IN THE

SUPREME COURT OF VIRGINIA

Record No. 181375

TRANSPARENT GMU and
AUGUSTUS THOMSON

Appellants;

v.

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

Appellees.

BRIEF OF *AMICUS CURIAE* THE VIRGINIA BUSINESS HIGHER EDUCATION COUNCIL

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INTEREST OF *AMICUS CURIAE*

The Virginia Business Higher Education Council (the "Council") is a nonprofit, nonpartisan partnership between Virginia's business community and higher education leadership. The Council's Board of Directors includes business leaders from across the Commonwealth, the presidents of eight of the 15 public four-year universities, and the chancellor of the community college system. As such, the Council prides itself on representing the interests of all of the public colleges and universities in the Commonwealth. Its mission is to enhance the performance of Virginia's public colleges, universities, and community colleges and their funding by state government so they can produce the greatest possible positive impact on Virginia's economy. Founded in 1994, the Council is committed to educating the public about the crucial role higher education plays in Virginia's economy. The Council strives to secure the support needed for the Commonwealth's colleges, universities, and community colleges to rank among the nation's best.

In recent rankings, Virginia has been named the top state for higher education despite ranking 37th in state financial support. Private fundraising—much of which is conducted through private, nonprofit foundations—has been instrumental in making higher education better, more affordable, and more accessible to Virginians, thereby attracting new businesses and jobs to the Commonwealth. The Council respectfully submits this brief as *amicus curiae* because it is concerned that

extending the Virginia Freedom of Information Act (the "VFOIA") to these foundations would chill private contributions, diminish investment returns, and undermine the critical role played by these foundations in ensuring the sustained excellence of Virginia's institutions of higher education.

INTRODUCTION

Petitioners ask the Court to extend the VFOIA to the records of a nonprofit foundation raising private funds for the benefit of a public university—a fundamental shift in policy that "fall[s] within the purview of the General Assembly." *Daily Press, LLC v. Office of Exec. Sec'y of Supreme Court*, 293 Va. 551, 557, 800 S.E.2d 822, 824 (2017).[1]

The George Mason University Foundation, Inc. (the "Foundation"), the foundation at issue in this case, is one of many nonprofit corporations formed to support Virginia's public institutions of higher education. The Foundation raises money from private donors to further the mission of George Mason University (the "University"), transferring some funds to the University and investing others to create greater returns for future use. Every public four-year institution of higher education in the Commonwealth is supported by a nonprofit foundation. So too are many community colleges, public school districts, museums, and state parks. The

[1] Unless otherwise noted, all internal citations, quotations, and alterations are omitted.

importance of private giving to nonprofit foundations for student aid to make college more affordable cannot be overstated. According to the Council's survey of all of Virginia's public two and four-year colleges and universities, for the 2017–18 academic year, **25,488 students** received **$153,091,263 in total financial aid** that resulted from private donations.

The General Assembly has "draw[n] the lines with respect to VFOIA" to exclude these nonprofit foundations from the act's requirements. *See Daily Press*, 293 Va. at 562, 800 S.E.2d at 826. "[A] VFOIA request only applies to a 'public body or its officers and employees.'" *Am. Tradition Inst. v. Rector & Visitors of Univ. of Virginia*, 287 Va. 330, 339, 756 S.E.2d 435, 440 (2014) (citing Va. Code § 2.2-3701). In turn, the General Assembly has defined "public body" to reach only corporations "supported wholly or principally by public funds" and those "organized by the Virginia Retirement System," not to nonprofit foundations that raise private funds for the benefit of public bodies. *See* Va. Code § 2.2-3701. As the Virginia Freedom of Information Advisory Council (the "VFOIA Council") has concluded, and consistent with the circuit court's findings after trial, "such fundraising organizations are not public bodies subject to FOIA" because they "collect[] private donations and gifts and then pass[] them on to the public entities" they support. VFOIA Council AO-09-09 (Oct. 23, 2009).

Petitioners in this case attempt to evade the public body requirement by grafting onto the VFOIA a provision that simply is not there. Petitioners contend that if a public body like the University delegates some form of "public business" to a private corporation serving as its "agent," the corporation's documents then become "public records" under the VFOIA and the public body is charged with producing them. But private fundraising by private foundations is not public business. And even if it were, the General Assembly has not enacted an expansive "delegated functions" clause in the VFOIA of the type that, in other states, has extended open records laws to documents that are "in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body." *See, e.g., Chicago Tribune v. Coll. of Du Page*, 79 N.E.3d 694, 703 (Ill. Ct. App. 2017). The most analogous VFOIA provision applies only to a "committee, subcommittee, or other entity however designated, of the public body," not to nonprofit foundations with their own corporate identity. Va. Code § 2.2-3701; *Beck v. Shelton*, 267 Va. 482, 487, 593 S.E.2d 195, 197–98 (2004); VFOIA Council AO 09-09.

A contrary holding would not only contravene the VOIA's text, it would disrupt settled policy within the Commonwealth. The General Assembly has "encouraged" public universities "to increase their endowment funds and unrestricted gifts from private sources," Va. Code § 23.1-101, and has endorsed the

use of nonprofit foundations for this purpose, Va. Code § 23.1-1010(3). At the same time, it has repeatedly declined to pass legislation that would include nonprofit foundations within the scope of the VFOIA. Consistent with those legislative actions, multiple Attorneys General have opined 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, 16.

The General Assembly has adopted these policies for a reason. Encouraging private contributions has resulted in hundreds of millions of dollars in financial aid to Virginia's students who may not have otherwise been able to afford college—investments that continue to attract economic development and jobs to the Commonwealth. But large donors often expect their gift to remain confidential, which occurs when private foundations engage in private fundraising that is not subject to public disclosure. And when private contributions are held by a nonprofit foundation, those funds can be invested aggressively to provide even greater benefits to the institutions they support. In short, nonprofit foundations benefit the Commonwealth precisely because they are private.

As the VFOIA Council recognized a decade ago, there are some who believe that nonprofit foundations should be "treated as a government agency for FOIA purposes." VFOIA Council AO-09-09. But then, as now, "that is not the case under

the current state of the law. Any 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." *Ibid.* The circuit court's judgment should therefore be affirmed.

ARGUMENT

I. The VFOIA Does Not Extend to Nonprofit Foundations.

A. The VFOIA Requires Disclosure of "Public Records" in the Custody of a "Public Body."

As the circuit court recognized, the VFOIA "requires both (1) a public body and (2) public records[] before any action under VFOIA is required or any rights under VFOIA arise." JA 246. Citing Va. Code § 2.2-3704(A), which references only "public records," Petitioners attempt to evade this basic requirement. *See* Pet. Br. at 33–34. They contend that the VFOIA merely "presume[s] that the entity responding to a record request will be a public body." *Id.* at 29.

But the General Assembly was clear on this point. "By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to *public records in the custody of a public body* or its officers and employees." Va. Code § 2.2-3700(B) (emphasis added). When a VFOIA request is received, '[a]ll *public bodies* and their officers and employees shall make reasonable efforts to reach an agreement with a requester concerning the production of the records requested." *Ibid.* (emphasis added). And "[a]ny *public body* that is subject to this chapter and that is the custodian of the requested records shall promptly, but in all cases within

five working days of receiving a request, provide the requested records to the requester or make one of the following responses in writing." Va. Code § 2.2-3704(B) (emphasis added).[2]

To the extent the VFOIA's text left any doubt that the VFOIA imposes obligations only on public bodies, this Court has removed it. Relying on this same statutory language, this Court explained that "a VFOIA request only applies to a 'public body or its officers and employees,'" and to "'public records in the custody of a public body.'" *Am. Tradition Inst.*, 287 Va. at 339–40, 756 S.E.2d at 440 (citing Va. Code § 2.2-3701); *see also Beck*, 267 Va. at 490, 593 S.E.2d at 199 ("FOIA deals with public access to records and meetings of public bodies."). "Accordingly,

[2] *See also* Va. Code § 2.2-3704(F) ("A *public body* may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records."); § 2.2-3704(G) ("Public records maintained by a *public body* in an electronic data processing system, computer database, or any other structured collection of data shall be made available to a requester at a reasonable cost"); § 2.2-3704(H) ("In any case where a *public body* determines in advance that charges for producing the requested records are likely to exceed $200, the public body may . . . require the requester to agree to payment of a deposit."); § 2.2-3704(I) ("a *public body* may require the requester to pay any amounts owed to the public body for previous requests for records"); § 2.2-3704.01 ("No provision of this chapter is intended, nor shall it be construed or applied, to authorize a *public body* to withhold a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure by this chapter or by any other provision of law."); § 2.2-3704.2(A) ("All state *public bodies* . . . that are subject to the provisions of this chapter and all local *public bodies* that are subject to the provisions of this chapter, shall designate and publicly identify one or more Freedom of Information Act officers."); § 2.2-3713(E) ("Any failure by a *public body* to follow the procedures established by this chapter shall be presumed to be a violation of this chapter.") (emphasis added in all cases).

all private records are exempt." *Am. Tradition Inst.*, 287 Va. at 339–40, 756 S.E.2d at 440. By limiting the VFOIA to reach only public bodies and not private organizations, the General Assembly "create[d] the basic parameters for which documents may be requested and from whom." *Ibid.*

Indeed, this Court has adhered to the statutory definition of a "public body" even in cases involving what would otherwise be accessible "public records." For instance, this Court affirmed the denial of a VFOIA request to the State Corporation Commission seeking, among other information, "public records listing all overpayments or unused payments that the Commission's authority to order a refund has lapsed." *Christian v. State Corp. Comm'n*, 282 Va. 392, 395, 718 S.E.2d 767, 768 (2011). Because the Commission is authorized by the Constitution and is not an "authority" or "agency" "to which responsibility to conduct the business of the people is delegated by legislative or executive action," the Commission is not a "public body" and is therefore "exempt from the VFOIA." *Id.* at 400, 771. Similarly, this Court affirmed the denial of a VFOIA request to a Commonwealth's Attorney because at the time they were "not a 'public body' within the meaning of the FOIA." *Connell v. Kersey*, 262 Va. 154, 160, 547 S.E.2d 228, 231 (2001). So too here. To obtain the Foundation's records, the Foundation must be a "public body" for purposes of the VFOIA.

B. Nonprofit Corporations Like the Foundation Are Not "Public Bodies."

The VFOIA defines a "public body" as follows:

> [A]ny legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; governing boards of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include (i) the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 and (ii) any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members. Corporations organized by the Virginia Retirement System are 'public bodies' for purposes of this chapter.

Va. Code § 2.2–3701.

Breaking down this definition into its constituent parts, the circuit court determined after trial that the Foundation is not a public body subject to the VFOIA. *See* JA 258–66. That holding was consistent with the VFOIA.

1. The Foundation Is a "Corporation," But It Is Not "Supported Wholly or Principally By Public Funds" and Was Not Formed By the VRS.

The definition of a "public body" focuses primarily on traditional public bodies like agencies and political subdivisions, but the General Assembly did include otherwise independent "corporations" in two narrow circumstances. Neither is applicable here.

First, the "public funding" provision of the definition embraces "other organizations" or "corporations . . . in the Commonwealth supported wholly or principally by public funds." Va. Code § 2.2-3701. For example, a private organization operating a day care center was found to be a "public body" because "[p]ayments from the Buchanan County General Fund were the principal—indeed, the most important, chief, leading, and primary—source of funds." *Voice v. Appalachian Reg'l Cmty. Servs., Inc.*, 89 Va. Cir. 284 (Buchanan 2014); *see also* VFOIA Council AO-05-17 (June 9, 2017) (considering whether government funds were the "principal" source of a nonprofit corporation's funds); VFOIA Council AO-09-05 (July 19, 2005) (same).[3]

When Petitioners invoked this provision below, the circuit court found that the Foundation does not draw support from public funds. JA 262–63. On the contrary, its reason for being is to raise private funds. On that point, the VFOIA Council's 2009 opinion regarding the American Frontier Culture Foundation is particularly persuasive. *See* VFOIA Council AO-09-09. There the VFOIA Council

[3] In cases requiring interpretation of the VFOIA, this Court "takes into account any informative views on the legal meaning of statutory terms offered by" the VFOIA Council, which is "authorized by law to provide advisory opinions." *Fitzgerald v. Loudoun Cty. Sheriff's Office*, 289 Va. 499, 504–05, 771 S.E.2d 858, 860 (2015); *see also* Va. Code § 30-179(1) (authorizing the VFOIA Council to "[f]urnish, upon request, advisory opinions or guidelines, and other appropriate information regarding the Freedom of Information Act").

considered whether the American Frontier Culture Foundation, which supports the Virginia Frontier Culture Museum, is a public body subject to the VFOIA. *Ibid*. The VFOIA Council concluded that the "public funds" clause did not apply because "nonprofit fundraising corporations such as the Foundation typically raise money from private sources, which are used both to support the operations of the nonprofit corporation and to provide support to the public body." *Ibid.* "In other words, such fundraising organizations do not receive public funds—they do the opposite, by collecting private donations and gifts and then passing them on to the public entities" they support. *Ibid.*; *see also* VFOIA Council AO-10-06 (Oct. 25, 2006) (nonprofit foundation was not a public body because it was funded by individuals and corporations).

Second, the definition includes "[c]orporations organized by the Virginia Retirement System," which the General Assembly explicitly made "'public bodies' for purposes of this chapter." Va. Code § 2.2-3701. The General Assembly added this provision prior to this Court's decision in *RF&P Corp. v. Little*, which concerned whether the board of directors of a corporation indirectly owned by VRS was a public body for purposes of the VFOIA. 247 Va. 309, 315–16, 440 S.E.2d 908, 913 (1994). The General Assembly's decision to craft a specific provision embracing corporations formed by VRS, and not by other public bodies, indicates that the General Assembly did not intend to extend the VFOIA to such corporations.

See Miller & Rhoads Bldg., L.L.C. v. City of Richmond, 292 Va. 537, 544, 790 S.E.2d 484, 487 (2016) ("the mention of specific items in a statute implies that all items omitted were not intended to be included"). The omission also confirms that when "the Virginia General Assembly has determined that certain entities ought to be subjected to VFOIA, it has specifically named them." JA 263.

2. The Foundation Does Not Fall Within the "Delegated Functions" Clause.

The Foundation is also not a "committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body." Va. Code § 2.2-3701. On appeal, Petitioners argue that the Foundation is an "entity . . . of" the University because an "entity" by definition has a "legal identity apart from its members or owners," and the term "of" need only indicate "identification and relation." Pet. Br. at 39, 40.

But the term "entity" must be "known by the company it keeps." *Cuccinelli v. Rector, Visitors of Univ. of Va.*, 283 Va. 420, 432, 722 S.E.2d 626, 633 (2012). And "the mention of specific items in a statute implies that all items omitted were not intended to be included." *Miller & Rhoads Bldg.*, 292 Va. at 544, 790 S.E.2d at 487. Here, the term "entity" is paired with the terms "committee" and "subcommittee," two sub-entities of public bodies without a separate legal identity. The General Assembly did *not* include the terms "corporation" or "organization," even though those terms implicate bodies with separate legal identities and appear

elsewhere within the same statutory provision. Consistent with these principles of statutory construction, this Court has observed that the "delegated functions" clause "simply includes committees, subcommittees, or entities *within* the types of public bodies covered by FOIA, irrespective of participation by private sector or citizen members." *Beck*, 267 Va. at 487, 593 S.E.2d at 197–98 (emphasis added).

The evolution of the "delegated functions" provision confirms that nonprofit foundations do not fall within its ambit. Before the General Assembly added this clause to the VFOIA, courts had held that the term "public body" did not include "functional subgroups" of those public bodies. *See, e.g., Students for Animals v. The Rector & Bd. of Visitors of the Univ. of Va.*, 12 Va. Cir. 247 (Richmond City 1988). For instance, in *Students for Animals*, the circuit court held that the Animal Research Committee of UVA was not a "public body" because, at the time, the applicable definition extended only to "'other organizations, corporations or agencies in the Commonwealth, supported wholly or principally by public funds." *Ibid.* (quoting Va. Code § 2.1-341(a)). The court determined that "the word 'organizations' must be construed to mean an organization having some independent status like that of a corporation or an agency." *Ibid.*

The General Assembly changed the law, but did so to embrace committees, subcommittees, and (eventually) "entities however designated" *like them* that a public body creates to advise it or to perform a delegated function. Over the years,

the VFOIA Council has applied this "delegated functions" clause to include task forces, study groups, working groups, liaison committees, and even citizen advisory groups, hence the statute's reference to "private sector or citizen members." *See, e.g.*, VFOIA Council AO-07-13 (July 30, 2013) (committees and advisory groups created by the Fort Monroe Authority to advise its Board of Trustees); VFOIA Council AO-03-09 (May 8, 2009) (joint task force of two authorities, a county board of supervisors, and a city council); VFOIA Council AO-11-09 (Nov. 30, 2009) (a working group established by the Arlington Sports Commission would be a public body, but a self-appointed working group would not).

On the other hand, private organizations like the Foundation do not fall within the scope of "entities however designated[] of a public body." For instance, in *RF & P Corp.*, the trial court held that the board was "a subcommittee or committee of a public body" because it "was effectively created as a committee to perform VRS's function of investing for the state employee retirement plan." *Id.* at 316, 913. This Court reversed. Applying the statute in effect before the General Assembly amended it to include corporations formed by VRS, the Court reasoned that the trial court's holding impermissibly "disregards [the corporation's] corporate identity" even when "[a]pplying a liberal construction to the statutory definition." *Ibid.*

Similarly, in its opinion regarding the American Frontier Culture Foundation, the VFOIA Council advised that the foundation—unlike the Foundation here—was

not a public body even though it was formed by the public body it supported. *See* VFOIA Council AO-09-09. As the VFOIA Council explained, "once established, the Foundation is a corporate entity in its own right separate from the Museum and its Board. . . . As a separate corporation, the Foundation is not a committee, subcommittee, or other entity however designated, of the Museum." *Id.*; *see also* VFOIA Council AO-10-06 (advising that a nonprofit foundation "is not a committee, subcommittee, or other entity of any public body"). The same is true of the Foundation.

C. Petitioners Cannot Evade the Public Body Requirement by Seeking the Foundation's Records from the University.

Petitioners are foreclosed from obtaining the Foundation's records because it is not a public body. All but conceding the point, Petitioners offer several arguments that attempt to obtain through the back door what is not available through the front. None of them, however, is consistent with the plain language of the VFOIA.

1. The Foundation's Documents Are Not "Public Records" Because It Is Not Engaged in Public Business.

Petitioners' principal argument rests on the VFOIA's definition of "public records," Pet. Br. at 17–35, which includes "writings and recordings . . . prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business." *See* Va. Code § 2.2-3701. According to Petitioners, the "threshold question" is whether the Foundation is engaged in "public

business," an undefined term used within that definition. Pet. Br. at 25. Petitioners argue that private fundraising is public business because contributions to the Foundation "further the University's educational mission" and would otherwise "naturally flow to the University itself." *Id.* at 18, 23. Then, relying on the definition's inclusion of the word "agents," Petitioners surmise that *the University* must produce the Foundation's records because "the Foundation acted as the University's agent in receiving, administering, and disbursing private gifts for the school's benefit." Pet. Br. at 9–10. In a nutshell, Petitioners argue that a "public body cannot . . . evade disclosure by outsourcing a key function to a separate entity." *Id.* at 1.

But a private corporation raising private funds from private donors does not engage in "public business" simply because those funds are later transferred to a public institution to "[a]dvanc[e] a statutory objective." JA 265. The undefined term "public business" must be read in light of the VFOIA's "primary purpose," which "is to facilitate openness in *the administration of government*." *Am. Tradition Inst.*, 287 Va. at 339, 756 S.E.2d at 440 (citing Va. Code § 2.2-3700(B)) (emphasis added). That "primary purpose" explains why "a VFOIA request only applies to a 'public body or its officers and employees.'" *Ibid.* (citing Va. Code § 2.2-3701). It further explains why, when defining a "public body," the General Assembly

extended that term to private corporations and organizations only when they are "supported wholly or principally by public funds." *See* Va. Code § 2.2-3701.

The distinction between public and private funds is consistent with the General Assembly's endorsement of private fundraising for public institutions. *See infra* at 24–25. In endorsing those fundraising activities, the General Assembly made clear that "in measuring the extent to which the Commonwealth shall finance higher education in the Commonwealth, the availability of the endowment funds and unrestricted gifts from private sources received by public institutions of higher education . . . shall neither be taken into consideration in nor used to reduce state appropriations or payments" to those institutions. Va. Code § 23.1-101(2). In other words, private contributions supplement, but do not supplant, public funding. Indeed, those funds "shall be used in accordance with the wishes of the donors of such funds" rather than the desires of a public decision maker. *Ibid.*

Petitioners claim that there is a "nationwide consensus of authority" that private fundraising is public business, but that observation does not withstand scrutiny. To be sure, some courts have held that private fundraising is a governmental function merely because it "advance[s] the statutory objects of the institution." *See, e.g., Gannon v. Bd. of Regents*, 692 N.W.2d 31, 40 (Iowa 2005). But others have recognized that private fundraising retains its private character even if it serves the public good. For instance, the Indiana Court of Appeals concluded

that the Indiana University Foundation was not a "public office" whose records were subject to examination by the State Board of Accounts, and therefore also subject to disclosure under the state's Public Records Act. *State Bd. of Accounts v. Indiana Univ. Found.*, 647 N.E.2d 342, 345 (Ind. Ct. App. 1995). Critical to the court's decision was the distinction between private and public funds: "Private donations received by Indiana University Foundation for the use or benefit of Indiana University are private not 'public funds' for purposes of the State Board of Accounts statute." *Id.* at 354–55. Similarly, in affirming the denial of a FOIA request directed at the West Virginia University Foundation, West Virginia's Supreme Court of Appeals recognized that "money donated to the Foundation is nonetheless garnered from private individuals . . . public-private cooperation does not affect the otherwise private corporation's status as such." *4-H Rd. Cmty. Ass'n v. W. Virginia Univ. Found., Inc.*, 182 W. Va. 434, 438, 388 S.E.2d 308, 312 (1989).

2. Petitioners' "Agency" Theory Impermissibly Seeks to Expand the "Delegated Functions" Clause.

Even assuming that the Foundation's work constitutes public business, Petitioners' argument still fails because it impermissibly seeks to expand the "delegated functions" clause beyond what the General Assembly prescribed. That provision reaches only a "committee, subcommittee, or other entity however designated, of the public body," not separate corporations with which the public body may contract. *See* Va. Code § 2.2-3701. When the General Assembly wanted

to subject a corporation's records to the VFOIA, it included them within the definition of a public body. *See ibid.* Similarly, when the General Assembly wished to impose responsibility on a public body for records in the custody of another body, it said so expressly. *See* Va. Code § 2.2-3704(J). That provision applies when "a public body has transferred possession of public records to any entity, including but not limited to any other public body, for storage, maintenance, or archiving," in which case "the public body initiating the transfer of such records . . . shall be responsible for retrieving and supplying such public records to the requester." *Ibid.* That provision does not apply here because Petitioners seek the Foundation's records, not public records of the University that it transferred to the Foundation. *Cf. Daily Press*, 293 Va. at 561–62, 800 S.E.2d at 826 (applying § 2.2-3704(J) to hold that clerks of court remained the custodians of public records that they transferred to the Executive Secretary of the Supreme Court).

The limited scope of these provisions distinguishes them from the open records acts of other states on whose decisions Petitioners rely. As the Supreme Court of Iowa observed, "a consensus has not emerged" among the states as to whether foundations are subject to open records laws, "[p]erhaps because of the differing statutory schemes involved and the fact-intensive nature of open-records challenges." *Gannon*, 692 N.W.2d at 38; *see also California State Univ. v. Superior Court*, 90 Cal. App. 4th 810, 829, 108 Cal. Rptr. 2d 870, 883 (2001)

(nongovernmental auxiliary organization was not a "state agency" under the California Public Records Act because that statutory definition did not "incorporate[] broad language" present in other states' laws).

Proving the point, in *Chicago Tribune v. Coll. of Du Page*, an Illinois appeals court applied a provision providing that a "public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of this Act." 79 N.E.3d at 703 (quoting 5 ILCS 140/7(2)). Based on that statute, the court reasoned that "certain third-party records," including the records of the foundation at issue, "are recast as public records of the public body for purposes of FOIA." *Ibid.* The other decisions Petitioners cite turned on similar provisions.[4] The absence of

[4] *See E. Stroudsburg Univ. Found. v. Office of Open Records*, 995 A.2d 496, 499 (Pa. Commw. Ct. 2010) ("A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a 'governmental function' on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.") (quoting 65 P.S. § 67.506(d)(1)); *Gannon*, 692 N.W.2d at 39 ("a government body shall not prevent the examination or copying of a public record by contracting with a nongovernment body to perform any of its duties or functions" (quoting Iowa Code § 22.2(2)); *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 65 Ohio St. 3d 258, 263, 602 N.E.2d 1159, 1163 (1992) (statute requires public offices to disclose records of a private entity "when a private entity performs the duties of a public office, the public

an analogous provision in the VFOIA renders these cases "inapposite due to the differences in statutory language." *Daily Press*, 293 Va. at 563 n.2, 800 S.E.2d at 827 n.2. It is not this Court's "prerogative" to "rewrite Code § 2.2–3701" to align Virginia's policy with that of other states. *Beck*, 267 Va. at 488, 593 S.E.2d at 198.

It is not the VFOIA Council's prerogative either. Petitioners cite to a number of its opinions to support their agency theory, but they ignore the opinion regarding the American Frontier Culture Foundation. *See* VFOIA Council AO-09-09. The requester sought a copy of the foundation's bylaws from the museum, but the museum denied the request because it "did not have custody of the Foundation's by-laws, and even if such a copy was physically on the premises, it would belong to the Foundation, not the Museum." *Ibid.* Thwarted by the museum, the requester "contend[ed] that the Foundation is a financial fundraising agent of the Virginia Frontier Culture Museum," relying on the same prior opinion as Petitioners. *Compare* Pet. Br. at 28, 30 (citing VFOIA Council AO-37-01 (Aug. 6, 2001)) *with ibid.* (same).

The VFOIA Council did not adopt Petitioners' theory. Instead, it explained that agency "was important in reference to the definition of public records," but "the analysis is incomplete without also looking to the definition of *public body*." *Ibid.*

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office is able to oversee the private entity, and the public office has access to the records produced by the private entity") (applying Ohio R.C. 149.43(B)).

As explained above, the foundation did not fall within that definition. *Ibid*. The VFOIA Council did not, as one would expect if Petitioners' theory was valid, direct the requester to renew his request to the museum. Instead, the VFOIA Council said that "the only way to obtain copies of the by-laws would be to ask the Foundation for them" because "the Museum has already indicated that it does not have actual or legal custody of them." *Ibid*.

3. Petitioners' Dual Employment and Alter Ego Arguments Are Inconsistent with the VFOIA.

Petitioners offer two other related arguments in an effort to avoid the public body requirement, but the circuit court correctly dismissed them as a matter of law.

First, Petitioners improperly conflate Dr. Janet Bingham's service as the University's Vice President of Development and the Foundation's President and CEO. *See* Pet. Br. at 35–37. According to Petitioners, Dr. Bingham's simultaneous service suggests that the University is the custodian of records she used in both capacities. *Ibid.* But it is a "well established principle of corporate law" that officers holding positions with affiliated companies "can and do 'change hats' to represent the two corporations separately." *United States v. Bestfoods*, 524 U.S. 51, 69 (1998). And, as the circuit court correctly reasoned, "[t]he presence of dual or multiple officers or board members does not expose the records of both corporations to search when an inquiry is directed to one corporation only." JA 242. In other words, documents belong to the University or the Foundation, not Dr. Bingham. To the

extent Dr. Bingham possessed public records in her capacity as the University's Vice President of Development, those records are the University's and subject to the VFOIA. But that does not make the documents that she possessed only in her work with the Foundation fair game for public disclosure.

Second, Petitioners ask the Court to "disregard the Foundation's separate legal identity and consider it an effective committee of the University for purposes of the Act," Pet. Br. at 38, an argument squarely at odds with *RF & P*. "This Court has been very reluctant to permit veil piercing. . . . only an extraordinary exception justifies disregarding the corporate entity and piercing the veil." *C.F. Tr., Inc. v. First Flight L.P.*, 266 Va. 3, 10, 580 S.E.2d 806, 810 (2003). In *RF & P*, as here, such an "extraordinary exception" was lacking—this Court refused to "disregard[] RF & P's corporate identity," even though it was a wholly-owned subsidiary of a nonprofit corporation formed by the VRS. *RF & P Corp.*, 247 Va. at 316, 440 S.E.2d at 913. The Court also reaffirmed that veil piercing is only permissible when a corporation is merely "a device or sham used to disguise wrongs, obscure fraud, or conceal crime." *Ibid.* (quoting *Cheatle v. Rudd's Swimming Pool Supply Co.*, 234 Va. 207, 212, 360 S.E.2d 828, 831 (1987)). Here there is no evidence that the Foundation engaged in wrongdoing. On the contrary, its actions were, by definition, lawful because they were consistent with the Commonwealth's policy of

encouraging private fundraising through private foundations to support public institutions.

II. Extending the VFOIA to Nonprofit Foundations Would Disrupt the Commonwealth's Policy of Encouraging Private Fundraising.

The General Assembly's decision to exclude nonprofit foundations from the VFOIA's ambit is informed by its policy of encouraging cooperation between public institutions and nonprofit foundations to raise private funds. Consistent with the lines the General Assembly has drawn, both the VFOIA Council and attorneys general have opined that foundations are distinct from the institutions they serve. And in reliance on the General Assembly's policy, foundations supporting Virginia's public universities have raised millions in private funds over a span of decades to make higher education better and more accessible to Virginians. To now find these foundations subject to the VFOIA would amount to a major shift in policy, upsetting donors' expectations of confidentiality and potentially hindering foundations' avenues for investing the funds they raise.

A. Legislative Action, VFOIA Council Records, and Attorney General's Opinions All Confirm the Settled Policy that Foundations Are Beyond the Scope of the VFOIA.

The Court need look no further than Title 23.1 to discern the General Assembly's policy toward nonprofit foundations. The General Assembly has affirmed that public institutions of higher education, along with a number of museums and other organizations, "shall be encouraged in their attempts to increase

their endowment funds and unrestricted gifts from private sources and reduce the hesitation of prospective donors to make contributions and unrestricted gifts," and that "the availability of the endowment funds and unrestricted gifts from private sources . . . shall neither be taken into consideration in nor used to reduce state appropriations or payments and shall be used in accordance with the wishes of the donors of such funds to strengthen the services rendered by these institutions to the people of the Commonwealth." Va. Code § 23.1-101. To achieve those ends, the General Assembly specifically authorized institutions to "[c]reate or continue the existence of one or more nonprofit entities for the purpose of soliciting, accepting, managing, and administering grants and gifts and bequests, including endowment gifts and bequests and gifts and bequests in trust." Va. Code § 23.1-1010(3). These policies were the subject of considerable debate in the late 1990s, with the Council advocating forcefully for private contributions to nonprofit foundations *not* to offset public appropriations. But if those foundations' financial information is now opened to public disclosure, it would become much easier for such fundraising to influence appropriations going forward, undermining if not abrogating existing policy.

While the General Assembly has endorsed private fundraising by nonprofit foundations, it has on at least three occasions rejected efforts to amend the VFOIA to reach the types of documents that Petitioners seek.

First, during the 1999 session, Delegate Marshall introduced a bill to amend the definition of "public body" to embrace "[c]orporations organized by the Virginia Retirement System *and foundations which exist for the primary purpose of supporting a public institution of higher education.*" H.B. 1659 (1999) (emphasis added to reflect proposed amendment). That bill failed in committee by a voice vote.

Second, only months before the petition was filed in this case, Senator Peterson introduced a bill to amend the definition of a public body 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." S.B. 1436 (2017). That bill too did not make it out of committee.

Third, and most recently, in the 2019 session, Delegate Bulova introduced a bill that would have narrowed an existing VFOIA exemption applicable to certain "[i]nformation maintained in connection with fundraising activities by or for a public institution of higher education." *See* Va. Code § 2.2-3705.4(7). Delegate Bulova's bill would have removed "information relating to the amount, date, purpose, and terms of the pledge or donation or the identity of the donor" from the exemption, and specified that a donor's identity could only be kept confidential if the donor's "pledge or donation does not impose terms or conditions related to academic decision-making." H.B. 2386 (2019). That bill likewise failed in committee.

The failure of these bills confirms that the VFOIA in its current form does not reach the documents that Petitioners seek despite "the legislature's awareness of the issue" raised in this case. *See Christian*, 282 Va. at 401, 718 S.E.2d at 772.

For their part, Petitioners rely heavily on the VFOIA exemption addressed in the 2019 bill, arguing that it demonstrates that "public university fundraising activities" are "a matter of public business" because otherwise "the exemption would be superfluous." Pet. Br. at 20. In fact the exemption further confirms the General Assembly's intent to keep foundations outside the scope of the VFOIA. Before the proposed exemption was introduced before the General Assembly, it was first raised before the VFOIA Council. VFOIA Council, 2007 Annual Report at 16, *available at* https://bit.ly/2DYVlci. The bill's proponents, acting on behalf of UVA, explained that "most university endowments are held by foundations," and that those "foundations are not subject to FOIA." *Ibid.* The exemption was necessary because UVA was "atypical in that it controls so much of its endowment directly," and "the way the UVA endowment [wa]s handled" meant that "many of the foundations' records end up in the possession of UVA itself, where they are subject to FOIA." *Ibid.* In response to concerns from the Coalition for Open Government (one of the *amici* supporting Petitioners), it was further noted that "the public sees none of the foundations' records" because "in the late 1990s there had been an unsuccessful movement to open to public disclosure university foundation records." *Id.* at 17.

Similar discussions took place at an additional meeting of the VFOIA Council, where it was again noted that "the issue about access to private foundations was settled 10 years ago in favor of not including them under FOIA." *Id.* at 19.

Reflecting those policy decisions, the VFOIA Council's guidance on foundations' status under the VFOIA has been clear. *See* VFOIA Council AO-09-09. Within two years after the proposed exemption was enacted, the VFOIA Council advised that, "as a general rule, such fundraising organizations are not public bodies subject to FOIA." *Ibid*. Absent circumstances not present here, "the only way to obtain" documents from such foundations is to ask for them voluntarily. *Ibid*.

Finally, a series of opinions from Attorneys General further confirms that nonprofit foundations fall outside the scope of the VFOIA because they are not a part of the institutions they benefit. In 1996 the Attorney General concluded that "a public university foundation" was not "an agency or institution of the Commonwealth for the purposes of . . . the Workforce Transition Act of 1995." 1996 Va. Op. Att'y Gen. 15. Consulting "[o]ther prior opinions of the Attorney General," the opinion "recognize[d] 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." *Id.* at 16 (citing 1984–85 Va. Op. Att'y Gen. 45; 1977–78 Va. Op. Att'y Gen. 26; 1974–75 Va. Op. Att'y Gen. 14). Citing still other opinions, the opinion reasoned that "separate, nonprofit

foundations organized for the benefit of state universities 'need only comply with the laws that govern such corporations,'" *id.* at 16 (quoting 1984–85 Va. Op. Att'y Gen. 46, 47), because "such foundations 'are customarily established, with some exceptions, as independent corporations under the Virginia Nonstock Corporation Act.'" *Id.* at 16. (quoting 1985–86 Va. Op. Att'y Gen. 54). This opinion—and the others it drew from—are "entitled to due consideration," particularly given that "the General Assembly has known of the Attorney General's Opinion . . . and has done nothing to change it." *Beck*, 267 Va. at 492, 593 S.E.2d at 200.

B. The General Assembly Excluded Nonprofit Foundations from the VFOIA Because of the Benefits They Bring to the Commonwealth.

The General Assembly excluded nonprofit foundations from the VFOIA for good reason. Although *amici* supporting Petitioners have identified incidents that they believe warrant the extension of the VFOIA to foundations, they ignore the benefits that these foundations confer on the Commonwealth.

This month the financial website SmartAsset again ranked Virginia as the top state for higher education. SmartAsset, Top States for Higher Education—2019 Edition, *available at* https://bit.ly/2SRZwLZ. But improving higher education—and specifically making it more accessible and affordable—remains a top priority in the Commonwealth. In passing the Virginia Higher Education Opportunity Act of 2011, which addresses state appropriations to institutions of higher education, the General Assembly stated its objective "to fuel strong economic growth in the Commonwealth

and prepare Virginians for the top job opportunities in the knowledge-driven economy of the 21st century," including ensuring that "educational and economic opportunities are accessible and affordable for all capable and committed Virginia students." Va. Code § 23.1-301(B). Investments in higher education have proven critical in bringing new jobs to the Commonwealth, including the recent $1 billion investment by Amazon. *To Win Amazon, Higher Ed Was Virginia's Secret Sauce*, Washington Post (Nov. 18, 2018), *available at* https://wapo.st/2XPsNti.

But even with these investments, Virginia remains the among the highest states for tuition and fees, ranking in the top ten states in cost and 37th in state support for higher education. State Council for Higher Education in Virginia ("SCHEV"), 2018–19 Tuition and Fees Report at 13–14, *available at* http://bit.ly/2018TFReport. "In 2004, the state set a goal to meet 67% of the cost of education." SCHEV, The Virginia Plan for Higher Education Annual Report for 2018 at 23, *available at* http://bit.ly/VirginiaPlan2018AnnualReport; *see also* Va. Code § 23.1-303(A). But the percentage of state support "has continued to decline and currently state support is about 20 percentage points less at 45% of the cost of education." *Ibid.* This "22 percentage point difference from the policy goal" represents a shortfall of approximately $759 million. 2018–19 Tuition and Fees Report at 12. With these shortfalls has come increased costs. For the 2018–19 academic year, total charges—the average tuition, fees, room and board—for in-

state undergraduates increased 4.4% from the prior year. *Id.* at 8. Similarly, estimated total charges rose to *half* of per-capita disposable income, a record high and 13 percentage points higher than the same measure 13 years ago. *Id.* at 15.

Private contributions are therefore critical to improving higher education in Virginia and making it more affordable. And nonprofit foundations are the linchpin of private fundraising efforts. Through these efforts, nonprofit foundations supporting the Commonwealth's four-year colleges and universities are supported by endowments with a total market value in excess of $12 billion for 2018. *See* National Association of College and University Business Officers, 2018 NACUBO-TIAA Study of Endowments (NTSE) Results (2019), *available at* https://bit.ly/2PUvWWj. Using those funds, and based on the Council's survey of all of Virginia's public two and four-year colleges and universities, some 25,488 students in the Commonwealth received financial aid for the 2017-18 academic year resulting from private donations. That financial aid totaled $153,091,263. By comparison, during the 2019 session, the General Assembly approved $134 million in new investments in higher education during the 2019 session, including $81 million addressing college affordability. *See* Growth4VA, 2019 Post-Session Update, *available at* http://growth4va.com/2019-post-session-update.

Private donors contribute to nonprofit foundations with the expectation that their identity and details of their contribution will not be subject to public disclosure–

–an interest the General Assembly recognized in enacting Va. Code § 2.2-3705.4(7). Before the VFOIA Council, the proponents of that exemption explained that "donors most often gave one of three reasons for requesting anonymity: (i) the donor does not want to be solicited for donations by other organizations, (ii) the donor has a child attending [the institution] and does not want the child's educational experience to be affected by the donation, and (iii) the donor does not wish for his or her spouse to know of the donation." VFOIA Council, 2007 Annual Report at 16; *accord* Deborah L. Jacobs, *How to Stay Anonymous When You Give to Charity*, Forbes (Sept. 19, 2012), *available at* https://bit.ly/2ZC8hOC (suggesting donors often wish to remain anonymous to "shun the limelight," "avoid hostility from people philosophically opposed to the causes they support," or out of "deeply felt religious conviction"). These donors' wishes should be respected. *See* Va. Code § 23.1-101(2) ("unrestricted gifts from private sources received by public institutions of higher education . . . *shall be used in accordance with the wishes of the donors of such funds*") (emphasis added).

The unintended consequences of subjecting foundations to the VFOIA also extend to how contributions are invested. Foundations often invest in private equity or hedge funds that offer the prospect of higher returns than other investments in which the institutions may invest. But the Investment of Public Funds Act places restrictions on the investments of, among others, "public bodies of the

Commonwealth." Va. Code §§ 2.2-4500 et seq. What is more, even if a decision based on the VFOIA would not apply in that context, disclosure of foundation records alone could threaten those investment opportunities. Like the VRS, private equity and hedge funds typically seek to protect confidential and proprietary information about their investment strategies. *See* Va. Code § 2.2-3705.7(12), (24) (providing an exclusion under the VFOIA for certain investment information held by the VRS and other retirement systems). These funds often include provisions in their contracts with foundations that require divestment, withholding of investment information, and/or financial penalties in the event the foundation becomes subject to open records laws. Extending the VFOIA to foundations could trigger these provisions and lead to a material loss of investment opportunities, another of the many policy consequences that make the extension of the VFOIA a question for the General Assembly, not the Court.

CONCLUSION

This Court should affirm the judgment of the circuit court.

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CERTIFICATE OF SERVICE

I hereby certify that this brief complies with Rules 5:6, 5:26, and 5:27 of the Rules of the Supreme Court of Virginia. This brief does not exceed 50 pages in length, excepting the Cover Page, Table of Contents, Table of Authorities, and this Certificate. I further certify that on this 16th day of May 2019, pursuant to Virginia Supreme Court Rule 5:26, three paper copies of the foregoing BRIEF OF *AMICUS CURIAE* have been hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy was filed via VACES. On this same day, an electronic copy of this brief was served via email upon the following counsel of record:

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