In the

Supreme Court of Virginia

At Richmond

Record No.

COURT OF APPEALS RECORD NO. 0157-24-2

SHERIFF DAVID R. HINES (IN HIS OFFICIAL CAPACITY AS SHERIFF FOR HANOVER COUNTY) and HANOVER COUNTY,

Petitioners,

– v. –

ALICE MINIUM,

Respondent.

PETITION FOR APPEAL

William W. Tunner (VSB No. 38358)
John P. O'Herron (VSB No. 79357)
Peter S. Askin (VSB No. 93371)
Daniel-Lester S. Edwards (VSB No. 99337)
*THOMPSON*MCMULLAN, P.C.
100 Shockoe Slip, 3rd Floor
Richmond, Virginia 23219
(804) 649-7545 (Telephone)
(804) 780-1813 (Facsimile)
wtunner@t-mlaw.com
joherron@t-mlaw.com
paskin@t-mlaw.com
dledwards@t-mlaw.com

Counsel for Petitioner
Sheriff David R. Hines

Rebecca B. Randolph (VSB No. 68564)
Deputy County Attorney
Leah D. Han (VSB No. 89131)
Senior Assistant County Attorney
HANOVER COUNTY ATTORNEY'S OFFICE
7516 County Complex Road
Hanover, Virginia 23069
(804) 365-6035 (Telephone)
(804) 365-6302 (Facsimile)
rbrandolph@hanovercounty.gov
ldhan@hanovercounty.gov

Counsel for Petitioner
Hanover County

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INTRODUCTION

The Court of Appeals of Virginia ("CAV") held that the Virginia Freedom of Information Act ("VFOIA") requires law enforcement agencies to disclose the names of all officers, even those actively on undercover assignment. CAV Op. at 5–6. This holding renders the VFOIA exclusion for the "identity of . . . undercover officer[s]" in Code § 2.2-3706(B)(10) completely meaningless and otherwise violates bedrock statutory interpretation principles and VFOIA's own statutory conflict canon in Code § 2.2-3706(F). More importantly, it jeopardizes the safety of former, active, or future undercover officers by exposing their identities. This Court should grant this Petition for Appeal.

SUMMARY OF ARGUMENT

Sheriff David R. Hines ("Sheriff Hines") maintains a group of officers "to serve in an undercover operation or protective detail at any point in time." CAV Op. at 5 n.6 (internal quotation marks omitted). Hanover County ("County") has access to these names. This appeal concerns whether VFOIA's law enforcement exclusions apply to the names of the officers in this group.

There are three main VFOIA provisions at issue. The first lies in the exclusions of "general application" in Code § 2.2-3705.1(1), which states that "[n]o provision" of VFOIA "shall be construed as denying public access" to "names" of public employees. The second excludes information that "would reveal the staffing, logistics, or tactical plans of [] undercover operations or protective details." Code § 2.2-3706(B)(8) (hereinafter, "Operations Exclusion"). The third excludes the "identity of . . . undercover officer[s]." *Id.* (B)(10) (hereinafter, "Identity Exclusion").

The CAV erred in mandating disclosure of the names in Sheriff Hines' undercover group despite the above exclusions, for three reasons.

First, the CAV erred in interpreting Code § 2.2-3705.1(1). The CAV held that such provision meant the General Assembly "did not intend to allow law enforcement agencies to refuse to produce the names of their employees under the exceptions in Code § 2.2-3706(B)(8) and (10)"—which are the Identity and Operations Exclusions. CAV Op. at 5. In other words, public bodies cannot "refuse to produce the names of law enforcement officials" under any circumstances, even if an officer is *actively undercover* at the time of the VFOIA request. CAV Op. at 6.

This interpretation renders the Identity Exclusion meaningless. If public bodies cannot withhold the "names" of law enforcement officials under any circumstances, then law enforcement can *never* withhold the "identity of . . . undercover officer[s]." *See* Code § 2.2-3706(B)(10). Disclosing one's "name" also discloses their "identity."

To the extent Code § 2.2-3705.1(1) and the Identity Exclusion conflict, the CAV had to resolve such conflict in favor of the latter. VFOIA itself states: "In the event of conflict between this section as it relates to requests made under this section and other provisions of law, *this section shall control*." Code § 2.2-3706(F) (emphasis added). "[T]his section" refers to the law enforcement exclusions section in Code § 2.2-3706(B), which contains the Identity and Operations Exclusions.

The CAV's Code § 2.2-3705.1(1) interpretation will have profound consequences for all law enforcement in the Commonwealth, who now must disclose names of all employees, regardless of how confidential or dangerous their work is and even if *any* VFOIA exclusion would apply.

Second, the CAV erred in failing to consider or apply the Identity Exclusion. The CAV never reached this exclusion because it reasoned

that Sheriff Hines and Hanover County failed to satisfy the CAV's contemporaneous objection rule in Rule 5A:18. CAV Op. at 4 n.5.

But Sheriff Hines and the County prevailed at the circuit court and were appellees at the CAV. "Rule 5A:18 does not require *an appellee* to raise an issue at trial before it may be considered on appeal . . . ." *Driscoll v. Commonwealth,* 14 Va. App. 449, 451–52 (1992) (emphasis added). Moreover, appellees can defend their judgment "on any ground supported by the record," even if not "considered by the circuit court." *Robert & Bertha Robinson Fam., LLC v. Allen*, 295 Va. 130, 141 (2018) (emphasis added).

The evidence was also sufficient to satisfy the Identity Exclusion. It is undisputed that the withheld names related to a group of officers who "may be assigned to serve in an undercover operation or protective detail at any point in time." CAV Op. at 5, n.6 (internal quotation marks omitted). They are thus "undercover officer[s]"—undercover work is within their job description.

Third, the CAV erred in interpreting and applying the Operations Exclusion. The CAV held that "would reveal" is limited to only "actually

existing" operations and not "[h]ypothetical future undercover operations." CAV Op. at 6–8.

But in the VFOIA exclusion context, "would" includes "potential future" results. *Virginia Department of Corrections v. Surovell*, 290 Va. 255, 265 (2015) (interpreting the phrase "would jeopardize" in VFOIA). In other contexts, "would" necessarily contemplates the "likelihood" or "probabilistic" result of something. *In re Watford*, 295 Va. 114, 124 (2018) (interpreting "would" in the actual innocence statutes). "Would reveal" therefore contemplates the potential or hypothetical "staffing" of future undercover and protective details, contrary to the CAV's interpretation.

The CAV's Operations Exclusion interpretation has broader VFOIA consequences. The phrase "would reveal" appears in no fewer than *seven* VFOIA exclusions related to trade secrets, personal information, and the Commonwealth's economic development strategies. *See, e.g.*, Code §§ 2.2-3705.2(11); -3705.4(A)(3); -3705.4(A)(7); -3705.6(11)(b); -3705.6(28); -3705.7(29); -3705.7(33). Because of the CAV's interpretative errors and their far-reaching impacts on the treatment of other public records and information, this Court should grant the Petition.

STATEMENT OF THE FACTS & THE CASE

Minium did not assign error to any circuit court factual findings. The CAV also held that it "accept[ed] and adopt[ed] the trial court's finding regarding which officers are available for assignment in undercover or protective operations." CAV Op. at 5, n.6. Accordingly, this Court views the facts "in the light most favorable to the prevailing party" at trial—Sheriff Hines and the County—drawing all reasonable inferences in their favor. *See Fitzgerald v. Loudoun Cnty. Sheriff's Off.*, 289 Va. 499, 505 (2015).

1. UNDERCOVER AND PROTECTIVE DETAIL OPERATIONS INVOLVE OFFICERS NOT READILY RECOGNIZABLE AS LAW ENFORCEMENT.

Sheriff Hines provides the primary source of law enforcement services to the citizens of Hanover County, including supplying bailiffs, executing civil process, and traffic patrol. R. 62. These operations also include assigning officers to undercover and protective detail work. R. 63.

An undercover operation is "[a]ny law enforcement activity where it's not known that [officers] are law enforcement" because officers are "not readily recognizable." R. 63. Sheriff officers work undercover, for example, in conjunction with state and federal law enforcement agencies, such as the DEA or the FBI. R. 63–64. Undercover work is typical for

drug enforcement and human trafficking. R. 64. This work involves using false identifications, pseudonyms, and cover stories, or coordinating confidential informants. R. 64, 74.

Protective detail operations are "personal protective services for individuals under extreme duress." R. 64. These assignments include investigating domestic violence threats, threats against judicial officers, escorting high ranking officials traveling in Hanover County, and conducting surveillance. R. 64-65. When performing protective detail work, officers are not "readily recognizable by the public." R. 65. The "whole purpose [of such work] would be to blend in with the community and not draw undue attention." R. 65.

2. Sheriff Hines Staffs Undercover and Protective Detail Operations from a Group of Officers.

When staffing undercover and protective detail operations, Sheriff Hines chooses from a group of officers below the rank of Captain. R. 66. This group does not include officers that are "public facing" or who regularly perform work that involves a "media presence," such as attending recruitment events or County fairs. R. 68. When assigning undercover or protective detail work, a supervising officer selects specific

officers from the group based, in part, on an officer's "physical characteristics" and the skills needed for a specific assignment. R. 66.

Publicly disclosing the names of the officers in this group "would hamper the officer's ability from the beginning of his or her career to engage in undercover field work" and force Sheriff Hines "to change [undercover and protective detail] operations out of its current form." R. 68–69.

3. MINIUM REQUESTS OFFICER NAMES TO POST PUBLICLY ONLINE.

Minium filed a VFOIA request to Sheriff Hines and the County for "a roster of all sworn law enforcement employees on payroll with [the Hanover Sheriff's Office]." R. 100–02, 136–37. Specifically, Minium asked for the full legal name, job title, rank, assigned unit or division, gender, race, date of first agency hire, date of current hire, fiscal year 2023 salary, fiscal year 2023 overtime and bonus pay, and fiscal year 2023 total compensation for each officer. *Id*.

Minium's VFOIA request stated that the requested names "will be made available to the general public," noting her website www.openoversightva.org, which contains pictures and descriptions of law enforcement officers. R. 11.

Sheriff Hines and the County responded by producing all sheriff employees' job title, rank, and the other information Minium requested. R. 103, 137. Pursuant to the Identity and Operations Exclusions in Code §§ 2.2-3706(B)(8) and (B)(10), Sheriff Hines and the County withheld the names of officers below the rank of Captain subject to undercover or protective detail job assignments. R. 103–15; R. 120–21, 137–38. Sheriff Hines and the County also produced the names of officers below the rank of Captain who "who have highly visible roles and have established a public presence." R. 67–68, 125–35.

4. THE CIRCUIT COURT RULES FOR SHERIFF HINES & THE COUNTY.

Minimum then filed a Petition for Writ of Mandamus under Code § 2.2-3713 seeking disclosure of the withheld names. R. 1–9. The circuit court held a trial on the Petition, where it heard testimony and written evidence consistent with the facts stated above. R. 37–99.

The circuit court entered an order and letter opinion dismissing the Petition. R. 22–31. The circuit court found that Sheriff Hines properly withheld the group of names pursuant to the Operations Exclusion in Code § 2.2-3706(B)(8). R. 22–27. It reasoned that publicly disclosing these

names would "interfere with the ability of the Sheriff to *staff* protective details or undercover operations, now or in the future." R. 26.

5. THE CAV REVERSES, HOLDING THAT CODE § 2.2-3705.1(1) SUPERSEDES THE IDENTITY AND OPERATIONS EXCLUSIONS.

The CAV issued an opinion reversing the circuit court. The opinion has three key holdings.

First, the CAV held that Code § 2.2-3705.1 prohibited withholding the officers' names. The CAV reasoned that the General Assembly passed Code § 2.2-3705.1(1) after the Identity and Operations Exclusions already existed, and therefore the General Assembly "did not intend to allow law enforcement agencies to refuse to produce the names of their employees" pursuant to the Identity and Operations Exclusions. CAV Op. at 5. The CAV held simply: "the County may not refuse to produce the names of law enforcement officials." *Id.* at 6.

Second, the CAV did not consider the Identity Exclusion. *Id.* at 4 n.5. The CAV noted that the circuit court "did not address" this exception and cited the CAV's contemporaneous objection rule in Rule 5A:18. *Id.*

Third, the CAV held that the Operations Exclusion did not apply to the withheld names. The CAV held that the phrase "would reveal" in such exclusion means that disclosure would reveal "actually existing tactical

plans, staffing, or logistics of an undercover operation." *Id.* at 6 (internal quotation marks omitted). The CAV thus reasoned that such exclusion did not apply to "[h]ypothetical future undercover operations" or "hypothetical undercover personnel staffing." *See* CAV Op. at 7–8.

Judge Lorish wrote a concurring opinion, finding that the Identity Exclusion in Code § 2.2-3706(B)(10) did not apply to the withheld names. The concurrence reasoned that Sheriff Hines and the County had a duty to produce evidence that that the withheld names related to an officer who "worked undercover, was currently working undercover, or was slated to work undercover on a specific operation." *Id.* at 10.

ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in holding that Code § 2.2-3705.1(1) of the Virginia Freedom of Information Act ("VFOIA") required disclosure of the names of Hanover County Sheriff officers who work undercover or on protective details, even if VFOIA exclusions in Code §§ 2.2-3706(B)(10) and (B)(8) applied to such names.

   See CAV Op., at 5–6. *Preserved at* Br. of Appellees at 22–25; CAV Panel Oral Argument, January 7, 2025.

2. The Court of Appeals erred in refusing to consider the VFOIA exclusion in Code § 2.2-3706(B)(10), and further erred in failing to interpret that exclusion and find the evidence sufficient to apply such exclusion to the withheld names of the officers employed by the Sheriff of Hanover County.

See CAV Op., at 4, n.5. *Preserved at* Br. of Appellees at 21–22, 27–28; CAV Panel Oral Argument, January 7, 2025; R. at 43, 137.

3. The Court of Appeals erred in interpreting the VFOIA exclusion in Code § 2.2-3706(B)(8) and in failing to find the evidence sufficient to apply that exclusion to the withheld names of the officers employed by the Sheriff of Hanover County.

   See CAV Op., at 6–8. *Preserved at* Br. of Appellees at 12–21, 27–28; CAV Panel Oral Argument, January 7, 2025.

STANDARD OF REVIEW

This appeal raises issues concerning the interpretation of VFOIA, the application of VFOIA exclusions to certain documents and information, and the circuit court's factual findings relevant to such exclusions. Accordingly, this appeal is "a mixed question of law and fact." *Hawkins v. Town of S. Hill*, 301 Va. 416, 424 (2022) (citation and internal quotation marks omitted).

Regarding any questions of fact, this Court gives "deference to the trial court's factual findings," viewing "the facts in the light most favorable to the prevailing party." *Am. Tradition Inst. v. Rector & Visitors of Univ. of Virginia*, 287 Va. 330, 338–39 (2014) (brackets, citation, and internal quotation marks omitted). This Court accordingly draws "all reasonable inferences" in favor of the prevailing party and defers

resolution of any "divergent or conflicting inferences" to the circuit court. *Fitzgerald v. Loudoun Cnty. Sheriff's Off.*, 289 Va. 499, 505 (2015) (citation and internal quotation marks omitted).

Statutory interpretation is a question of law this Court reviews de novo. *Hawkins*, 301 Va. at 424. This Court applies the plain meaning to statutory terms. *Am. Tradition Inst.*, 287 Va. at 341. If a statutory term is "clear and unambiguous" courts "may not consider *rules of statutory construction*, legislative history, or extrinsic evidence," *Jackson v. Jackson*, 298 Va. 132, 139 (2019) (citation and internal quotation marks omitted) (emphasis added).

If a statutory term in VFOIA is nonetheless ambiguous, then this Court turns to the "statutory canons of construction." *Hawkins*, 301 Va. at 424. VFOIA, for instance, states that provisions requiring public disclosure "shall be liberally construed" and that any exclusion thereto shall be "narrowly construed." Code § 2.2-3700(B). However, the "liberal construction of a statute" is not a license for this Court to substitute its judgment for the words the legislature chose or to "draw the line with respect to VFOIA" on "[p]ublic policy questions." *Daily Press, LLC v. Off. of Exec. Sec'y of Supreme Ct.*, 293 Va. 551, 563 (2017).

ARGUMENT

Generally, VFOIA requires that public documents "shall be open to citizens of the Commonwealth." Code § 2.2-3704(A). VFOIA, however, provides numerous exclusions to this general access to documents.

This appeal turns on the application of the exclusions in Code § 2.2-3706(B) unique to law enforcement. Specifically, VFOIA excludes disclosure of both the "identity of any . . . undercover officer" (the Identity Exclusion) as well as information that "would reveal the staffing, logistics, or tactical plans of [] undercover operations or protective details" (the Operations Exclusion). Code §§ 2.2-3706(B)(8) & (B)(10).

The CAV, however, held that the General Assembly "did not intend to allow law enforcement agencies to refuse to produce the names of their employees under the exceptions in Code § 2.2-3706(B)(8) and (B)(10)." CAV Op. at 5. Instead, Code § 2.2-3705.1(1)—a VFOIA sub-section of "general application"—mandated disclosure of all "names of law enforcement officials," even if any VFOIA exclusion applied. *Id.* at 6.

This is error. Code § 2.2-3705.1(1) does not mandate disclosure of names if a VFOIA exclusion otherwise applies, and the trial evidence—

in the light most favorable to Sheriff Hines and the County—supports applying the Identity and Operations Exclusions to the withheld names.

1. THE CAV ERRED IN APPLYING CODE § 2.2-3705.1(1) TO THE WITHHELD OFFICERS' NAMES (AOE 1).

Unlike other VFOIA exclusions particular to a subject-matter, Code § 2.2-3705.1 provides VFOIA exclusions of "general application." Of note, subsection (1) excludes "[p]ersonnel information concerning identifiable individuals." Code § 2.2-3705.1(1). This subsection then states:

> No provision of this chapter or any provision of Chapter 38 shall be *construed* as denying public access to . . . (ii) records of *the name*, position, job classification, official salary, or rate of pay of, and records of the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body.

Id. (emphases added).[1]

The CAV held that this provision mandated disclosure of all "names of law enforcement officials," *even if* such names met the VFOIA disclosure "exceptions in Code § 2.2-3706(B)(8) and (B)(10)." CAV Op. at 5–6. Thus, according to the CAV, law enforcement must disclose all employee names, including officers that have been undercover, will be

[1] Sheriffs are constitutional officers, who "shall be considered public bodies." Code § 2.2-3701; *Connell v. Kersey*, 262 Va. 154, 161 (2001).

undercover, or are even actively undercover at the time of a VFOIA request.

Such interpretation violates principles of statutory interpretation, VFOIA's own statutory conflict canons, and the plain meaning of Code § 2.2-3705.1(1).

1.1 The CAV's Interpretation Violates Statutory Canons in Code § 2.2-3706(F) and this Court's Jurisprudence.

The CAV's Code § 2.2-3705.1(1) interpretation effectively deletes the Identity Exclusion from VFOIA. If law enforcement must disclose all "names" of all employees in all circumstances pursuant to Code § 2.2-3705.1(1) as the CAV held, then such disclosure will necessarily divulge the "identity of . . . undercover officer[s]" as provided in the Identity Exclusion. There is thus no scenario where law enforcement could invoke the Identity Exclusion under the CAV's opinion.

Such interpretation violates multiple canons of statutory construction. First, the CAV's interpretation violates VFOIA's own interpretative guidance. Subsection F of Code § 2.2-3706—which contains the law enforcement VFOIA exclusions—provides: "[i]n the event of conflict between this section as it relates to requests made under this section and other provisions of law, *this section shall control*." Code

§ 2.2-3706(F) (emphasis added). Because the Identity Exclusion lies within "this section" (Code § 2.2-3706), it must "control" over Code § 2.2-3705.1(1).

Second, the CAV's interpretation violates this Court's statutory interpretation principles more broadly. This Court "resist[s] a construction of a statute that would render part of a statute superfluous." *Bd. of Supervisors of Fairfax Cnty. v. Cohn*, 296 Va. 465, 473 (2018). "Every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary." *Id.* Because disclosing a "name" will always inherently disclose a person's "identity," the CAV has rendered the Identity Exclusion without any force or effect.

Third, the CAV's interpretation is inconsistent with this Court's own statutory conflict principles.

> [W]here one statute speaks to a subject generally and another deals with an element of that subject specifically, the statutes will be harmonized, if possible, and if they conflict, *the more specific statute prevails.*

Crawford v. Haddock, 270 Va. 524, 528 (2005) (emphasis added).

Thus, when faced with an apparent conflict between Code § 2.2-3705.1(1) and the Identity Exclusion, the CAV had to harmonize the

statutes so that both have effect. To do so, the CAV had to rule that the "more specific statute" controls.

The CAV failed to do so. Code § 2.2-3705.1(1) is a statute of "general application." The Identity Exclusion, by contrast, lies within Code § 2.2-3706, which is specific to law enforcement. Both statutes would have effect only if the Identity Exclusion controls.

1.2 Code § 2.2-3705.1(1) Only Provides an Interpretative Canon for a VFOIA Ambiguity.

The CAV also ignored Code § 2.2-3705.1(1)'s plain meaning and context. That statute states that no VFOIA exclusion "shall be *construed*" to prevent the disclosure of the "name" of any applicable government official. *Id.* (emphasis added).

This statute is merely a canon of statutory construction. Its only directive is to "construe[]" other VFOIA terms. A VFOIA provision that directs a court to "construe[]" its terms constitutes a "statutory canon[] of construction." *Hawkins*, 301 Va. at 424–25. But this Court applies "rules of statutory construction"—i.e., tools to "construe[]" statutes—only to resolve a statutory ambiguity. *Jackson*, 298 Va. at 139. Thus, the CAV could rely on Code § 2.2-3705.1(1) only to resolve an ambiguous statutory term existing elsewhere in VFOIA.

The CAV, however, never identified any such ambiguity in any other VFOIA provision. In fact, the CAV specifically held that the phrase "would reveal" in the Operations Exclusion was "*un*ambiguous." CAV Op. at 6 (emphasis added). The CAV never even addressed the Identity Exclusion at all. Absent any ambiguity in any VFOIA exclusion, there was nothing for the CAV to "construe[]," and its reliance on the interpretative guidance in Code § 2.2-3705.1(1) is error.

Code § 2.2-3705.1(1)'s broader context supports this plain meaning interpretation. *See Sheppard v. Junes*, 287 Va. 397, 403 (2014) (holding that courts "must consider a statute in its entirety, rather than by isolating particular words or phrases"). In its full context, VFOIA is structured by giving a general statement that "all public records shall be open to citizens of the Commonwealth," Code § 2.2-3704(A), and then providing various exclusions to that general statement.

Code § 2.2-3705.1 is not a supplement to that general statement in Code § 2.2-3704(A)—instead, it lies within a VFOIA exclusion of "general application." In light of its context, Code § 2.2-3705.1 does not contain any independent, more specific, duty to disclose documents. It is illogical that the General Assembly would embed a separate and independent

duty to disclose within an exclusionary provision of general application. The CAV thus misinterpreted Code § 2.2-3705.1(1) as any independent directive to public bodies to disclose names of government officials.

2. THE EVIDENCE WAS SUFFICIENT TO SATISFY THE IDENTITY EXCLUSION (AOE 2).

Should this Court reverse the CAV as to the first assignment of error, it must then determine whether the evidence was sufficient to support the Identity or Operations Exclusions in Code § 2.2-3706.

Citing Rule 5A:18, the CAV's majority opinion did not address the Identity Exclusion at all. The second assignment of error thus presents three sub-issues: (1) did the CAV err in relying on Rule 5A:18 in failing to address the Identity Exclusion, and (2) if so, what is the plain meaning of "undercover officer," and (3) was the trial evidence sufficient to support applying the Identity Exclusion to the withheld names?

2.1 The CAV Erred in Relying on Rule 5A:18 to Ignore the Identity Exclusion.

The CAV's majority opinion failed to address the Identity Exclusion in Code § 2.2-3706(B)(10) because the circuit court "did not address" this exclusion and therefore the CAV had "no ruling to address" pursuant to "Rule 5A:18"—the contemporaneous objection rule. CAV Op. at 4 n.5.

This is error. Rule 5A:18 did not apply to the County and Sheriff Hines because they were the appellees at the CAV. "Rule 5A:18 does not require *an appellee* to raise an issue at trial before it may be considered on appeal . . . ." *Driscoll v. Commonwealth,* 14 Va. App. 449, 451–52 (1992) (emphasis added). Moreover, an "appellee is free to defend its judgment on any ground supported by the record, whether or not that ground was relied upon, rejected, or *even considered by the circuit court*." *Robert & Bertha Robinson Fam., LLC v. Allen*, 295 Va. 130, 141 (2018) (emphasis added). The County and Sheriff Hines had no duty to preserve error because they prevailed at the circuit court.

Even if Rule 5A:18 applied to Sheriff Hines and the County, they satisfied it. Sheriff Hines and the County consistently asserted the Identity Exclusion in their initial response to the VFOIA request, at the circuit court, and at the CAV. *See* R. at 43, 137; Br. of Appellees at 21. The CAV's opinion also acknowledged: "the County asserted two exceptions to VFOIA under Code §§ 2.2-3706(B)(8) *and (10)*." CAV Op. at 4 (emphasis added). Sheriff Hines and the County have never waived or failed to assert the Identity Exclusion at any point in this litigation.

2.2 "Undercover Officer" Is a Job Description—Not an Ongoing Temporal Requirement.

The Identity Exclusion excludes "[t]he identity of any . . . undercover officer." Code § 2.2-3706(B)(10). Minium has not disputed that the withheld names fall within the plain meaning of "identity." The sole issue is thus whether the evidence was sufficient to show that the withheld names concerned officers who are "undercover officer[s]." Specifically, the parties dispute whether this phrase has a temporal requirement in relation to the time a VFOIA request is submitted. Minium argued, for instance, that officers must be actually "undercover on [the] specific date" of the VFOIA request. R. at 82.

VFOIA does not define "undercover officer." To ascertain its plain meaning, this Court turns to dictionary definitions—primarily, legal dictionaries. *Sheets v. Castle*, 263 Va. 407, 413 (2002). An "undercover officer" therefore means "[a] police officer whose appearance is that of an ordinary person," displaying "nothing to indicate that he or she is a police officer." POLICE OFFICER, Black's Law Dictionary (11th ed. 2019).

"Undercover officer" thus means an officer whose law enforcement role includes working assignments where they are "undercover"—i.e., not displaying police identification. Serving as an "undercover officer" is part

of an officer's job description. If an officer works patrol, jail, and court in a typical month, then that officer is simultaneously a patrol officer, a jail officer, and a court officer. The officer's identity as these types of officers does not change based on the specific assignment he or she works on any given day or even any hour.

The statutory context of "undercover officer" supports this interpretation. The Identity Exclusion applies to the "*identity* of . . . undercover officer[s]." Code § 2.2-3706(B)(10) (emphasis added). "Identity" means, in part, "the qualities and attitudes that a person or group of people have." IDENTITY(4), Black's Law Dictionary (12th ed. 2024). "Identity" thus connotes a degree of permanence—the "qualities" of an individual or a thing do not change day to day. An officer's "identity" as an "undercover officer" or as a patrol officer does not change merely because their job requires them to do something else on a particular day.

Comparing other states' freedom of information statutes supports this interpretation of the Identity Exclusion. Pennsylvania, for instance, permits public bodies to withhold the "name" or "identity" of any individual "*performing* an undercover or covert law enforcement activity." 65 P.S. § 67.708(b)(6)(iii) & (c) (emphasis added). Tennessee

similarly excludes information that identifies "an officer designated as *working* undercover." Tenn. Code § 10-7-504(g)(1)(A)(iii) (emphasis added). Arkansas provides an exception for the "identities of law enforcement officers *currently* working undercover." Ark. Code § 25-19-105(b)(10)(A) (emphasis added).

These undercover exceptions in other state FOIA statutes have a common theme—they denote the present progressive tense ("performing," "currently," "working") indicating a temporal limitation regarding the undercover activity. By contrast, the Identity Exclusion lacks any such temporal limitation. It is written more broadly to include any "undercover officer," whether currently working in such capacity or not. If the General Assembly had intended the Identity Exclusion to apply only to officers working undercover at the time of a VFOIA request, it would have adopted language similar to these statutes.

Minium's proposed definition of "undercover officer"—an officer working in an undercover capacity on the "specific date" of the VFOIA request—is otherwise impracticable. This reading would mean the Identity Exclusion's applicability would change day-to-day—even hour-by-hour—depending on who is working undercover at the exact moment

that a VFOIA request is submitted. The mere timing of the VFOIA request cannot determine the precise contours of a statutory term.

Even the CAV's concurrence disagreed with Minium's narrow interpretation of "undercover officer." *See* CAV Op. at 9–10 (Lorish, J., concurring). The concurrence held that this phrase included not only an officer who "currently working undercover," but also officers who "had worked undercover" or were "slated to work undercover." *Id.* at 10.

Sheriff Hines and the County agree with the concurrence that the Identity Exclusion applies to *at least* these categories of officers—past, present, and soon-to-be undercover officers. However, because the "undercover officer" definition lacks any sort of temporal limitation, its plain meaning must also include any officer who has undercover assignments as part of their expected job duties. This is the plain meaning this Court should apply.

2.3 The Evidence Was Sufficient to Invoke the Identity Exclusion.

The evidence at trial was sufficient to show that the withheld names were associated with officers who have undercover assignments as part of their expected job duties. It is undisputed that Sheriff Hines maintains a group of officers below the rank of Captain to perform

undercover operations. R. 66. When Sheriff Hines needs to staff an undercover assignment, he selects an officer within this group depending on the physical appearances or skills needed for that assignment. R. 66. Job assignments are considered undercover if a officer "is not readily recognizable" as law enforcement, such as when officers use aliases, pseudonyms, and cover stories, or officers coordinate with confidential informants. R. 64, 74.

The CAV affirmed these factual findings. It held that it "adopt[ed] the trial court's finding" that the officers in this group are "available for *assignment in undercover* or protective operations." Op. at 5, n.6 (emphasis added). Minium has not assigned error to any factual findings.

Because these officers were "available for assignment" to undercover operations, undercover work was part of their expected job duties, making them "undercover officers" under the Identity Exclusion. At a minimum, this is a reasonable inference that this Court must resolve in Sheriff Hines and the County's favor. *See Fitzgerald*, 289 Va. at 505.

3. THE CAV ERRED IN INTERPRETING AND APPLYING THE OPERATIONS EXCLUSION (AOE 3).

Unlike the Identity Exclusion, the CAV expressly considered the Operations Exclusion, which authorizes a public body to withhold:

> Those portions of any records containing information related to undercover operations or protective details that *would reveal* the *staffing*, logistics, or tactical plans of such undercover operations or protective details.

Code § 2.2-3706(B)(8) (emphases added).

The third assignment of error raises two issues: (1) did the CAV err in interpreting "would reveal" to exclude future undercover and protective detail operations, and (2) if so, was the evidence sufficient to satisfy the Operations Exclusion? The answer to both questions is yes.

3.1 "Would Reveal" Contemplates Potential Future Staffing of Operations.

The CAV held that the circuit court erred in interpreting the phrase "would reveal." The CAV held that such phrase is "unambiguous" and means that disclosure of information "would 'make known to others' *actually existing* 'tactical plans,' staffing,' or 'logistics' of an undercover operation." CAV Op. at 6 (emphasis added). It reasoned that "would" does not contemplate "hypothetical undercover personnel staffing." CAV Op. at 7–8.

This is error, for three reasons. First, this Court has already interpreted "would" in other VFOIA exclusions to contemplate "potential

future harm" in addition to "an actual harm," as held in *Virginia Department of Corrections v. Surovell*, 290 Va. 255, 265 (2015).

Surovell, for instance, interpreted a similar VFOIA exclusion that exempted information that "would jeopardize" safety. The VFOIA petitioner there argued that this exclusion applied only to information that "would *actually cause* a security breach or harm to persons." *Id.* (emphasis added).

This Court disagreed. Specifically, it concluded that "would jeopardize" does not mean that VDOC must "prove"

> some facility's security would *in fact* be compromised or jeopardized. . . . A circuit court must take into account that any agency statement of threatened harm to security will always be speculative to some extent, in the sense that it describes a *potential future harm* rather than an actual harm.

Id. at 265 (brackets, citation, and internal quotation marks omitted) (emphases added).

The CAV therefore erred in interpreting "would" differently than *Surovell* by excluding "hypothetical undercover personnel staffing." *See* CAV Op. at 7–8. Both the Operations Exclusion and the *Surovell* exclusion contain the word "would" as a contingency—if the information is revealed, such disclosure "would" cause a negative result to security or

undercover operations. Like "would jeopardize," "would reveal" must also contemplate a future, hypothetical result—the "potential" for disclosure to reveal "the staffing, logistics, or tactical plans of such undercover operations or protective details." *See* Code § 2.2-3706(B)(8). To affirm the CAV would contradict *Surovell* and allow the word "would" to mean different things in two similar VFOIA exclusions.

Second, the dictionary plain meaning of "would" also contemplates a potential and hypothetical result. Sheriff Hines and the County agree that "would" in the Operations Exclusion "express[es] a contingency." *See* CAV Op. at 7. *If* the names are disclosed, *then* it would reveal the "staffing" or "logistics" of undercover or protective detail operations.

Contrary to the remainder of the CAV's analysis however, the contingency definition of "would" includes the "likelihood" of a result. *See In re Watford*, 295 Va. 114, 124 (2018) (interpreting "would" in the actual innocence statutes). Stated differently, "[i]t requires the Court to make a *probabilistic* determination" about what "would" result. *Id.* at 123 (emphasis added) (internal quotation marks and citation omitted). Thus, like *Surovell*, the plain meaning of "would" contemplates a potential

future result—a likelihood or probability that something, even if hypothetical, will occur.

Third and finally, the CAV's exclusion of potential future results from the definition of "would reveal" has profound impacts on other VFOIA exclusions. The phrase "would reveal" appears in no fewer than *seven* VFOIA exclusions. *See, e.g.*, Code §§ 2.2-3705.2(11); -3705.4(A)(3); -3705.4(A)(7); -3705.6(11)(b); -3705.6(28); -3705.7(29); -3705.7(33). All of these phrases are also expressed as a contingency: if information is disclosed, then a certain result would occur.

Applying the CAV's interpretation of "would reveal" will have unwanted impacts on these VFOIA exclusions. For instance, Code § 2.2-3705.7(29) contains a VFOIA exclusion for information disclosures "that would reveal" economic development "strategies" "to the Commonwealth's competitors." Similarly, Code §§ 2.2-3705.6(11)(b) and (28) contain VFOIA exclusions for information disclosures that "would reveal [] trade secrets." Under the CAV's interpretation of "would reveal," public bodies cannot withhold information even if there was a strong likelihood that such disclosures would reveal potential trade secrets or economic development strategies.

3.2 The Evidence Was Sufficient to Satisfy the Operations Exclusion.

The evidence was sufficient to satisfy the Operations Exclusion—under either Sheriff Hines and the County's interpretation as stated above, or even the CAV's own interpretation.

First, under even the CAV's interpretation of the Operations Exclusion, disclosing the names would reveal the *actually existing* "staffing" of undercover and protective operations. "Staff" means, in part, "a specific group of workers or employees." STAFF, Webster's New World College Dictionary, at 1303 (3rd ed. 1996). As a verb, staff means "to provide as a staff, as of workers." *Id*.

Disclosing the names reveals who is in the group of officers performing undercover and protective detail operations. Such disclosure therefore reveals the *actually existing* "staffing" of this group—it reveals who is in the group, and who is not. Because this group already exists, it satisfies even the CAV's more narrow definition of the Operations Exclusion. *See* CAV Op. at 6.

Second, disclosing the names would also reveal the potential or future "staffing, logistics, or tactical plans" of undercover and protective detail operations. Minium's VFOIA request specifically notes that the

requested names "will be made available to the general public," noting her website www.openoversightva.org, which contains names and pictures of law enforcement officers. R. 11. At trial, sheriff representatives testified that publicly disclosing the names of the officers within the pool "would hamper [those] officer[s'] ability from the beginning of his or her career to engage in undercover field work." R. 68. Disclosing the names meant that Sheriff Hines "would have to change [undercover and protective detail] operations out of its current form." R. 69.

Drawing all reasonable inferences in Sheriff Hines' favor, disclosing the names would reveal how Sheriff Hines will staff undercover or protective detail operations. Public disclosure of the names means that such officers can be identified as law enforcement, even when attempting to work undercover or on protective detail. Undercover officers would be outed by Minium's public website, which would be available to the criminal individuals and organizations that those officers are investigating. Officers who are publicly disclosed on the internet likely could not perform undercover or protective detail work in the future.

Say, for example, Sheriff Hines and the County disclose the name of an officer who is not engaged in undercover work at the time of the VFOIA request. If that same officer is subsequently assigned to an active undercover operation and that officer's name is withheld pursuant to a second VFOIA request, then a simple comparison of both VFOIA responses "reveals" the identity of that undercover officer. Responding to the first VFOIA request therefore "would reveal" how Sheriff Hines "staff[s]" subsequent undercover or protective detail operations.

In other words, disclosing the names of officers in the undercover pool "would compromise the objectives of the [Operations] exemption" in VFOIA, which is designed to protect *how* law enforcement generally staffs and operates undercover and protective detail work. *See Surovell*, 290 Va. at 274 (Mims, J., concurring). The CAV erred in interpreting "would reveal" and otherwise failing to hold the evidence sufficient to satisfy the Operations Exclusion in Code § 2.2-3706(B)(8). This Court should therefore grant the third assignment of error.

CONCLUSION

For these reasons, this Court should grant this Petition for Appeal, docket this case for full briefing and oral argument, and reverse the decision of the CAV.

Respectfully submitted,

DAVID R. HINES

/s/ Peter S. Askin
William W. Tunner (VSB #38358)
John P. O'Herron (VSB #79357)
Peter S. Askin (VSB #93371)
Daniel-Lester S. Edwards (VSB #99337)
*THOMPSON*MCMULLAN, P.C.
100 Shockoe Slip, Third Floor
Richmond, VA 23219-4140
(804) 649-7545 (Telephone)
(804) 780-1813 (Facsimile)
wtunner@t-mlaw.com
joherron@t-mlaw.com
paskin@t-mlaw.com
dledwards@t-mlaw.com
Counsel for Sheriff David R. Hines

&

HANOVER COUNTY

/s/ Rebecca B. Randolph

Rebecca B. Randolph (VSB #68564)
Deputy County Attorney
Leah D. Han (VSB #89131)
Deputy County Attorney
HANOVER COUNTY ATTORNEY'S OFFICE
7516 County Complex Road
Hanover, Virginia 23069
(804) 365-6035 (Telephone)
(804) 365-6302 (Facsimile)
rbrandolph@hanovercounty.gov
ldhan@hanovercounty.gov
Counsel for Hanover County

CERTIFICATE OF SERVICE

Pursuant to Rule 5:17(i) of the Supreme Court of Virginia, I hereby certify the following:

1. The petitioners are Sheriff David R. Hines and Hanover County.

2. Counsel for petitioner Sheriff David R. Hines are:

William W. Tunner (VSB No. 38358)
John P. O'Herron (VSB No. 79357)
Peter S. Askin (VSB No. 93371)
Daniel-Lester S. Edwards (VSB No. 99337)
*THOMPSON*MCMULLAN, P.C.
100 Shockoe Slip, 3rd Floor
Richmond, Virginia 23219
(804) 649-7545 (Telephone)
(804) 780-1813 (Facsimile)
wtunner@t-mlaw.com
joherron@t-mlaw.com
paskin@t-mlaw.com
dledwards@t-mlaw.com

3. Counsel for petitioner Hanover County are:

Rebecca B. Randolph (VSB No. 68564)
Leah D. Han (VSB No. 89131)
HANOVER COUNTY ATTORNEY'S OFFICE
7516 County Complex Road
Hanover, Virginia 23069
(804) 365-6035 (Telephone)
(804) 365-6302 (Facsimile)
rbrandolph@hanovercounty.gov
ldhan@hanovercounty.gov

4. The respondent is Alice Minium.

5. Counsel for the respondent is:
Andrew T. Bodoh (VSB No. 80143)
Thomas H, Roberts & Associates, P.C.
105 S. 1st Street
Richmond, Virginia 23219
(804) 783-2000 (Telephone)
(804) 991-4260 (Direct)
(804) 783-2105 (Facsimile)
andrew.bodoh@robertslaw.org

6. An electronic of the foregoing Petition for Appeal was filed with the Clerk of the Supreme Court of Virginia, via VACES and one copy was served, via email, upon counsel for the respondent this 27th day of March, 2025.

7. Counsel for the petitioners desire to state orally and in person to a panel of this court the reasons why this petition should be granted.

8. This Brief contains 6,347 words, excluding those portions that by rule do not count toward the word limit.

/s/ Peter S. Askin
Peter S. Askin (VSB No. 93371)
*Thompson*McMullan, PC
100 Shockoe Slip, Third Floor
Richmond, VA 23219-4140
(804) 649-754 (Telephone)
(804) 460-9156 (Direct)
(804) 780-1813 (Facsimile)
paskin@t-mlaw.com

Counsel for Petitioner Sheriff David R. Hines