IN THE SUPREME COURT OF VIRGINIA

Record No. 181375

TRANSPARENT GMU and AUGUSTUS THOMSON,

Petitioners/Appellants,

v.

GEORGE MASON UNIVERSITY and GEORGE MASON UNIVERSITY FOUNDATION, INC.,

Respondents/Appellees.

GEORGE MASON UNIVERSITY'S BRIEF IN OPPOSITION TO THE PETITION FOR APPEAL

MARK R. HERRING
Attorney General of Virginia

CARRIE S. NEE
Senior Assistant Attorney General

BRIAN WALTHER
University Counsel

DAVID G. DRUMMEY
Associate University Counsel/Senior Assistant Attorney General

TOBY J. HEYTENS (VSB #90788)
Solicitor General

MATTHEW R. MCGUIRE (VSB #84194)
Principal Deputy Solicitor General

MICHELLE S. KALLEN (VSB #93286)
Deputy Solicitor General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240
(804) 371-0200 (fax)
SolicitorGeneral@oag.state.va.us

Counsel for George Mason University

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INTRODUCTION

Many of Virginia's public institutions—including parks, museums, colleges, and universities—are supported by nonprofit foundations. These foundations serve critical roles, including the facilitation of private fundraising. And, as then-Attorney General Gilmore explained more than two decades ago, "tax exempt foundations organized for the purposes of administering endowments and providing other financial management arrangements for state universities *are not a part of the universities*" and thus "need only comply with the laws that govern such corporations." 1996 Va. Op. Att'y Gen. 15 (emphasis added).

This petition for appeal seeks a massive judicial expansion of Virginia's Freedom of Information Act, Va. Code Ann. § 2.2-3700 *et seq.* (2017), (FOIA) by holding public intuitions responsible for the records of supporting foundations.[1] Neither Virginia law nor the public interest supports that interpretation, and the General Assembly declined to

[1] Petitioners also ask this Court to interpret FOIA as requiring the Foundation to produce the requested records. Because those arguments do not address the University's obligations under FOIA, we do not address them here.

enact a similar expansion of FOIA last year. See S.B. 1436 (2017). The petition for review should be refused.

STATEMENT

1. In April 2017, petitioners Transparent GMU and Augustus Thomson submitted FOIA requests to George Mason University (University) and the George Mason University Foundation, Inc. (Foundation) about donations made or offered by certain donors or suspected donors. 06/06/17 Petition (Initial Petition), Exhibit I, 04/05/2017 letter to George Mason University FOIA Compliance Officer; *id.* Exhibit J, 04/05/2017 letter to Foundation. The University initially concluded it did not have any of the requested documents in its possession. *Id.* ¶ 62; 10/05/17 Petition (Amended Petition) ¶ 58. After further review, however, the University discovered some responsive documents and promptly produced them.[2] 6/27/17 GMU Demurrer ¶ 10. The Foundation responded that it was not subject to FOIA and that it

[2] The petition for appeal sets forth no assignments of error involving the University's disclosure of these documents. Accordingly, any issues involving such document are not properly before this Court. See Va. Sup. Ct. R. 5:21(7) ("Only errors so assigned will be noticed by this Court and no error not so assigned will be considered as grounds for reversal of the decision below.").

was thus not required to produce the requested records. Initial Petition ¶ 70; Amended Petition ¶ 64.

2. On May 26, 2017, petitioners filed a petition for a writ of mandamus against the University and the Foundation (Initial Petition), arguing that both entities violated FOIA. The Initial Petition raised two claims against the University: (1) an alter-ego theory that "[t]he University denied the Petitioners their rights under the Act by refusing to search for and provide requested records as the legal custodian of records held by its agent, the Foundation, in the transaction of public business," Initial Petition ¶¶ 72–81; and (2) "[t]o the extent the Foundation is an independent contractor rather than an agent of the University, the University has denied the Petitioners their rights under the Act by frustrating the Act's policy of ready access to records relating to the transaction of public business," *id.* ¶¶ 82–88.

The University and the Foundation each demurred to the Initial Petition. The trial court sustained those demurrers, and petitioners filed an amended petition for a writ of mandamus in October 2017 (Amended Petition).

The Amended Petition alleged two claims against the University: (1) "[t]he University denied the Petitioners their rights under [FOIA] by refusing to search for and provide requested records as the legal custodian of records held by its agent, the Foundation, in the transaction of public business," Amended Petition ¶¶ 66–81; and (2) "[t]he University denied the Petitioners their rights under [FOIA] by refusing to search for and provide requested records as the legal custodian of records possessed and/or used in the transaction of public business by Dr. Janet E. Bingham, an officer, employee, and/or agent of the University," *id.* ¶ 82–96. Like the first mandamus petition, the second petition was premised on the theory that the Foundation was the alter-ego of the University.

The University and the Foundation again demurred. The University argued that it was entitled to sovereign immunity, and the Foundation demurred on the ground that it was not a public body subject to FOIA. 10/13/17 GMU Plea of Sovereign Immunity and Demurrer; 10/13/17 Foundation Demurrer. The Foundation also filed an answer responding to petitioners' claim that the Foundation violated FOIA because the Foundation's performance of public functions of

University rendered the Foundation a "public body." 10/13/17 Foundation Answer.

The trial court sustained the University's demurrer in its entirety and sustained the Foundation's demurrer in part. 11/29/17 Order. The trial court dismissed petitioners' request for a declaratory judgment against the University because FOIA's waiver of sovereign immunity extends only to suits for mandamus and injunctive relief. *Id.* at 18.[3] The trial court also dismissed petitioners' claims that the University violated FOIA by failing to search for records held by the dual employee of the University and the Foundation. *Id.* The court explained that the University is not the custodian of the Foundation's records and the fact that the University and Foundation share a common employee does not make the University the custodian of those records. *Id.*

Trial was held about whether the Foundation is a "public body" subject to FOIA, and the trial court specifically found that it was not. Instead, the court found that the Foundation is "an independent non-stock corporation that coexists alongside the University it serves." 7/5/18 Opinion Letter at 6. The trial court emphasized that the

[3] The petition for appeal does not assign error to that ruling and it is not before this Court. See Va. Sup. Ct. R. 5:21(7).

Foundation "is not an agency of the Commonwealth or any of its political subdivisions," and "the fact that a privately-formed Foundation 'serves' a University, even if that is its sole purpose, is not sufficient for the Court to conclude that it is a sub-entity of the public body it serves." *Id.* at 2, 6. Because the Foundation is not a public body, the trial court thus held that the Foundation's fundraising records are not subject to FOIA. *Id.* at 4–5.

ARGUMENT

Petitioners ask this Court to hold that FOIA requires a public institution (here, the University) to reach outside its own records and search for and turn over records of a separate corporate entity (the Foundation). That argument disregards the separate corporate structures of the Foundation and the University. It also contravenes the General Assembly's support of such foundations and its recent rejection of proposed legislation that would have extended FOIA to university foundations. The judicial expansion of FOIA sought by petitioners would undercut the ability of foundations to support the Commonwealth's public institutions such as museums, parks, and universities. The petition for appeal should be refused.

I. The petition sets forth no errors for this Court to correct

The petition for appeal does not clearly specify which assignments of error apply to the University. But, as before, petitioners' arguments about the University appear to be twofold: (1) because of the relationship between the University and the Foundation, the University was required to search for and produce Foundation records (assignments of error 2, 5, and 6); and (2) the University was required to compel a University employee to search documents she maintained in her capacity as an employee of the Foundation (assignment of error 4). Neither argument has merit.

A. Standard of review

Whether a trial court has correctly interpreted a statute involves a question of law and is thus reviewed de novo. *McGrath v. Dockendorf*, 292 Va. 834, 837, 793 S.E.2d 336, 337 (2016). But "when the proper construction of a FOIA provision establishes a legal standard governing a factfinding exercise, [this Court] give[s] deference to the circuit court's findings of fact and view[s] the facts on appeal in the light most favorable to the prevailing party." *Fitzgerald v. Loudoun Cty. Sheriff's Office*, 289 Va. 499, 505, 771 S.E.2d 858, 860 (2015) (internal quotation marks and citation omitted). "Where divergent or conflicting inferences

reasonably might be drawn from established facts their determination is exclusively for the fact-finding body." *Id.* (quoting *Hopson v. Hungerford Coal Co.*, 187 Va. 299, 308, 46 S.E.2d 392, 396 (1948)).

B. The trial court did not err in finding that the Foundation is not the University's agent or alter ego

Neither the Initial Petition nor the Amended Petition alleges that the University holds records petitioners seek; instead, petitioners allege that the records at are Foundation records. See Initial Petition ¶¶ 78, 170, 173; Amended Petition ¶¶ 60, 71–74, 91–94. For purposes of their claims against the University, therefore, petitioners attempt to impute the Foundation's custody over the records onto the University and thus argue that FOIA requires the University to search for and turn over Foundation records. Pet. 20–25. The trial court correctly rejected that argument.

1. Petitioners are notably imprecise in characterizing the legal relationship between the University and the Foundation. At times, they describe the Foundation as the University's "agent." Pet. 19, 25. At others, petitioners argue that the Foundation was "created to perform delegated functions of the University." *Id.* at 31. At still others, petitioners label the Foundation "an effective committee of the

University." *Id.* These statements are inaccurate, and the trial court correctly concluded that petitioners have established no justification for disregarding the Foundation's distinct corporate structure.

Petitioners cite no authority for the proposition that the Foundation is an agent or committee of the University. But "an agency relationship is never presumed," and "the party alleging an agency relationship bears the burden of proving it." *State Farm Mut. Auto. Ins. Co. v. Weisman*, 247 Va. 199, 203, 441 S.E.2d 16, 19 (1994).

Indeed, the Virginia Freedom of Information Advisory Council (Council) has squarely *rejected* the view that a foundation supporting a public institution is that public institution's "agent" or "committee." In a 2009 advisory opinion, for example, the Council concluded that no "agency relationship . . . exist[ed]," even though a foundation was described on a museum's website as "a tax-exempt, 501(c)(3) organization, founded . . . to support the . . . Museum's educational mission." Staff Opinion, FOIA Advisory Council, No. AO-09-09 & n.2 (Oct. 23, 2009); see *id.* (concluding that, "[a]s a separate corporation, the Foundation is not a committee, subcommittee, or other entity however designated, of the Museum"); accord Staff Opinion, FOIA Advisory

Council, No. AO-10-06 (Oct. 25, 2006) (advising that a nonprofit foundation "is not a committee, subcommittee, or other entity of any public body").[4]

The Council's conclusion is also bolstered by at least four Attorney General opinions—issued over three different Attorneys General over the course of more than two decades—concluding that "tax-exempt foundations organized for the purposes of administering endowments and providing other financial management arrangements for state universities *are not a part of the universities*." 1996 Va. Op. Att'y Gen. 15 & n.5 (emphasis added) (citing previous opinions). Accordingly, "nonprofit foundations organized for the benefit of state universities 'need only comply with the laws that govern such corporations.'" *Id.* (quoting 1984–1985 Op. Va. Att'y Gen. 46, 47).

2. Because the Foundation is neither an "agent" nor a "committee" of the University, it must be respected as its own distinct corporate entity. See Staff Opinion, FOIA Advisory Opinion, No. AO-09-

[4] The Council's 2006 and 2009 opinions were years after the 2001 FOIA amendments and thus accounted for the "delegated functions" clause in Code § 2.2-3701's definition of "public body." See Pet. at 30–31 (suggesting that the 2001 amendments materially expanded definition of public body under FOIA).

09 (Oct. 23, 2009) ("once established, the Foundation is a corporate entity in its own right separate from the Museum and its Board"). The question is thus whether the University had a FOIA obligation to disregard the distinct corporate structures and search and gather Foundation records. As the trial court correctly determined, the answer is no, both as a matter of FOIA and black-letter Virginia corporate law.

a. The General Assembly has listed two situations where a public body must respond to a FOIA request for records held by a different entity. Neither applies here. Va. Code Ann. § 2.2-3704(J) (2017) does not apply because petitioners do not allege that the records originated with the University, much less that they were "transferred" to the Foundation. Va. Code Ann. § 2.2-3704(B)(3) (2017) is inapplicable because that provision is triggered only where "the public body that received the request knows that *another public body* has the requested records." (emphasis added). And, even then, the public body that received the request is not required to produce the records itself. See *id.* (stating that, in such situations, "the response shall include contact information for the other public body").

b. The only way that records in the Foundation's custody can be imputed on the University for FOIA purposes is if the Foundation's separate corporate structure is overlooked through veil piercing. As the trial court correctly found, there is no basis for doing so here.

"In Virginia, unlike in some states, the standards for veil piercing are very stringent, and piercing is an extraordinary measure that is permitted only in the most egregious circumstances." *C.F. Tr., Inc. v. First Flight L.P.*, 266 Va. 3, 12, 580 S.E.2d 806, 811 (2003).[5] It is not enough to show that the University and the Foundation have a close relationship. Rather, petitioners must establish that the University and the Foundation have such "unity of interest and ownership" that their separate identities "no longer exist," and that the Foundation was used "to evade a personal obligation, to perpetrate a fraud or a crime, to commit an injustice, or to gain an unfair advantage." *Id.*; *Cheatle v. Rudd's Swimming Pool Supply Co.*, 234 Va. 207, 212, 360 S.E.2d 828, 831 (1987) (stating that a party urging veil-piercing "must show that

[5] For that reason, petitioners' reliance on out-of-state authority, see Pet. at 16–19, sheds little light on the question of Virginia law presented here.

the corporate entity was the alter ego, alias, stooge, or dummy of the individuals sought to be charged personally.").

As the trial court correctly found, petitioners fell far short that required showing. Most importantly, the trial court found "no evidence that [the Foundation] was created as a sham entity." 11/29/17 Order at 9. What is more, "[r]egardless of how many 'indicia of control' there are between the University and the Foundation, it cannot be said to be *impermissible* control when it is exactly the sort of control envisioned by the General Assembly and prescribed by law." 11/29/17 Order at 10. And because the University and the Foundation are "distinct legal entities," the fact that they share certain employees "does not alter the separate character of the two" entities. *RF & P Corp. v. Little*, 247 Va. 309, 316, 440 S.E.2d 908, 913 (1994) (finding veil-piercing inappropriate even when one entity was the "sole shareholder" of the other).[6] See Initial Petition Exhibit E (Foundation bylaws); *id.* Exhibit D (Foundation Articles of Incorporation); *id.* Exhibits F, G, and H (formal contracts memorializing relationship between University and

[6] *RF&P* remains good law and has been cited by the Council even after the 2001 FOIA amendments. See Staff Opinion, FOIA Advisory Council, No. AO-09-09 (Oct. 23, 2009) (discussing *RF&P*).

Foundation). In short, the trial court's decision to respect the separate corporate structures of the University and the Foundation is consistent with this Court's instruction that "only an extraordinary exception justifies disregarding the corporate entity and piercing the veil." *C.F. Trust*, 266 Va. at 10, 580 S.E.2d at 809 (internal quotation marks and citation omitted).

C. FOIA does not require the University to search for records held by a third party's employee

Petitioners also assert that the University has FOIA obligations regarding Foundation records because a single person served as both Vice-President for University Development and Alumni Affairs and CEO of the Foundation. The petition for appeal does not specify whether acceptance of this argument would require the Foundation to produce the documents directly or would require the University to seize the records from the Foundation. In any event, petitioners' "joint employee" argument is wrong.

As the trial court correctly explained, "Dr. Bingham wears 'two hats,' and the functions she performs while wearing one are not imputed into her position under the other." 11/29/17 Order at 13. The reason is simple: "It is the *position* over which [a] corporation has

control, not the *person*." *Id.* (emphasis added); accord *United States v. Bestfoods*, 524 U.S. 51, 69 (1998) (noting the "well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership") (internal quotation marks and citation omitted). "To the extent that" Dr. Bingham—like any other University employee—"conducts activities outside of her position at GMU, the University does not have authority and control over her, and she is not an agent of the University with respect to those activities." 11/29/17 Order at 13. "Therefore, *if* Dr. Bingham served as the custodian of the records on behalf of the Foundation, she did so *outside* of her position at GMU, and the University had no control over her in that respect." *Id.*[7] Dr. Bingham's

[7] Petitioners claim the trial court did not give "the 'most favorable' reading the law requires" because petitioners alleged "Dr. Bingham used (and therefore necessarily possessed) the documents at issue in performing her duties as a University officer." Pet. 28–29. But the provisions of the Amended Petition that petitioners cite do not plausibly allege that Dr. Bingham possessed documents in her University role. Paragraph 85 simply describes Dr. Bingham's roles. Paragraph 87 asserts that "Dr. Bingham's duties as a University officer concern the same *subject matter* and are *directed toward* the same goals as her duties" with the Foundation. (emphasis added). And paragraph 91 asserts that the requested documents "are *in the possession of and/ or*

dual roles with the University and the Foundation do not impose on the University an obligation to disregard the Foundation's corporate structure and search for and produce Foundation records. See *Washington & Old Dominion Users Ass'n v. Washington & Old Dominion R. R.*, 208 Va. 1, 6, 155 S.E.2d 322, 325 (1967) (refusing to disregard separate corporate existence of wholly owned subsidiary even though "most of the officers and directors" of the subsidiary "have also been officers and directors" of the parent); see Staff Opinion, FOIA Advisory Council, No. AO-09-05 (July 19, 2005) ("That two members of a public body also serve as members of the board of a private entity does not by itself transform that private entity into a public body subject to FOIA.").

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are used by Dr. Bingham . . . *in the performance of fundraising and endowment management activities*—both of which are forms of 'public business'—for the benefit of the University." (emphasis added). But petitioners' raw assertion that that the requested documents were in the possession of *and/or* are used by Dr. Bingham in her capacity as a University employee is conclusory and need not be accepted as true. *Terry v. Irish Fleet, Inc.*, 296 Va. 129, 818 S.E.2d 788, 790 (2018) (this Court is "not bound . . . by the conclusory allegations set forth in the amended complaint") (internal quotation marks and citations omitted).

D. The General Assembly's failure to enact legislation that would have amended FOIA to reach university foundations underscores that current law does not cover them

During its most recent session, the General Assembly considered a bill that would have extended FOIA to foundations that exist to support public institutions of higher education. See S.B. 1436 (2017) (seeking to "[e]xpand[] the definition of public body under FOIA to include any foundation that exists for the primary purpose of supporting a public institution of higher education and that is exempt from taxation under § 501(c)(3) of the Internal Revenue Code."). That bill was referred to the Senate Committee on General Laws and Technology and assigned to a subcommittee, from which it did not emerge.[8] The petition for appeal thus asks this Court to do what the General Assembly very recently declined to do itself. See *Daily Press, LLC v. Office of Exec. Sec'y of Supreme Court*, 293 Va. 551, 557, 800 S.E.2d 822, 824 (2017) ("Public policy questions concerning where to draw the line with respect to []FOIA fall within the purview of the General Assembly.").

[8] See also Virginia's Legislative Information System, 2017 Session: SB 1436 Virginia Freedom of Information Act; expands definition of public body, https://lis.virginia.gov/cgi-bin/legp604.exe?171+cab+SC10116SB1436+SBREF.

II. Accepting petitioners' argument would have serious policy implications

The Commonwealth of Virginia has a well-deserved reputation for being a leader in higher education, and much of Virginia's success in this regard relies on private funding.[9] The General Assembly has recognized the importance of private fundraising by expressly empowering public universities to "[c]reate . . . one or more nonprofit entities for the purpose of soliciting, accepting, managing, and administering grants and gifts and bequests." Va. Code Ann. § 23.1-1010(3) (2016). The General Assembly has further stated that "[i]t is the public policy of the Commonwealth that" public colleges and universities "shall be encouraged in their attempts to increase their endowment funds and unrestricted gifts from private sources and

[9] See, *e.g.*, John McLaughlin and Keith Frederick, *How higher education sets Virginia apart*, Washington Post (Feb. 16, 2018) ("Virginia's higher-education system generates the second-highest graduation rates in the country despite ranking near the bottom (41st in 2016) in state support per student"); Terance J. Rephann, Ph.D., *Study of the Growing Economic Impact of Virginia Public Higher Education*, Weldon Cooper Center for Public Service at 1 (Feb. 2017), http://www.growth4va.com/wp-content/uploads/2017/08/Higher_ed_report_FINAL.pdf (estimating that more than 30% "of Virginia public higher education institutions' revenue is derived from out-of-state sources such as federal grants and contracts, out-of-state tuition, and private gifts")

reduce the hesitation of prospective donors to make contributions and unrestricted gifts." Va. Code Ann. § 23.1-101(1) (2016).

These provisions underscore the "General Assembly's intent to protect public universities and colleges from being placed at a competitive disadvantage in relation to private universities and colleges." *American Tradition Inst. v. Rector & Visitors of Univ. of Virginia*, 287 Va. 330, 342, 756 S.E.2d 435, 442 (2014). And in this context—as in the "higher education research" context at issue in *American Tradition Institute*—"competitive disadvantage" includes rules that would "undermin[e] . . . expectations of privacy and confidentiality." *Id.*

Ignoring the Foundation's separate identity and subjecting records Foundation records to FOIA would violate donor expectation of confidentiality, undermine the General Assembly's intent, and chill future donations to public institutions of higher education in Virginia. Private donors often seek confidentiality, including for religious reasons or simply a desire to avoid the spotlight. For that reason, the ability to

assure confidentiality is crucial to successful recruitment of donations.[10] Yet, under petitioners' view, private colleges and universities seeking donations would be able to promise such confidentiality whereas foundations seeking donations to benefit Virginia's public institutions of higher education could not. As in *American Tradition Institute,* this Court should "not attribute to the General Assembly an intention to disadvantage the Commonwealth's public universities in comparison to private colleges and universities." 287 Va. at 343, 756 S.E.2d at 442 (rejecting FOIA against state university for disclosure of documents produced or received by a former professor while working at university).

Nor would the harms of adopting petitioners' proposal be limited to public institutions of higher education. Because nonprofit corporations like the Foundation support many of the Commonwealth's parks, museums, and local school districts, the expansive reach of FOIA advocated by petitioners also would dissuade donations to these

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[10] See also Ed Enoch, *UA must balance donors' desire for anonymity with the perks of publicity*, Tuscaloosa News (Jun. 3, 2018) https://www.tuscaloosanews.com/news/20180603/ua-must-balance-donors-desire-for-anonymity-with-perks-of-publicity; Deborah L. Jacobs, *How to Stay Anonymous When You Give to Charity,* Forbes (Sept. 19, 2012), https://www.forbes.com/sites/deborahljacobs/2012/09/19/how-to-stay-anonymous-when-you-give-to-charity/#5b776d5240dd.

entities. But, as the Council has aptly explained, "[a]ny change to current law that might bring such entities within the ambit of FOIA would require a policy decision and action by the General Assembly." Staff Opinion, FOIA Advisory Council, No. AO-09-09 (Oct. 23, 2009).

* * *

Petitioners repeatedly emphasize Code § 2.2-3700's admonition that FOIA "shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government." Va. Code Ann. § 2.2-3700 (2017); see Pet. at 12, 23–24, 33. But, as this Court has emphasized, "liberal construction of a statute is one thing. Substituting our judgment for what the General Assembly has expressed would be another." *Daily Press, LLC*, 293 Va. at 563, 800 S.E.2d at 827; accord *Beck v. Shelton*, 267 Va. 482, 488, 593 S.E.2d 195, 198 (2004) ("We do not believe that the legislature was inviting the judiciary . . . to rewrite the provisions of FOIA as we deem proper or advisable."). The General Assembly has not made entities like the Foundation subject to FOIA, and the trial court correctly rejected

petitioners' attempt to obtain the same result by serving FOIA requests on the University.

CONCLUSION

The petition for appeal should be refused.

Respectfully submitted,

By: /s/ Michelle Kallen

Michelle S. Kallen (VSB #93286)
Deputy Solicitor General

Mark R. Herring
Attorney General of Virginia

Toby J. Heytens (VSB #90788)
Solicitor General

Matthew R. McGuire (VSB #84194)
Principal Deputy Solicitor General

Carrie S. Nee
Senior Assistant Attorney General

Brian Walther
University Counsel

David G. Drummey
Associate University Counsel/Senior Assistant Attorney General

CERTIFICATE OF SERVICE AND FILING

I hereby certify that in compliance with Rule 5:18 of the Rules of the Supreme Court of Virginia, on this 19th day of November, 2018, I have filed with the Supreme Court of Virginia seven (7) copies of the Brief in Opposition to the Petition for Appeal, and I have mailed one (1) copy via first-class mail, postage prepaid, to:

Evan D. Johns
(Va. State Bar No. 89285)
Appalachian Mountain Advocates
415 Seventh Street Northeast
Charlottesville, Virginia 22902
Telephone: (434) 529-6787
Facsimile: (304) 645-9008
E-Mail: ejohns@appalmad.org

I further certify that this Brief in Opposition does not exceed 25 pages.

Counsel for the Commonwealth desires notification if the Court grants oral argument on the Petition for Appeal.

Michelle Kallen

Michelle S. Kallen