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**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE COUNTY OF CHESTERFIELD**

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|---|---|---|
| PROFESSIONAL BACKGROUND SCREENING ASSOCIATION; IPROTECT SCREENING LLC; ROUNDSTONE, INC.; SCREENTHEM BACKGROUND INVESTIGATIONS, INC; and S2VERIFY, LLC, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Case No. CL26007948-00 |
| VIRGINIA DEPARTMENT OF STATE POLICE; and COLONEL JEFFREY S. KATZ, in his official capacity as Superintendent of the Virginia Department of State Police, | ) | |
| Defendants. | ) | |

**PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM**

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## TABLE OF CONTENTS

**Page**


INTRODUCTION ..... 1

BACKGROUND ..... 2

I. Business Screening Services and Their Role ..... 2

II. Statutory and Regulatory Background ..... 4

III. Plaintiffs and the Impact of the VSP's New Annual Fee ..... 7

IV. Virginia Freedom of Information Act Request ..... 11

LEGAL STANDARD ..... 12

ARGUMENT ..... 13

I. Plaintiffs Will Suffer Irreparable Harm. ..... 13

II. Plaintiffs Are Likely to Succeed on the Merits. ..... 16

A. The VSP's New Annual Fee Is an Unlawful Tax. ..... 17

B. The VSP Exceeded Its Statutory Authority in Enacting the VSP's New Annual Fee. ..... 19

C. The VSP's New Annual Fee Violates the Due Process Clause of the Virginia Constitution. ..... 22

III. The Remaining Factors Strongly Favor Entry of an Injunction. ..... 25

CONCLUSION ..... 26

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Avalon Assisted Living Facilities, Inc. v. Zager*,
39 Va. App. 484 (2002) .....19

*Bd. of Cnty. Sup'rs of Fairfax Cnty. v. Davis*,
200 Va. 316 (1958) .....24

*Black & White Cars, Inc. v. Groome Transp., Inc.*,
247 Va. 426 (1994) .....13

*Cartograf USA, Inc. v. Comerica Bank*,
85 Va. App. 1 (2025) .....13

*City of Charlottesville v. Marks' Shows*,
179 Va. 321 (1942) .....17

*Cnty. Bd. of Sup'rs of Fairfax Cnty. v. Am. Trailer Co.*,
193 Va. 72 (1951) .....17, 18

*Commonwealth v. Sadler Bros. Oil Co.*,
No. 230610, 2023 WL 9693656 (Va. Oct. 13, 2023) .....26

*Crestwood Const. Co. v. Bd. of Sup'rs of Fairfax Cnty.*,
212 Va. 6 (1971) .....15

*D.R. Horton, Inc. v. Bd. of Sup'rs for Cnty. of Warren*,
285 Va. 467 (2013) .....15, 16

*Ducard v. Lazy Creek*,
99 Va. Cir. 449 (2018) .....25

*Elizabeth River Crossings OpCo, LLC v. Meeks*,
286 Va. 286 (2013) .....17

*Env't Def. Fund, Inc. v. Virginia State Water Control Bd.*,
15 Va. App. 271 (1992) .....20

*Giovani Carandola, Ltd. v. Bason*,
303 F.3d 507 (4th Cir. 2002) .....26

*Highlander v. Virginia Dep't of Wildlife Res.*,
84 Va. App. 404 (2025) .....13

*Hollowell v. Virginia Marine Res. Comm'n*,
56 Va. App. 70 (2010) .....21

*Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*,
17 F.3d 691 (4th Cir. 1994) .....14

*Jackson v. Marshall*,
19 Va. App. 628 (1995) .....20

*Justs. of Harrison Cnty. v. Holland*,
44 Va. 247 (1846) .....26

*Kavanaugh ex rel. Kavanaugh v. Virginia Birth-Related Neurological Inj. Comp. Program*,
60 Va. App. 440 (2012) .....21

*King v. Virginia Birth-Related Neurological Inj. Comp. Program*,
242 Va. 404 (1991) .....22

*Levisa Coal Co. v. Consolidation Coal Co.*,
276 Va. 44 (2008) .....13

*Lingle v. Chevron U.S.A. Inc.*,
544 U.S. 528 (2005).....22

*Loudoun Cnty. Dep't of Soc. Servs. v. Etzold*,
245 Va. 80 (1993) .....20

*Lucas v. Stimson*,
115 Va. Cir. 519 (2025) .....26

*Marshall v. N. Virginia Transp. Auth.*,
275 Va. 419 (2008) .....17, 18

*Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*,
915 F.3d 197 (4th Cir. 2019) .....14

*Nat'l Linen Serv. Corp. v. City of Norfolk*,
196 Va. 277 (1954) .....22, 24

*Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*,
257 Va. 1 (1999) .....22, 24

*Salomon & Ludwin, LLC v. Winters*,
150 F.4th 268 (4th Cir. 2025) .....14

*Shivaee v. Commonwealth*,
270 Va. 112 (2005) .....22

*Thompson v. Smith*,
155 Va. 367 (1930) .....13

*Williams v. Consolvo*,
237 Va. 608 (1989) .....16

**Statutes**

Va. Code § 2.2-3704(B)(4) .....11

Va. Code § 2.2-4026 .....20

Va. Code § 8.01-628 .....13

Va. Code §§ 19.2-392.6, -392.10, -392.12 .....4

Va. Code § 19.2-392.16 .....5, 6, 21, 23

Va. Code § 19.2-392.16(A) .....4, 24

Va. Code § 19.2-392.16(B) .....4, 24

Va. Code § 19.2-392.16(C) ..... *passim*

**Other Authorities**

Va. Const. Art. I, § 6 .....2, 17, 26

Va. Const. Art. I, § 11 .....2, 22

Va. S. Ct. R. 3:26 .....12, 13, 16, 26, 28

## INTRODUCTION

The Commonwealth of Virginia has never given the Virginia Department of State Police ("VSP") the power to tax. Yet, that is exactly what VSP has done. Under the guise of a modest "licensing fee," VSP now demands $30,000 a year from every business screening service—small and large, high-volume and low-volume, alike—with no statutory authority, no public justification, and no relationship whatsoever to the cost of the service the fee is supposed to fund.

The General Assembly authorized exactly one thing: a fee "to cover the cost of providing" notifications when criminal records are sealed. Code § 19.2-392.16(C). VSP's own documents reveal what actually happened. Employees privately debated whether their "30k estimate isn't too insane afterall," then worked backward from that number to manufacture a per-notification rate that sounded palatable. That is not cost recovery. That is a number picked first and rationalized second—the signature of an unlawful tax, not a regulatory fee.

The consequences are not hypothetical. Thirty-one businesses have already paid VSP's toll in the first month alone, handing VSP $930,000 for a notification system that costs a fraction of that to run. If the 250 registrants VSP itself projects come to pass, VSP stands to collect $7.5 million a year, and an unelected agency will be raising revenue with none of the accountability the Constitution of Virginia demands of taxation. And VSP's own counsel has already signaled that $30,000 is only the starting point, with future increases to follow.

For Plaintiffs, the fee is not a cost of doing business: it is an extinction event. ScreenThem Background Investigations, Inc. ("ScreenThem"), a small, woman-owned company with seven employees, will likely be forced to close. Roundstone, Inc. ("Roundstone"), a six-employee family business, will be forced out of the Virginia market altogether. iProtect LLC ("iProtect") and S2Verify, LLC ("S2Verify") will be forced to raise prices in an industry where customers walk over an increase of fifty cents a search, guaranteeing the loss of clients they have spent years

courting and institutionalizing. And the Professional Background Screening Association ("PBSA") will watch its membership hollowed out as smaller screening services across the United States are priced out of existence, all so VSP can fund a notification portal that costs nowhere near what it charges.

That is precisely the kind of unchecked administrative overreach the Constitution of Virginia forbids. In short, VSP's $30,000.00 annual registration fee ("VSP New Annual Fee") is an unlawful tax imposed by an unelected agency in violation of Article I, Section 6 of the Virginia Constitution. It is also the product of *ultra vires* agency action that exceeds the narrow authority the General Assembly granted under Code § 19.2-392.16(C). And it is arbitrary state action that violates the Due Process Clause of Article I, Section 11, because it bears no rational relationship to any legitimate governmental purpose.

For these reasons, Plaintiffs respectfully request that this Court enter a temporary restraining order and preliminary injunction to halt enforcement of VSP's New Annual Fee before it inflicts harm that no later judgment can undo.

## BACKGROUND

### I. Business Screening Services and Their Role

"Business screening services"—the term assigned to the background screening industry by the statute in question—consist of a variety of different types of companies but they all, on some level, collect and distribute criminal history records. Compl. ¶ 9. They provide an important service by enabling employers, property managers, and volunteer organizations to verify an applicant's history, allowing them to make informed decisions about who they hire or place in positions of trust, particularly in roles involving vulnerable populations, financial responsibility, or the safety of the public. *Id.* at ¶¶ 9–10. Two common types of business screening services are wholesale record providers and Consumer Reporting Agencies ("CRAs").

CRAs, among other things, provide criminal background reports to end user clients, such as businesses and nonprofits. *Id.* at ¶ 9. Only a very small minority of CRAs maintain databases for resale purposes. *Id.* The criminal background report process typically begins when a CRA receives a request from an end user client to run a criminal background check on a specific individual for which disclosure has been provided and authorization has been granted. *Id.* The CRA will then conduct a "search" on the individual/applicant using the name and date-of-birth or other information provided by the client to confirm whether the individual has prior criminal history records. *Id.* In conducting this search, they often work with contracted partners like court record retrievers or wholesalers, to collect criminal records that match the search criteria (often name and date-of-birth) in real time from official sources. *Id.* at ¶¶ 25, 28. While many background checks include the use of databases or database services as a component of the background screening check or process, they are typically used as a locator to identify jurisdictions to search for records and run any results returned from the database at the original source to determine if they are accurate and up to date for reporting. *Id.* at ¶ 9. After the CRA has compiled relevant criminal records, if any, it creates a criminal background report that it provides to its customer. *Id.*

Wholesalers are on the "front lines" of records collection, providing support for other business screening services like CRAs. *Id.* at ¶¶ 15, 20. After a wholesaler receives a search request from a CRA or other business screening service, it collects criminal records directly from courts or other official sources and then provides those records to the CRA. *Id.* at ¶¶ 17, 20. Wholesalers interact with court clerks or other public officials as necessary to ensure the accuracy of the records they collect. *Id.* at ¶¶ 17, 22.

These services are essential for Virginia businesses and organizations, providing them with critical information that enables them to make informed decisions regarding who they place in key

positions. *Id.* at ¶ 10. For example, it allows businesses in the financial services industry to avoid hiring individuals who have committed financial crimes, such as embezzlement. *Id.* at ¶ 11. It also allows organizations that work with children, such as churches with youth programs and youth sports organizations, to ensure that they do not hire convicted sex offenders. *Id.* Likewise, organizations that work with vulnerable populations, including the mentally ill, disabled, and the elderly, can avoid hiring individuals with a violent criminal history that pose a threat. *Id.* In short, this critical information enables countless organizations to act confidently in making pivotal decisions that affect communities far and wide.

## II. Statutory and Regulatory Background

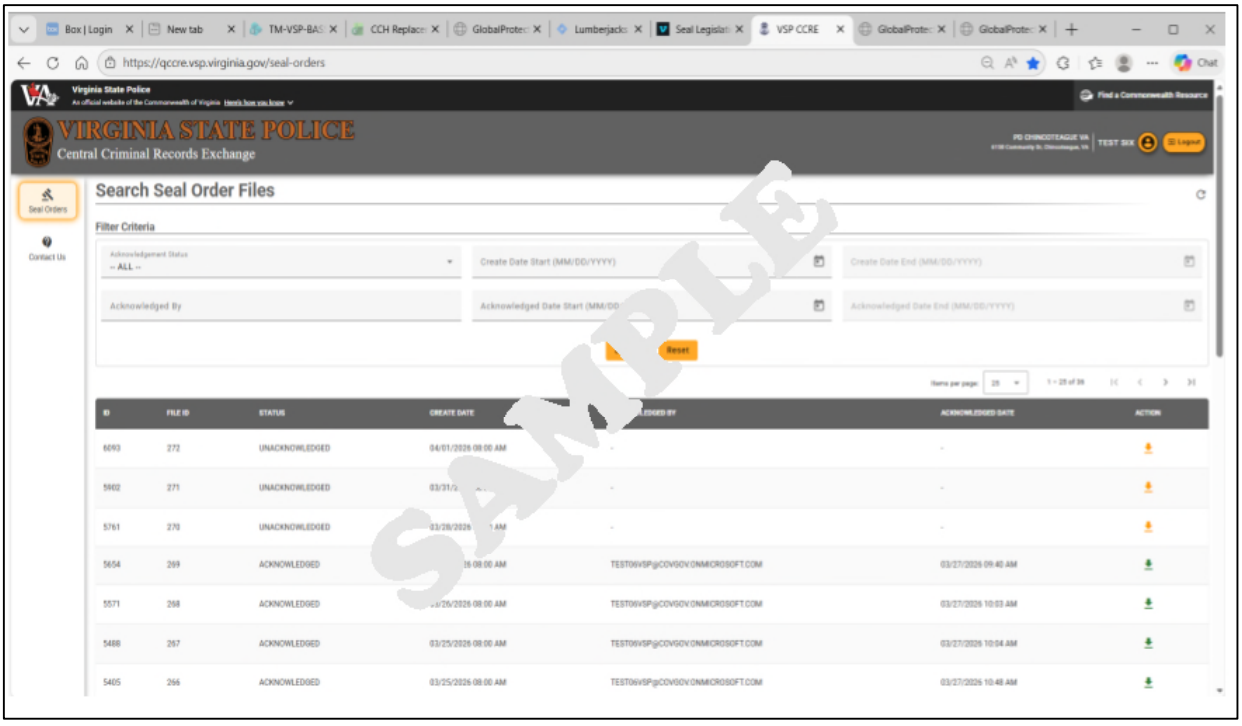
On July 1, 2026, Virginia's new "Clean Slate" law took effect, allowing for the records of numerous criminal offenses to be sealed, either automatically or via petition. *See* Code §§ 19.2-392.6, -392.10, -392.12. As part of this new sealing regime, the General Assembly also imposed new requirements on "business screening services," companies that are "engaged in the business of collecting, assembling, evaluating, or disseminating Virginia criminal history records or traffic history records on individuals." *Id.* § 19.2-392.16(A). Among other things, the statute requires business screening services to delete any records in their possession that they know are sealed, other than those they are required to retain under state and federal law. *Id.* § 19.2-392.16(B). The statute also requires all business screening services to register with the VSP "to electronically receive notifications of orders of sealing." *Id.* § 19.2-392.16(C) ("A business screening service ***shall register*** with the Department of State Police . . . ." (emphasis added)). Business screening services are intended to use the notifications of sealing orders "for the sole purpose of deleting criminal history records that have been sealed." *Id.* To facilitate the VSP's notifications, the VSP is allowed to "charge an annual licensing fee to the business screening service . . . with such fee to be used to cover the cost of providing such records." *Id.* If a business screening service violates

any of the provisions in Code § 19.2-392.16, it will be liable "to the person who is the subject of the criminal history record or traffic history record for a penalty of $1,000 or actual damages" and subject to "a civil penalty of not more than $2,500 per violation." *Id.* § 19.2-392.16(H).

At some point after the enactment of the new requirements for business screening services,[1] the VSP created a webpage entitled "Business Screening Services Seal Order Notification Program." VSP, *Business Screening Services Seal Order Notification Program* (last visited Aug. 7, 2026), https://vsp.virginia.gov/business-screening-services/ (hereinafter *BSS Seal Order Notification Program*). The webpage outlines a "Virginia Business Screening Services (BSS) program," and states that it is mandated by Code § 19.2-392.16 and "***requires*** businesses handling Virginia criminal and traffic history records to register and comply with specific regulations to ensure proper management of sensitive information." *Id.* (emphasis added). It also states that "[a]ny business collecting, assembling, evaluating, or disseminating VA criminal/traffic records" should register for the program to "ensure legal compliance" and avoid "potential penalties and legal action." *Id.*

[1] The VSP webpage does not indicate precisely when it went live. The first capture by the Internet Archive Wayback Machine was on March 3, 2026. Internet Archive, *Wayback Machine – Calendar of* https://vsp.virginia.gov/business-screening-services/ (last visited August 6, 2026), https://web.archive.org/web/20260000000000*/https://vsp.virginia.gov/business-screening-services/.

Participating in the Program gives business screening service registrants access to a "Seal Order Notification Portal" that allows the businesses to access and review notifications of sealing orders from the VSP. *Id.* An example image from the VSP that illustrates what the portal will look like is below.




VSP, *Business Screening Services Seal Notification Services: Interface Control Document* (last visited Aug. 7, 2026), https://tinyurl.com/yc3996a9. All businesses registered as users in the portal receive periodic emails notifying them that there is a sealing order notification in the portal that they can download and use to delete any related records. *Id.* To register with the VSP and obtain access to the portal, the VSP requires all business screening services to pay "an annual licensing fee of $30,000," regardless of whether they have need for the sealing order notifications. *BSS Seal Order Notification Program*. VSP has not provided any public information regarding how it calculated the $30,000.00 amount or how that amount is related to VSP's costs for providing sealing order notifications.

## III. Plaintiffs and the Impact of the VSP's New Annual Fee

Plaintiffs iProtect, Roundstone, ScreenThem, and S2Verify (collectively, the "BSS Plaintiffs") are all business screening services that would be required to pay the VSP New Annual Fee. Compl. ¶¶ 15, 20, 23, 27. Plaintiff PBSA (collectively with the BSS Plaintiffs, the "Plaintiffs") is a non-profit trade organization whose members consist primarily of business screening services. *Id.* at ¶ 29. Each Plaintiff will be substantively harmed if the VSP is allowed to enforce the VSP's New Annual Fee. *Id.* at ¶¶ 51–69.

iProtect is a Virginia-based wholesale court researcher that provides criminal and public records data directly from judiciary databases to CRAs. Compl. ¶¶ 16–17. It is a woman-owned small business with ten employees. *Id.* at ¶ 14. iProtect does not maintain a database of criminal history records, and each time it receives a request for a background screen, it runs a new search of Virginia public records. *Id.* at ¶ 18. This means that it does not rely on old data for its criminal history records research, and it does not retain any records aside from those required to be maintained by law. *Id.* Because its operations in Virginia constitute a material portion of iProtect's business, withdrawing from the Virginia market is not a tenable option for iProtect. *Id.* at ¶ 55. If required to pay the $30,000 for VSP's New Annual Fee, iProtect will be forced to substantially raise its prices per search. *Id.* In a highly cost-sensitive industry in which clients routinely move their business in response to a price increase as small as fifty cents per search, a price increase resulting from the $30,000 fee will almost certainly cause iProtect to lose customers. *Id.* at ¶¶ 54–55.

Roundstone is also a wholesale court researcher that locates criminal history records at a county level and provides them directly from the court or state-run databases to CRAs or other larger wholesale providers. *Id.* at ¶¶ 19–20. Roundstone is a small, family-owned business with six full-time employees. *Id.* at ¶ 19. Based in Florida, Roundstone operates in sixteen states,

including Virginia. *Id.* For each record request it receives, Roundstone conducts entirely new research based on public records, either through in-person or online court public access terminals or through communicating with a court clerk. *Id.* at ¶ 22. Roundstone then sends any criminal records it locates to its client. *Id.* at ¶ 20. It does not retain any criminal history records beyond what it is required to maintain by law, does not maintain a database of records, and does not use any previously obtained records when conducting a criminal history search. *Id.* at ¶ 21. Due to its small size, Roundstone is unable to absorb the cost of VSP's New Annual Fee. *Id.* at ¶ 56. The total revenue it earns from its Virginia operations would be insufficient to cover the full fee amount. *Id.* Accordingly, if Roundstone is required to pay the $30,000 fee, it will be forced to exit the Virginia market entirely. *Id.*

ScreenThem is a small, woman-owned and accredited CRA based in Alexandria, Virginia. *Id.* ¶ 23. It has seven employees and primarily hires mothers who are returning to the workforce. *Id.* It provides background screening and verification services to clients including businesses, property managers, and non-profit organizations, providing them with the information they need to make informed decisions regarding applicants. *Id.* at ¶ 24. This information helps businesses and non-profits to make informed decisions, protect vulnerable populations, and minimize the risk of financial, physical, or sexual abuse. *Id.* at ¶ 11. To create criminal history background reports, ScreenThem both works with wholesale court research providers to obtain up-to-date information directly from courts and also conducts research itself. *Id.* at ¶ 25. ScreenThem verifies the information it receives prior to providing the information in a criminal history background report. *Id.* Other than what it is required to retain by law, ScreenThem does not retain any criminal history records, does not maintain a database, and does not use previously obtained information when searching records and creating new criminal history background reports. *Id.* at ¶ 26. Though

ScreenThem sometimes uses database vendors for initial searches, every criminal history background report is verified with information directly from official public sources. *Id.* at ¶ 25. If ScreenThem is required to pay the VSP's New Annual Fee, it will likely be forced to close its doors because it has neither a large enough volume of searches nor the financial reserves to enable it to absorb the cost of that fee. *Id.* at ¶ 61. To pay the VSP New Annual Fee, ScreenThem would be required to take on additional debt and would be forced to substantially raise prices. *Id.* Such a price increase in a market where customers regularly seek lower-cost alternatives will inevitably lead to the loss of customers. *Id.*

S2Verify is an accredited CRA headquartered in Atlanta, Georgia. *Id.* at ¶ 27. It provides background screening services to over 16,000 clients in the U.S. and internationally and processes several thousand background screening requests per day. *Id.* Its business in Virginia represents approximately 5% of its total volume. *Id.* S2Verify does not maintain a database of criminal history records and only retains records necessary to comply with state and federal law and its end user clients' document retention policies. *Id.* at ¶ 28. Consistent with industry standards, it conducts a new records search for each record request it receives, obtaining fresh records from vendors. *Id.* Though Virginia comprises only a small percentage of S2Verify's business, many of its larger clients operate in Virginia and require their background screening services in each state where they operate. *Id.* at ¶ 27. Likewise, regardless of client location, an applicant may have history from anywhere around the globe, including Virginia, and clients would not accept reports that exclude one or more locations an applicant has history in as doing so defeats the entire purpose of a background check. Due to this, S2Verify has paid the VSP's New Annual Fee. *Id.* at ¶ 28. Though S2Verify has paid the fee, it will be forced to raise prices due to the costs it has incurred. *Id.* at ¶ 28. This includes not only the amount of the fee, but price increases from its vendors who have

also paid the fee and operational costs for modifying systems to comply with the new deletion requirements. *Id.* at ¶¶ 28, 62–63. These price hikes, which could as much as double the cost of background screenings in Virginia, will likely cause it to lose customers. *Id.* at ¶ 65.

PBSA is a nonprofit trade association with over 750 members that primarily consist of companies providing employment and tenant background screening services. *Id.* at ¶ 29. It provides educational resources to its members, legislative and regulatory information, offers individual certificate programs and organizational accreditation programs, and serves as an advocate on their behalf before courts, legislative, and regulatory bodies. The majority of PBSA's members do business in Virginia, to some extent. *Id.* at ¶ 31. Each of the BSS Plaintiffs are PBSA members and are representative of the harms that PBSA's members who do business in Virginia will suffer due to the VSP's New Annual Fee. *Id.* at ¶¶ 31, 66. Many of PBSA's members are at risk, particularly smaller members since they are less likely to have the funds or revenue to afford a yearly $30,000.00 fee but including all members and screening services generally if fee structures such as this proceed. *Id.* at ¶ 67. They will be forced to either raise prices, leading to a loss of customers, or stop operating in Virginia completely. *Id.* This will not only lead to less competition within the Virginia marketplace, reducing reliable options for businesses in Virginia and businesses opting out of pursuing expansion in Virginia and even Virginia candidates because the cost to onboard becomes unfavorable as compared to every other state, but it will also directly harm PBSA by diminishing its membership pool. *Id.* at ¶¶ 68–69. Further, PBSA's mid-size and larger members will be forced to raise prices, suffer diminished competition in their supply chains, and navigate compliance hurdles that will cause a direct harm to their businesses through loss of customers. *Id.* at ¶¶ 67–68. To meet these members' needs, PBSA will be required to expend

significant time and resources providing information and educational materials to members on the new scheme. *Id.* at ¶ 69.

The VSP's New Annual Fee will ultimately lead to small players being crushed and forced out of the market, and mid-sized players being forced to raise prices and work at a disadvantage when competing with large players that have more revenue to pay the tax as a cost of doing business. *Id.* at ¶ 68. This result harms the end user clients, who will be left with limited options, Virginia applicants who will be bypassed for applicants in other states, and increased prices for all entities when attempting to obtain background checks to ensure the safety of their operations. *Id.*

## IV. Virginia Freedom of Information Act Request

On July 17, 2026, counsel for Plaintiffs submitted a request to VSP under the Virginia Freedom of Information Act ("VFOIA"), Code § 2.2-3700, *et seq.* Compl. ¶ 47. This request sought all communication and documents underlying the VSP's decision to implement the VSP's New Annual Fee and the rationale for the amount. *Id.* The VSP exercised its privelege under Code § 2.2-3704(B)(4) to extend its time to respond to the request, rendering the response due on August 4, 2026. *Id.* Despite this deadline, VSP failed to respond fully to the request by that date. *Id.* Instead, the VSP only made a partial production of responsive documents on August 4, 2026, August 6, 2026, and August 7, 2026, and asked for an agreed extension of the deadline until August 7, 2026. *Id.* Counsel for Plaintiffs agreed but, despite this extension, VSP indicated that it was not able to complete the full production by August 7, 2026. *Id.* Thus, Plaintiffs were unable to receive the benefit of a full production prior to filing this motion. *Id.*

The VSP's partial production primarily consists of PowerPoint presentations, communications, and research documents that addressed the new sealing scheme and the VSP's New Annual Fee as well as drafts of public facing documents. *Id.* at ¶ 48. Some of the documents within the production shed light on the VSP's rationale for its New Annual Fee. For example, a

research document contained a breakdown of the types and amount of similar fees charged by other states and the federal government for obtaining court and criminal records, all of which are significantly less than $30,000.00. *Id.* Ex. 3. An internal chat between VSP employees discussing that breakdown stated "maybe our 30k estimate isn't too insane afterall [sic]" and appeared to use the numbers from other jurisdictions to arrive at a "2 cents per seal-order notification" amount. *Id.* Ex. 2. This 2-cents-per-seal-order amount is memorialized in an official VSP PowerPoint presentation which states that the VSP's New Annual Fee is "less than 2 cents (1.8 cents) per seal-order notification ($1.7 million records at $30,000)." *Id.* Ex. 4 at 10.

Other VSP communications give conflicting reports about how many business screening services it expects to register. In a January 16, 2025 email, a VSP employee states that it "do[esn't] know how many agencies will enroll in the program and how many users will be designated under each of those agencies." *Id.* Ex. 5. A month later, in a February 20, 2025 email, another VSP employee estimated that 250 business screening services would register "based on google searches." *Id.* Ex. 6.

Though one of the email communications that VSP produced discusses a cost estimate of "approximately $4M," the numbers the estimate is based on "are rough estimates and use large assumptions." *Id.* Ex. 7. Further, a comment from VSP's counsel on a draft Business Screening Service User Agreement indicates that the fee will likely increase in future years. *Id.* Ex. 1 at 3 ("As the years go by and VSP's costs go up, you likely will want to be able to increase the fee to a higher amount . . . .").

## LEGAL STANDARD

To obtain a temporary restraining order or preliminary injunction, the moving party must make a threshold showing that it will "more likely than not suffer irreparable harm" in the absence of an injunction. Va. S. Ct. R. 3:26(c). Once the moving party makes this showing, the Court

considers three additional factors: (i) whether the movant's claim "will more likely than not succeed on the merits"; (ii) "whether the balance of the hardships . . . favors granting the preliminary injunction"; and (iii) whether the injunction is in the public interest. Va. S. Ct. R. 3:26(d); *Cartograf USA, Inc. v. Comerica Bank*, 85 Va. App. 1, 19 (2025). A court shall only issue an injunction if it is "satisfied of the plaintiff's equity." Va. Code § 8.01-628.

A court may grant a temporary restraining order to preserve the status quo "pending a hearing on a motion for preliminary injunction" "[i]f the equities of the case warrant doing so." Va. S. Ct. R. 3:26(a).

## ARGUMENT

### I. Plaintiffs Will Suffer Irreparable Harm.

Plaintiffs will suffer irreparable harm absent injunctive relief because some will go out of business if they pay the fee, others will have to cease Virginia operations, and all face significant competitive harm and loss of goodwill even if they find a way to stay in business and pass along the costs.

"To secure an injunction, a party must show irreparable harm and the lack of an adequate remedy at law." *Black & White Cars, Inc. v. Groome Transp., Inc.*, 247 Va. 426, 431 (1994). "An irreparable injury is one for which 'fair and reasonable redress may not be had in a court of law and [for which] to refuse the injunction would be a denial of justice.'" *Highlander v. Virginia Dep't of Wildlife Res.*, 84 Va. App. 404, 436 (2025) (quoting *Thompson v. Smith*, 155 Va. 367, 387 (1930)) (alteration in original). A plaintiff must be able to demonstrate that "monetary damages would otherwise not make him whole." *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 62 (2008).

First and foremost, Plaintiffs will suffer irreparable harm to their businesses absent an injunction because a regulatory requirement that forces a business to close is an irreparable harm

that cannot be remedied by money damages. *See Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 694 (4th Cir. 1994) ("[E]ven where a harm could be remedied by money damages at judgment, irreparable harm may still exist where the moving party's business cannot survive absent a preliminary injunction."); *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 218 (4th Cir. 2019) (stating that "a temporary delay in recovery" can constitute irreparable harm when it "threaten[s] a party's very existence by, for instance, driving it out of business before litigation concludes"). For ScreenThem, being required to pay the VSP's New Annual Fee is expected to result in the closure of its business. Compl. ¶ 61. It simply cannot afford to pay the fee and would likely be unable to recover the fee through raising prices given its overall volume of business. *See supra* pp. 8–9. Likewise, Roundstone will be forced to exit the Virginia market rather than pay the fee; it will not recoup the cost of the fee in a year of providing Virginia searches. *See supra* pp. 7–8. These are major business changes and the harm to customer goodwill and competitive advantage as a result cannot be undone with money damages.

Even if Plaintiffs could continue operating after paying the VSP's New Annual Fee, they would be forced to raise prices and likely lose customers, which would also trigger irreparable harm. "[P]ermanent loss of customers to a competitor or the loss of goodwill constitutes irreparable injury." *Salomon & Ludwin, LLC v. Winters*, 150 F.4th 268, 279 (4th Cir. 2025) (internal citation omitted). S2Verify, for example, has no choice but to continue operating in Virginia because some of its customers require background searches in multiple states, including Virginia, and would likely look for a new vendor if S2Verify was unable to conduct background searches in all the states where they operate. Compl. ¶ 27. But because S2Verify is not a large enough company to simply absorb the cost of the VSP's New Annual Fee, it will be forced to increase its prices in

order to continue operating in Virginia. *Id.* at ¶ 64. This is necessary to cover (1) the VSP's New Annual Fee and (2) the increased prices of S2Verify's vendors that have also had to raise prices due to the VSP's New Annual Fee and the increased employee cost of complying with Virginia's new business screening service requirements. *Id.* at ¶ 63. The other Plaintiffs who continue to operate in Virginia will likewise be forced to raise their fees for similar reasons. *Id.* at ¶¶ 55, 61. Because the business screening services industry is highly cost-sensitive where even an increase of fifty cents per search will cause customers to exit, Plaintiffs raising their prices significantly to compensate for the VSP's New Annual Fee will invariably lead to Plaintiffs losing long-term client relationships. *Id.* at ¶¶ 54–55, 60, 64. Of course, the harm that Plaintiffs will suffer from the loss of customers and of goodwill is not quantifiable and thus warrants injunctive relief.

Virginia's voluntary payment doctrine further demonstrates the irreparable harm with which the VSP's New Annual Fee has saddled the BSS Plaintiffs. That doctrine establishes that, if a party makes a voluntary payment with knowledge that the requirement of payment is unlawful, the party cannot recover the payment. *D.R. Horton, Inc. v. Bd. of Sup'rs for Cnty. of Warren*, 285 Va. 467, 467 (2013). The doctrine applies to fees paid to the government; if they are paid voluntarily, the payor cannot recover them. *Id.* (finding that the voluntary payment doctrine applied to bar recovery of an unlawful permit fee); *Crestwood Const. Co. v. Bd. of Sup'rs of Fairfax Cnty.*, 212 Va. 6, 7 (1971) (holding that plaintiff could not recover fees paid to a county for an unlawful ordinance because plaintiff "paid the fees without protest").

Accordingly, absent an injunction, Plaintiffs face a Hobson's choice. They are "require[d]" to pay the VSP's New Annual Fee to continue operating in Virginia. *BSS Seal Order Notification Program*. But if they pay and a court holds that the fee is unlawful, then they will have no avenue to recoup the sum the VSP illegally charged them. For this reason, the Supreme Court has stated

that plaintiffs facing fees of questionable legality should "s[eek] injunctive relief" before paying the fee. *See D.R. Horton*, 285 Va. at 467; *Williams v. Consolvo*, 237 Va. 608, 615 (1989) (noting that plaintiff should have pursued injunctive relief prior to making voluntary payment). This lack of an adequate legal remedy is precisely the type of irreparable harm that an injunction is meant to protect against.

Additionally, PBSA will suffer irreparable harm from a permanent loss of members due to the effects of the VSP's New Annual Fee. Compl. ¶ 69. As the VSP's New Annual Fee forces small business screening services to cease operating, PBSA's membership pool will shrink materially. *Id.* Likewise, PBSA will also suffer harm from being required to divert time and resources addressing the VSP's New Annual Fee and providing resources to its members that opt to pay the fee. *Id.* These are harms that cannot be rectified absent an injunction.

Because each Plaintiff will suffer harm for which it has no adequate remedy at law, Plaintiffs have met the threshold requirement to demonstrate that irreparable harm and injunctive relief is warranted. *See* Rule 3:26(c) ("A court may issue a preliminary injunction only if it first determines that the movant will more likely than not suffer irreparable harm without the preliminary injunction.").

## II. Plaintiffs Are Likely to Succeed on the Merits.

Plaintiffs are likely to succeed on the merits because at least three separate and independent bases exist to invalidate the VSP's New Annual Fee as unlawful. First, it qualifies as an unlawful tax per the Virginia Constitution. Second, it qualifies as an *ultra vires* agency action because no statute authorized setting the fee at $30,000.00. Third, it contravenes the Due Process Clause of the Constitution of Virginia. Plaintiffs are more likely than not to prevail on each of these theories under Virginia law, although they need only show they are more likely than not to prevail on a single one for temporary and preliminary injunctive relief to issue.

### A. The VSP's New Annual Fee Is an Unlawful Tax.

The VSP's New Annual Fee violates the Constitution of Virginia and is an unlawful tax because it bears no relationship to VSP's costs.

Under Article 1, Section 6 of the Constitution of Virginia, "taxes must be imposed only by a majority of the elected representatives of a legislative body, with the votes cast by the elected representatives being duly recorded." *Marshall v. N. Virginia Transp. Auth.*, 275 Va. 419, 435 (2008). In keeping with this Constitutional provision, "the General Assembly may not delegate its taxing power to a non-elected body." *Id.*; *see also Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 286, 311–12 (2013) (noting that, if the fees at issue were taxes, "the General Assembly's delegation of the power to impose and set the rates of such taxes to [an agency] would be a constitutionally impermissible delegation of legislative power"). When a governmental body imposes a fee, courts look to the purpose of the fee to determine whether it is a regulation or taxation. *Marshall*, 275 Va. at 431. If the fee has a "reasonable relation" to the cost of a government program or a regulatory scheme, then it is a regulatory measure, but "if revenue is the primary purpose" of the fee, it is a tax. *City of Charlottesville v. Marks' Shows*, 179 Va. 321, 329 (1942). "If it is manifest that the amount imposed is out of proportion to the expenses involved, the ordinance will generally be regarded as a revenue measure and void as a regulation under the police power." *Cnty. Bd. of Sup'rs of Fairfax Cnty. v. Am. Trailer Co.*, 193 Va. 72, 76 (1951).

Obviously, the VSP is not an elected body and thus lacks independent authority to impose a tax. It follows, then, that the question for this Court is whether the VSP's New Annual Fee functions as a regulatory fee or an unlawful tax. The Supreme Court's decisions in this area provide a roadmap for answering this pivotal question. In *American Trailer*, plaintiffs challenged a trailer park licensing fee, alleging that licensing fees of $16,100 and $2,750 were invalid. 193 Va. at 73–74. The Supreme Court held that the act authorizing the licensing fee was intended to be a

regulatory act. *See id.* at 75. But if the licensing fee was "out of proportion to the expenses involved," it would be treated as a revenue measure and rendered void. *Id.* at 76. Because the county gave "no consideration [] to the cost of regulation in arriving at the amount of the tax," the Court held that "the tax bears no relation to the cost of regulation." *Id.* at 76–77. Likewise, in *Marshall*, the General Assembly delegated the ability to impose certain regional taxes and fees to the Northern Virginia Transportation Authority ("NVTA"), an un-elected political subdivision of the Commonwealth. *See* 275 Va. at 425–26. The NVTA then proceeded to impose the authorized taxes and fees and admitted that their primary purpose was to raise revenue. *Id.* at 426, 431. The Supreme Court held that, because of that purpose, it was a tax and that it was unconstitutional because "the General Assembly may not delegate its taxing power to a non-elected body." *See id.* at 431, 435.

Applying that same logic here, the VSP's New Annual Fee amounts to an unlawful tax. The sole statutory purpose of the VSP's New Annual Fee is "***to cover the cost*** of providing [notifications of orders of sealing]," Code § 19.2-392.16(C) (emphasis added), but the VSP's New Annual Fee bears no relationship to this cost. VSP provides notifications of sealing orders through its portal, so the relevant cost is the VSP's expenditure to provide this portal and accompanying automated emails. Indeed, in setting the amount of the fee, the VSP considered the costs of similar services, including Virginia's Officer of the Court Remote Access service fees, fees for records from PACER, and the fees for bulk data retrieval in other states, all of which were significantly less than $30,000.00 per year. *See* Compl. Ex. 3.

Yet, the VSP has failed to provide any justification explaining how the $30,000.00 amount for its New Annual Fee relates at all to ***its*** costs. It has provided the public with no details regarding the factors it considered to calculate the $30,000.00 amount, the estimated cost of administering

the portal, or even whether VSP will have to hire additional personnel to comply with the new record sealing scheme. Though one communication that the VSP provided under VFOIA gives a breakdown of costs totaling "approximately $4M," this estimate is not grounded in any actual facts because it consists of "rough estimates and use[s] large assumptions." Compl. Ex. 7. The VSP also has not specified why all business screening service providers are charged the same amount, regardless of size or volume. This lack of consideration demonstrates that the fee is not reasonably related to any of VSP's anticipated costs.

Additionally, the amount of the fee is manifestly disproportionate to any costs VSP may incur. Based on VSP's estimate, *see* Compl. Ex. 6, if 250 business screening services register with the VSP and pay the VSP New Annual Fee (31 have already registered within the first month), VSP will receive $7.5 million in licensing fees. It is inconceivable that VSP requires millions of dollars to run a straightforward portal that has the sole purpose of notifying business screening services when records have been sealed. Because the VSP's New Annual Fee is not reasonably related to VSP's costs, Virginia law dictates that it necessarily is an unlawful tax that violates the Constitution of Virginia.

For these reasons, Plaintiffs are therefore likely to succeed on the merits of their allegation that sVSP's New Annual Fee constitute an unlawful tax under Virginia law.

### B. The VSP Exceeded Its Statutory Authority in Enacting the VSP's New Annual Fee.

The VSP's New Annual Fee is also unlawful because the VSP exceeded its statutory authority when it set the amount at $30,000.00 without justification for its New Annual Fee.

"When the legislature delegates authority to an administrative agency to promulgate regulations, those regulations must neither exceed the scope of the authority delegated nor be inconsistent with it." *Avalon Assisted Living Facilities, Inc. v. Zager*, 39 Va. App. 484, 508 (2002).

The Virginia Administrative Process Act gives "any person affected by and claiming the unlawfulness of any regulation" the ability to challenge a regulation that exceeds its lawful scope through a "court action against the agency." Code § 2.2-4026. In such an action, courts may not "merely rubber-stamp an agency determination" where the agency's compliance with the governing statutes is at issue. *Jackson v. Marshall*, 19 Va. App. 628, 634 (1995). Instead, a court must set aside agency action if it fails "to comply with statutory authority," regardless of whether the action is "supported by substantial evidence." *Env't Def. Fund, Inc. v. Virginia State Water Control Bd.*, 15 Va. App. 271, 278 (1992) (citation omitted). When construing a statute, "courts must look first to the language of the statute. If a statute is clear and unambiguous, a court will give the statute its plain meaning." *Loudoun Cnty. Dep't of Soc. Servs. v. Etzold*, 245 Va. 80, 85 (1993).

The VSP has exceeded the scope of its authority by implementing an annual licensing fee of $30,000.00 per business without providing any justification regarding how that fee will cover its costs. Code § 19.2-392.16(C) expressly authorizes the VSP only to "charge an annual licensing fee" for providing notifications of sealing orders and expressly limits that fee to the amount necessary "to cover the cost of providing such records." Despite this plain and unambiguous statutory limitation, VSP elected to impose an aggressive flat fee of $30,000.00 on all business, charged on an annual basis. It did so abruptly, without promulgating a formal regulation, without soliciting public comment or even providing opportunity or forum for such comment, and without disclosing its methodology for determining that the $30,000.00 fee was necessary to cover its costs in providing sealing order notifications. In fact, there is no publicly available evidence ***anywhere*** showing that the $30,000.00 fee bears any relationship whatsoever to VSP's actual record-provision costs at all. The VSP's VFOIA production likewise lacks any evidence that the VSP's

New Annual Fee is tied to its costs. The best justification for the fee in those documents is that the "30k estimate isn't too insane afterall [sic]" because "2 cents per seal-order notification" is comparable to what other states charge per document for records. Compl. Ex. 2. Such a justification bears no relationship to the costs that VSP will incur to implement the sealing order notification program. Likewise, VSP's "rough estimate" of $4 million is not grounded in any objective evidence or facts. *Id.* Ex. 7. Nor is there evidence that VSP considered other less costly alternatives, such as charging an individualized licensing fee to each business based on the volume of record retrievals that it performs in the Commonwealth.

The staggering size of the VSP's New Annual Fee combined with the VSP's complete lack of public justification for the amount it selected demonstrate that it has no connection to Code § 19.2-392.16(C)'s imperative—that the fee must "be used to cover the cost." This arbitrary $30,000.00 per-business screening service fee is expected to equate to millions of dollars in unjustified annual revenue to the VSP beyond the cost of providing notifications of sealing orders via a portal and automated messages.

Due to the gross disparity between the VSP's New Annual Fee and the actual costs VSP will incur to provide sealing notifications, the establishment of VSP's New Annual Fee constitutes an *ultra vires* exercise of agency power. *See Kavanaugh ex rel. Kavanaugh v. Virginia Birth-Related Neurological Inj. Comp. Program*, 60 Va. App. 440, 447 (2012) (holding that an agency could not issue a regulation that was indirectly inconsistent "with the text and structure of the enabling legislation"); *Hollowell v. Virginia Marine Res. Comm'n*, 56 Va. App. 70, 89 (2010) (holding that a regulation which expanded the authorizing statute's limits on restricting crab dredging in "a" season by prohibiting crab dredging indefinitely was invalid). Based on a plain reading of Code § 19.2-392.16, the VSP's New Annual Fee exceeds the authority that the General

Assembly granted to the VSP, and Plaintiffs are consequently more likely than not to prevail on this second theory of *ultra vires* agency action as well.

### C. The VSP's New Annual Fee Violates the Due Process Clause of the Virginia Constitution.

Because the VSP's New Annual Fee has no rational relationship to the purpose of its authorizing statute and is therefore arbitrary, it unequivocally violates the Due Process Clause of the Virginia Constitution.

The Constitution of Virginia requires "[t]hat no person shall be deprived of his life, liberty, or property without due process of law." Va. Const. Art. I, § 11. A substantive challenge under Virginia's due process clause "measures the reasonableness of a statute against the legislature's power to enact the law." *King v. Virginia Birth-Related Neurological Inj. Comp. Program*, 242 Va. 404, 412 (1991). Where, as here, "no fundamental right or suspect class is affected," courts apply the rational basis test to substantive due process claims. *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 257 Va. 1, 21 (1999). "The rational basis test is satisfied from a due process standpoint if the challenged legislation has a reasonable relation to a proper purpose and is not arbitrary or discriminatory." *Id.*; *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) ("[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.").[2]

For the same reasons establishment of VSP's New Annual Fee amounts to *ultra vires* action insofar as it exhibits no fidelity to the express text of the enabling statute, it, too, violates the Due Process Clause, given that it bears no relationship to the stated government interest here: covering the cost of providing notification of sealing orders. *See Nat'l Linen Serv. Corp. v. City of Norfolk,*

[2] "[T]he due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution." *Shivaee v. Commonwealth*, 270 Va. 112, 119 (2005).

196 Va. 277, 281 (1954) ("[T]he authority conferred under a general or implied grant of power must be exercised reasonably, in good faith, and bear a real and substantial relation to the public health, safety, morals or general welfare . . . ."). Here, the only legitimate governmental interest that the VSP's New Annual Fee can serve is that outlined in the VSP's New Annual Fee's enabling statute: It is an "annual licensing fee . . . to be used to cover the cost of providing [notifications of orders of sealing]." Code § 19.2-392.16(C). On its face, the fee of $30,000.00 is not rationally related to covering VSP's costs of providing notifications of sealing. And nowhere in the VFOIA documents that VSP provided does the VSP even consider the actual costs to VSP when determining the amount of the fee. The statutory scheme simply requires VSP to "electronically notify" business screening services that have registered with the VSP of sealing orders. The VSP has chosen to provide these notifications through a portal where it uploads regular sealing order notifications that registered business screening services can access and download. *See supra* p. 6. Requiring every business screening service engaged in the business of collecting, assembling, evaluating, or disseminating Virginia criminal history records and traffic history records on individuals to pay an arbitrary, yearly fee of $30,000.00 far exceeds the costs of operating such a system and is the definition of an arbitrary amount. Already, thirty-one businesses have registered and paid the $30,000.00 fee. *BSS Seal Order Notification Program*. This means that, within a month of Code § 19.2-392.16 taking effect, VSP has already earned $930,000.00. When considering that the VSP expects 250 business to register, the VSP stands to make millions of dollars from this fee *annually*. *See* Compl. Ex. 6. And this amount does not even take into account the statement of VSP's counsel that the VSP "likely will want to be able to increase the fee to a higher amount" in the future. Compl. Ex. 1 at 3. Such a high return is not reasonably related to the cost of providing a standard notification via a portal, rendering it arbitrary.

Further, the VSP's New Annual Fee is arbitrary because it fails to account for the differences between business screening services. *See Pulliam*, 257 Va. at 21 (to satisfy due process, a regulation must not be "arbitrary or discriminatory"). The VSP imposes the VSP's New Annual Fee uniformly, across all business screening services, regardless of their need for sealing notifications, their size, or the amount of criminal history records they obtain. This means that small businesses who have no need for the sealing notifications because they do not store criminal history records are inexplicably treated the same as large businesses that maintain databases. For example, all the BSS Plaintiffs conduct new, individualized searches for every name they receive. *See supra* pp. 7–10. In other words, they do not maintain a database or utilize the stale criminal history record information that deletion under Code § 19.2-392.16(B) is intended to target. Despite this, the BSS Plaintiffs are required to pay a $30,000.00 fee annually because they fall under the broad statutory definition of "business screening services." *See* Code § 19.2-392.16(A) (defining "[b]usiness screening service" as "a person engaged in the business of collecting, assembling, evaluating, or disseminating Virginia criminal history records or traffic history records on individuals"). This requirement is arbitrary and bears no relationship to the statute's purpose of ensuring business screening services maintain accurate criminal history records.

Finally, to the extent the $30,000.00 fee effectively forecloses smaller business screening services from operating in the Virginia market, it functions as a barrier to entry that has no relationship to either the regulatory goal of covering VSP's costs or ensuring the deletion of sealed records. Restricting competition is not a legitimate government interest because it has "no substantial relation to the public health, safety, morals, or welfare of the community." *Bd. of Cnty. Sup'rs of Fairfax Cnty. v. Davis*, 200 Va. 316, 323 (1958); *see also Nat'l Linen Serv. Corp.*, 196 Va. at 283–84 (holding that an ordinance which would have established "an unfair monopoly" was

arbitrary and invalid). The reality for ScreenThem as a small, woman-owned business is that, if it is required to pay a yearly $30,000.00 fee, it will likely be forced to go out of business. Compl. ¶ 61. Likewise, the VSP's New Annual Fee will force Roundstone to stop operating in Virginia. *Id.* ¶ 56. Many other small business screening services throughout the Commonwealth face a similar fate. *Id.* ¶ 57. A fee that operates to exclude small businesses from the market, rather than as a mechanism for cost recovery, cannot survive rational basis review.

Accordingly, Plaintiffs are likely to succeed on their claim that the VSP's New Annual Fee violates due process.

## III. The Remaining Factors Strongly Favor Entry of an Injunction.

The two remaining factors, the balance of the hardships and whether the injunction is in the public interest, both strongly weigh on the scale in favor of injunctive relief here.

First, the balance of the hardships favors granting an injunction because Plaintiffs will suffer far greater harm than the VSP if the status quo continues. Plaintiffs will lose customers due to unavoidable price hikes, or worse, go out of business. Compl. ¶¶ 51–65; *see also Ducard v. Lazy Creek*, 99 Va. Cir. 449 (2018) (holding that the balance of the equities favored plaintiff because plaintiff would potentially lose 20 percent of its customer base). PBSA's members will suffer the same harm, and PBSA will lose members as companies who cannot pay the fee decide to close their doors. Compl. ¶ 69. Compared to the negligible harm that the VSP will suffer from being unable to collect a fee so exorbitant that the Legislature did not authorize it, the balance of the hardships weighs in favor of Plaintiffs. And of course, entry of an injunction does not preclude the VSP from "trying again" and setting a lawful fee that actually reflects reality in terms of their costs; it would simply restrain the VSP from acting ***arbitrarily***, which of course the government has no legitimate interest in doing. Further, due to the imminent harm Plaintiffs face, the equities favor

granting a temporary restraining order to preserve the status quo pending a hearing on Plaintiffs' motion for preliminary injunction.

Also, preventing an unconstitutional tax promulgated by unelected officials is decidedly in the public interest. Indeed, it has been well established throughout our nation's history that "taxation without representation is a monstrous and intolerable despotism," and this guiding principle has informed not only the Virginia Constitution, but also the ***revolution*** and the U.S. Constitution as well. *Justs. of Harrison Cnty. v. Holland*, 44 Va. 247, 256 (1846). And it is axiomatic that "[t]he public interest is always served by clarifying and enforcing the constitutional order." *Lucas v. Stimson*, 115 Va. Cir. 519 (2025); *see also Commonwealth v. Sadler Bros. Oil Co.*, No. 230610, 2023 WL 9693656, at *5 (Va. Oct. 13, 2023) ("[T]here is a significant public interest in protecting the constitutional rights of the citizenry from being transgressed by an unconstitutional statute."); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("[U]pholding constitutional rights surely serves the public interest."). Here, the public interest is served by enforcing both the taxation and due process requirements of the Constitution of Virginia. In the same vein, preventing the enforcement of a fee that exceeds its statutory authority, causes disproportionate harm to small businesses, and hampers the free market is also in the public interest.

As a result, the remaining Virginia Supreme Court Rule 3:26 factors favor granting an injunction as well.

## CONCLUSION

For these reasons, the Court should grant a temporary restraining order and preliminary injunction enjoining the VSP from enforcing or collecting the $30,000.00 business screening service annual licensing fee. Plaintiffs also request that the Court set a hearing on the motion at the earliest practicable date.

Dated: August 7, 2026

Respectfully submitted,

**PROFESSIONAL BACKGROUND SCREENING ASSOCIATION; IPROTECT SCREENING LLC; ROUNDSTONE, INC.; SCREENTHEM BACKGROUND INVESTIGATIONS, INC.; and S2VERIFY, LLC**

By: _____
Of Counsel

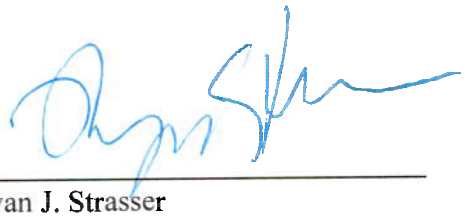
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## CERTIFICATE OF NOTICE

I hereby certify that on August 7, 2026, I gave letter notice of Plaintiffs' filing of the Motion for a Temporary Restraining Order and Preliminary Injunction pursuant to Va. S. Ct. R. 3:26(b) via hand delivery on:

Virginia Department of State Police &
Colonel Jeffrey S. Katz, in his official capacity as
Superintendent of the Virginia State Police
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