition for child support on his behalf. The agency complied, but only after a 9-month delay. McBurney attributes that delay to agency error and says that it cost him nine months of child support. To ascertain the reason for the agency's delay, McBurney filed a Virginia FOIA request seeking "all emails, notes, files, memos, reports, letters, policies, [and] opinions" pertaining to his family, along with all documents "regarding [his] application for child support" and all documents pertaining to the handling of child support claims like his. The agency denied McBurney's request on the ground that he was not a Virginia citizen. McBurney later requested the same documents under Virginia's Government Data Collection and Dissemination Practices Act, and through that request he received most of the information he had sought that pertained specifically to his own case. He did not, however, receive any general policy information about how the agency handled claims like his.

Hurlbert is the sole proprietor of Sage Information Services, a business that requests real

estate tax records on clients' behalf from state and local governments across the United States. In 2008, Hurlbert was hired by a land/title company to obtain real estate tax records for properties in Henrico County, Virginia. He filed a Virginia FOIA request for the documents with the Henrico County Real Estate Assessor's Office, but his request was denied because he was not a Virginia citizen.

Petitioners filed suit seeking declaratory and injunctive relief for violations of the Privileges and Immunities Clause and, in Hurlbert's case, the dormant Commerce Clause.

II

Under the Privileges and Immunities Clause, "[t]he Citizens of each State [are] entitled to all Privileges and Immunities of Citizens in the several States." U. S. Const., Art. IV, §2, cl. 1. We have said that "[t]he object of the Privileges and Immunities Clause is to 'strongly . . . constitute the citizens of the United States [as] one people,' by 'plac[ing] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.'" This does not mean, we have cautioned, that "state citizenship or residency may never be used by a State to distinguish among persons." *Baldwin v. Fish and Game Comm'n of Mont.*, 436 U. S. 371, 383 (1978). "Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do." Rather, we have long held that the Privileges and Immunities Clause protects only those privileges and immunities that are "fundamental."

Petitioners allege that Virginia's citizens-only FOIA provision violates four different "fundamental" privileges or immunities: the opportunity to pursue a common calling, the ability to own and transfer property, access to the Virginia courts, and access to public information. The first three items on that list, however, are not abridged by the Virginia FOIA, and the fourth--framed broadly--is not protected by the Privileges and Immunities Clause.

A

Hurlbert argues that Virginia's citizens-only FOIA provision abridges his ability to earn a living in his chosen profession, namely, obtaining property records from state and local governments on behalf of clients. He is correct that the Privileges and Immunities Clause protects the right of citizens to "ply their trade, practice their occupation, or pursue a common calling." *Hicklin v. Orbeck*, 437 U. S. 518, 524 (1978); *Supreme Court of N. H. v. Piper*, 470 U. S. 274, 280 (1985) ("[O]ne of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State' "). But the Virginia FOIA does not abridge Hurlbert's ability to engage in a common calling in the sense prohibited by the Privileges and Immunities Clause. Rather, the Court has struck laws down as violating the privilege of pursuing a common calling only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens. See, e.g., *Hicklin*, *supra*, (striking down as a violation of noncitizens' privileges and immunities an "Alaska Hire" statute containing a

resident hiring preference for all employment related to the development of the State's oil and gas resources); *Toomer v. Witsell*, 334 U. S. 385, 395, 397 (1948) (striking down a South Carolina statute imposing a \$2,500 license fee on out-of-state shrimping boats and only a \$25 fee on in-state shrimping boats where petitioners alleged that the "purpose and effect of this statute . . . [was] not to conserve shrimp, but to exclude non-residents and thereby create a commercial monopoly for South Carolina residents"); *United Building & Constr. Trades Council of Camden Cty. v. Mayor and Council of Camden*, 465 U. S. 208 (1984) (New Jersey municipal ordinance requiring that at least 40% of employees of contractors and subcontractors working on city construction projects be city residents facially burdened out-of-state citizens' ability to pursue a common calling). In each case, the clear aim of the statute at issue was to advantage in-state workers and commercial interests at the expense of their out-of-state counterparts.

Virginia's FOIA differs sharply from those statutes. By its own terms, Virginia's FOIA was enacted to "ensur[e] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted." Hurlbert does not allege--and has offered no proof--that the challenged provision of the Virginia FOIA was enacted in order to provide a competitive economic advantage for Virginia citizens. Rather, it seems clear that the distinction that the statute makes between citizens and noncitizens has a distinctly nonprotectionist aim. The state FOIA essentially represents a mechanism by which those who ultimately hold sovereign power (i.e., the citizens of the Commonwealth) may obtain an accounting from the public officials to whom they delegate the exercise of that power. In addition, the provision limiting the use of the state FOIA to Virginia citizens recognizes that Virginia taxpayers foot the bill for the fixed costs underlying recordkeeping in the Commonwealth. The challenged provision of the state FOIA does not violate the Privileges and Immunities Clause simply because it has the incidental effect of preventing citizens of other States from making a profit by trading on information contained in state records. While the Clause forbids a State from intentionally giving its own citizens a competitive advantage in business or employment, the Clause does not require that a State tailor its every action to avoid any incidental effect on out-of-state tradesmen.

B

Hurlbert next alleges that the challenged provision of the Virginia FOIA abridges the right to own and transfer property in the Commonwealth. Like the right to pursue a common calling, the right to "take, hold and dispose of property, either real or personal," has long been seen as one of the privileges of citizenship. See *Corfield v. Coryell*, 6 F. Cas. 546, 552 (CCED Pa. 1825); see also Paul, *supra*, at 180 (listing "the acquisition and enjoyment of property" among the privileges of citizenship). Thus, if a State prevented out-of-state citizens from accessing records--like title documents and mortgage records--that are necessary to the transfer of property, the State might well run afoul of the Privileges and Immunities Clause.

Virginia, however, does not prevent citizens of other States from obtaining such documents.

Under Virginia law, "any records and papers of every circuit court that are maintained by the clerk of the circuit court shall be open to inspection by any person and the clerk shall, when requested, furnish copies thereof." Such records and papers include records of property transfers, like title documents; notices of federal tax liens and other federal liens against property; notices of state tax liens against property; and notice of mortgages and other encumbrances.

A similar flaw undermines Hurlbert's claim that Virginia violates the Privileges and Immunities Clause by preventing citizens of other States from accessing real estate tax assessment records. It is true that those records, while available to Virginia citizens under the state FOIA, are not required by statute to be made available to noncitizens. But in fact Virginia and its subdivisions generally make even these less essential records readily available to all. These records are considered nonconfidential under Virginia law and, accordingly, they may be posted online. Henrico County, from which Hurlbert sought real estate tax assessments, follows this practice, as does almost every other county in the Commonwealth. Requiring noncitizens to conduct a few minutes of Internet research in lieu of using a relatively cumbersome state FOIA process cannot be said to impose any significant burden on noncitizens' ability to own or transfer property in Virginia.

C

McBurney alleges that Virginia's citizens-only FOIA provision impermissibly burdens his "access to public proceedings." McBurney is correct that the Privileges and Immunities Clause "secures citizens of one State the right to resort to the courts of another, equally with the citizens of the latter State." But petitioners do not suggest that the Virginia FOIA slams the courthouse door on noncitizens; rather, the most they claim is that the law creates "[a]n information asymmetry between adversaries based solely on state citizenship."

The Privileges and Immunities Clause does not require States to erase any distinction between citizens and non-citizens that might conceivably give state citizens some detectable litigation advantage. Rather, the Court has made clear that "the constitutional requirement is satisfied if the non-resident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens." The challenged provision of the Virginia FOIA clearly does not deprive noncitizens of "reasonable and adequate" access to the Commonwealth's courts.

Moreover, Virginia law gives citizens and noncitizens alike access to judicial records. And if Virginia has in its possession information about any person, whether a citizen of the Commonwealth or of another State, that person has the right under the Government Data Collection and Dissemination Practices Act to inspect that information.

McBurney's own case is illustrative. When his FOIA request was denied, McBurney was told that he should request the materials he sought pursuant to the Government Data Collection and

Dissemination Practices Act. Upon placing a request under that Act, he ultimately received much of what he sought. Accordingly, Virginia's citizens-only FOIA provision does not impermissibly burden noncitizens' ability to access the Commonwealth's courts.

D

Finally, we reject petitioners' sweeping claim that the challenged provision of the Virginia FOIA violates the Privileges and Immunities Clause because it denies them the right to access public information on equal terms with citizens of the Commonwealth. We cannot agree that the Privileges and Immunities Clause covers this broad right.

This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws. It certainly cannot be said that such a broad right 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." No such right was recognized at common law. Most founding-era English cases provided that only those persons who had a personal interest in non-judicial records were permitted to access them.

Nineteenth-century American cases, while less uniform, certainly do not support the proposition that a broad-based right to access public information was widely recognized in the early Republic. Nor is such a sweeping right "basic to the maintenance or well-being of the Union." *Baldwin*, 436 U. S., at 388. FOIA laws are of relatively recent vintage. The federal FOIA was enacted in 1966, and Virginia's counterpart was adopted two years later. There is no contention that the Nation's unity foundered in their absence, or that it is suffering now because of the citizens-only FOIA provisions that several States have enacted.

III

In addition to his Privileges and Immunities Clause claim, Hurlbert contends that Virginia's citizens-only FOIA provision violates the dormant Commerce Clause. Our dormant Commerce Clause jurisprudence "significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce." *Maine v. Taylor*, 477 U. S. 131, 151 (1986). It is driven by a concern about "economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Philadelphia v. New Jersey*, 437 U. S. 617, 624 (1978) ("The crucial inquiry . . . must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental").

Virginia's FOIA law neither "regulates" nor "burdens" interstate commerce; rather, it merely provides a service to local citizens that would not otherwise be available at all. The "common thread" among those cases in which the Court has found a dormant Commerce Clause violation is that "the State interfered with the natural functioning of the interstate market either through

prohibition or through burdensome regulation." Here, by contrast, Virginia neither prohibits access to an interstate market nor imposes burdensome regulation on that market. Rather, it merely creates and provides to its own citizens copies--which would not otherwise exist--of state records. As discussed above, the express purpose of Virginia's FOIA law is to "ensur[e] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted." This case is thus most properly brought under the Privileges and Immunities Clause: It quite literally poses the question whether Virginia can deny out-of-state citizens a benefit that it has conferred on its own citizens. Because it does not pose the question of the constitutionality of a state law that interferes with an interstate market through prohibition or burdensome regulations, this case is not governed by the dormant Commerce Clause.

Even shoehorned into our dormant Commerce Clause framework, however, Hurlbert's claim would fail. Insofar as there is a "market" for public documents in Virginia, it is a market for a product that the Commonwealth has created and of which the Commonwealth is the sole manufacturer. We have held that a State does not violate the dormant Commerce Clause when, having created a market through a state program, it "limits benefits generated by [that] state program to those who fund the state treasury and whom the State was created to serve." *Reeves, Inc. v. Stake*, 447 U. S. 429, 442 (1980). "Such policies, while perhaps 'protectionist' in a loose sense, reflect the essential and patently unobjectionable purpose of state government--to serve the citizens of the State." Cf. *Department of Revenue of Ky. v. Davis*, 553 U. S. 328, 341 (2008) ("[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"). For these reasons, Virginia's citizens-only FOIA provision does not violate the dormant Commerce Clause.

Because Virginia's citizens-only FOIA provision neither abridges any of petitioners' fundamental privileges and immunities nor impermissibly regulates commerce, petitioners' constitutional claims fail. The judgment below is affirmed.