# In The
# Supreme Court of Virginia

**RECORD NO. 181375**

**TRANSPARENT GMU and AUGUSTUS THOMPSON,**
***Appellants*,**

**v.**

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

## BRIEF *AMICI CURIAE* OF THE ALUMNI ASSOCIATION OF THE UNIVERSITY OF VIRGINIA, THE COLLEGE FOUNDATION OF THE UNIVERSITY OF VIRGINIA, THE JEFFERSON SCHOLARS FOUNDATION, THE UNIVERSITY OF VIRGINIA DARDEN SCHOOL FOUNDATION, THE UNIVERSITY OF VIRGINIA INVESTMENT MANAGEMENT COMPANY, AND THE UNIVERSITY OF VIRGINIA LAW SCHOOL FOUNDATION

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## INTEREST OF THE AMICI

The Alumni Association of the University of Virginia was formed in 1838. The Association builds affinity among alumni and between alumni and the university while representing the independent perspective of alumni to the university. The Association supports the mission of the university by providing alumni- and student-engagement programs including career services and professional networking, class- and affinity-based reunions, admissions counseling services and a quarterly magazine. The Alumni Association raises and invests private funds to administer these programs as well as for the benefit of restricted student scholarships and catalytic seed funding for student and faculty ideas. The Alumni Association is a Virginia non-stock, nonprofit corporation located and operating in Charlottesville.

The College Foundation of the University of Virginia raises and invests private funds for the benefit of the University of Virginia's primary schools, the College and Graduate School of Arts and Sciences. The Foundation was founded in 2001 and is a Virginia non-stock, nonprofit corporation located and operating in Charlottesville.

The Jefferson Scholars Foundation serves the University of Virginia by funding scholarships, fellowships, and professorships for select individuals possessing the highest qualities of leadership, scholarship and citizenship. The Foundation is a Virginia non-stock, nonprofit corporation located and operating in Charlottesville.

The University of Virginia Darden School Foundation is a Virginia non-stock, nonprofit corporation located and operating in Charlottesville. It was incorporated in 1952 to establish and support the University of Virginia's Darden School of Business. The Foundation promotes philanthropic support for the Darden School from alumni, friends, and corporations, manages endowment funds for the school's benefit, and operates the school's top-ranked executive education programs.

The University of Virginia Investment Management Company ("UVIMCO") invests the endowment and other long-term funds held by the University of Virginia and its associated organizations and manages those funds in accordance with the spending requirements and risk tolerance of the University. UVIMCO is a Virginia non-stock, nonprofit corporation located and operating in Charlottesville.

The University of Virginia Law School Foundation receives, administers, and manages private gifts to the University of Virginia School of Law from its graduates and friends. It was created by alumni of the law school as a trust in 1952 and is a Virginia non-stock, nonprofit corporation located and operating in Charlottesville.

## STATEMENT OF THE CASE

The Amici agree with and adopt the statement of the case as set forth in the brief of appellee George Mason University Foundation, Inc. ("GMU Foundation").

## STATEMENT OF FACTS

The Amici agree with and adopt the statements of facts as set forth in the brief of appellee GMU Foundation.

## STANDARD OF REVIEW

The Amici agree with and adopt the standard of review as set forth in the brief of appellee GMU Foundation.

## ARGUMENT

Virginia's public colleges and universities rank among the premier institutions of higher learning in the United States. They sustain and enrich the economic, cultural, and civic life of the Commonwealth at

comparatively minimal cost to its taxpayers. Each year, these schools educate hundreds of thousands of Virginia residents, support tens of thousands of employees in communities across the Commonwealth, attract employers, professionals, scholars, and students to Virginia, and maintain major ancillary facilities for the public benefit, including hospitals, laboratories, and facilities for commercial, medical, and defense research. The continued success and stability of Virginia's public colleges and universities is inextricably bound to the general welfare of the Commonwealth.

Private fundraising and investment activities are critical means of support for these educational institutions. Judicial expansion of the Virginia Freedom of Information Act ("VFOIA") to cover private, independent foundations would undermine this support, contravene the stated goals of the General Assembly, and increase the cost of sustaining higher education in Virginia. By contrast, Virginia's express public policy is to encourage private funding for the benefit of public schools in the Commonwealth. This Court, therefore, should reject Appellants' proposed revision to the law.

## I. University foundations are independent, private entities which promote the public policy goals expressly stated by the General Assembly

For centuries, the Commonwealth of Virginia has stood at the forefront of higher education in the United States. In accord with that legacy, this Court and the General Assembly have long recognized the importance of preserving the quality and sustainability of Virginia's public universities.

This has been particularly evident in the context of the ability of Virginia's public universities to compete with their private counterparts. For example, in its recent decision in *American Tradition Institute v. Rector and Visitors of the University of Virginia*, 287 Va. 330 (2014), this Court specifically noted 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." 287 Va. at 342. Moreover, the Court noted that this policy implicated both financial and academic concerns. *Id.* at 342-43 (interpreting VFOIA's exemption for "information of a proprietary nature"); *see generally* Code § 2.2-3705.4 (exempting certain educational records from disclosure under the VFOIA).

To further public policy in support of public higher education, the General Assembly has long encouraged public universities to increase their funding independent of the public purse. Code § 23.1-101, some form of which has existed since the Code of 1950, states that "[e]ach public institution of higher education . . . 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." (Emphasis added.) Additionally, the General Assembly has expressly encouraged public institutions of higher education 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." Code § 23.1-1010(3).

Like the GMU Foundation, the undersigned amici exist to further these policy objectives. Accepting the General Assembly's invitation, nearly every public university in Virginia depends on the beneficial work of private, nonprofit entities to support the growth and mission of their institution. For example, the undersigned foundations solicit, administer, invest, and disburse funds donated to benefit the University

of Virginia ("UVA"). The beneficiaries of this work include graduate programs, academic scholarships, fellowships, professorships, and more.

While their funds support different areas of academic life at UVA, the undersigned share several common traits: each is a private, nonprofit organization; each is a Virginia non-stock corporation distinct from the University itself; each is managed by full-time, professional staff paid by the foundation; and each is governed by an independent and volunteer board of directors. Moreover, each of the undersigned either solicits or manages private donations intended to benefit UVA. Importantly, these funds are not controlled by UVA. In fact, a majority of funds received by foundations are restricted by donors: some are earmarked for the academic division or the athletic division, some for particular scholarships or professorships, and some for specific projects or purposes, such as the construction of a new building or development of a new department. *See, e.g.*, University of Virginia, *Financial Report 2017-2018* at 7 (2018), ("[A]bout two-thirds of the earnings [from the endowment] are restricted as to use by donors."), *available at* https://www.virginia.edu/financialreport/UVAFInancialReport2018.pdf.

The unifying feature of almost all funds donated to these foundations is that they are not subject to the control of the university. This is, in fact, a reason for the effectiveness of these separate foundations: donors want assurance that their contributions will *not* be subject to the control of the university, or to reappropriation by the General Assembly. The longstanding and well-settled status of foundations as independent bodies, not subject to the control of or designation as a public body, has been a key attribute of their existence and success.

As the Attorney General has recognized, these "tax-exempt foundations . . . are not a part of the universities" they support. 1996 Va. Op. Att'y Gen. 15, 1996 WL 658746, at *1-2. As "separate, nonprofit corporations organized for the benefit of state universities," they "need only comply with the laws that govern such corporations." *Id.* at 1. These organizations' power, in other words, derives from their incorporation and not from their relationship with the university they support.

Foundations in the Commonwealth such as the undersigned amici have operated independently for decades under formal guidance of the Attorney General of Virginia. In a memorandum issued almost 40 years

ago to Virginia's public university presidents, the Attorney General offered specific recommendations regarding foundations' structure and governance which have subsequently guided these organizations' operations. Summary of Responses Regarding Foundations Supporting Public Institutions of Higher Education and Recommendations of the Attorney General, May 20, 1983, Gerald L. Baliles, Attorney General, Paul J. Forch, Senior Assistant Attorney General.[1] As the Attorney General noted, foundations had "broad discretion," independent of the institutions they support, to manage and dispose of the private gifts they received. *Id.* at 2-3, 13. Such entities, however, were subject to both the laws governing tax-exempt organizations and the fiduciary obligations that govern all charitable organizations. *See id.* at 2 and n.1; Code § 57-48, *et seq*.[2]

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[1] The undersigned amici obtained the memorandum, which is cited frequently by Virginia colleges and universities, from the Office of the Attorney General and will make it available upon request.

[2] Many Virginia colleges and universities have expressly referenced the memorandum in policies governing their conduct toward foundations more than 35 years after its issuance. *See, e.g.*, Virginia Community College System, *Policy Manual*, Section 2A: Policies, Procedures, and Regulations Governing the Establishment and Operation of the Comprehensive Community College System in Virginia, § 2.10(G), *available at* https://go.boarddocs.com/va/vccs/Board.nsf/Public;

Foundations are decidedly not "legal fiction[s]" or participants in an "open government shell game," as Appellants and their supporting amici allege. Op. Br. at 1; Br. *Amici Curiae* of the Brechner Center for Freedom of Information, et al. (hereinafter "Brechner Center Br."), at 13. They are distinct legal entities incorporated by the Commonwealth of Virginia and governed by Virginia and federal law applicable to charitable organizations. As with other foundations supporting public universities in Virginia, the undersigned are governed by an independent board of directors, deal at arm's length and on negotiated terms with UVA, and raise or invest private funds to support UVA's mission. In other words, just as the GMU Foundation does, the undersigned amici further the General Assembly's express public policy goals of supporting successful and stable public universities. To consider them to be public bodies within the scope of VFOIA requires ignoring both the reality of their existence and these public policy objectives.

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Virginia State University, *Board Policy 1110: University-Related Foundations*, at 1, *available at* http://www.vsu.edu/hr/policies.php; Norfolk State University, *Board of Visitors Policy #13 (2015) University Related Foundations*, at 12 n.1, *available at* https://www.nsu.edu/policy/bov-13.aspx.

## II. Construing independent foundations as public bodies subject to VFOIA would impede critical private sources of funding for higher education in Virginia

The undersigned amici represent two critical aspects of the private support of public universities: soliciting private donations for the long-term benefit of the universities and their constituencies, and investing those funds to keep pace with inflation and long-term spending needs. With respect to both, expanding the scope of VFOIA to encompass these entities would result in significant negative impact on the growth and support of public universities. The undersigned fundraising foundations entrust a portion of raised funds to UVIMCO, which invests those funds for the long term. Historically the undersigned foundations have been successful fundraisers, and UVIMCO has been a successful investor, each to the manifest benefit of UVA.

### a. Construing independent foundations as public bodies would impede private fundraising

Private donations are critical to the functioning of an excellent public higher education system like that enjoyed in Virginia. Private dollars permit public universities to weather economic downturns and periods of uncertain state appropriations, which often coincide, without increasing tuition or limiting scholarships and other access-oriented aid.

In better times, those funds enhance public schools' power to pursue their public-spirited mission.

Thirty years ago, state appropriations to UVA accounted for six times more of the university's academic operating budget than endowment spending did. *See* University of Virginia Investment Management Company, *2017-2018 Annual Report* 7 (2018), *available at* https://www.uvimco.org/annual-report-2018. Today, by the same measure, the university receives more financial support from the endowment than from the state. *Id.* Meanwhile, peer public institutions competing with Virginia's public universities and colleges often receive much more public funding per student than Virginia schools do.[3] Private dollars permit UVA and our other public colleges and universities to maintain a national reputation for excellence in the face of these disparities.

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[3] Virginia's support for higher education is lower than that of nearly 75% of states. *See* National Science Foundation, *State Support for Higher Education per Full-Time Equivalent Student*, State Indicators 2018, *available at* https://nsf.gov/statistics/state-indicators/indicator/state-support-for-higher-education-per-fte-student/map/2017. Virginia ranked 37th among the states in 2017 and has ranked 38th on average since 2000. *See id.*

The independence of university foundations allows them to be effective fundraisers; expansion of VFOIA to encompass their activities would make fundraising cost more and achieve less. At the outset, and contrary to the arguments of Appellants' amici, exposure to public records laws like VFOIA would chill fundraising. The ability to offer complete confidentiality to donors who want to support UVA is critical to maintaining competitive equilibrium with private colleges and universities. Donors want and expect confidentiality, and sometimes anonymity, in connection with some aspects of their donations. The option to donate in confidence can easily turn donors toward private institutions and away from public ones with open records.

Statutory exemptions offer minimal relief, as a philanthropist concerned about public disclosure is unlikely to discern the applicability of certain exemptions. Anything that threatens donor confidentiality will ultimately disadvantage Virginia's public colleges and universities. *See Am. Trad. Inst. v. Rectors and Visitors*, 287 Va. at 342 (noting 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").

The amicus brief of the Brechner Center, et al., cites the fact that *some* donors to universities and foundations want their identities publicized as proof that *no* donor wants confidentiality. Brechner Center Br. at 18. As organizations which exist to raise private donations, and which work with donors on a daily basis, the undersigned amici can attest that this is not the case. The capacity to offer confidentiality to those donors who want it is an important competitive advantage in fundraising, which exposure to VFOIA would forfeit. That outcome cannot be reconciled with Virginia's public policy, plainly memorialized in statutory law, to favor the growth of private funding for public schools; nor can it be reconciled with the General Assembly's intent in drafting VFOIA to refrain from impairing public schools' competitive advantages. *See* Code § 23.1-101(1) ("It is the public policy of the Commonwealth that [e]ach public institution of higher education . . . shall be encouraged in [its] attempts to increase [its] endowment funds . . . from private sources."); *Am. Trad. Inst.*, 287 Va. at 342 (noting the "General Assembly's intent" in drafting VFOIA to "protect public universities and colleges from being placed at a competitive disadvantage in relation to private colleges and universities").

In addition to confidentiality, many donors desire certainty that their contributions will be directed toward a specific benefit and free from the control of the university or possible reappropriation by the General Assembly. Only private, independent foundations, and not public universities, can offer this assurance. To undermine the effectiveness of foundations, and indeed the very reason for their longstanding existence in the Commonwealth, would decrease private donations in support of higher education goals.

Sudden exposure to VFOIA, as envisioned by Appellants and their amici, would also inject significant uncertainty into the charitable giving landscape in which the undersigned operate. Recent changes to the tax deductibility of donations to nonprofit organizations has increased the challenge of sustaining the fundraising efforts needed to support public education. While the extent to which the new tax landscape will affect Virginia's colleges and universities is unclear, it is safe to assume that a decrease in the deductibility of donations will increase the absolute cost of those donations to donors and suppress private fundraising by college and university foundations going forward. Fundraising while subject to VFOIA will cost more and achieve less. In this uncertain environment, it

is especially important that the policy issues at stake be left to the General Assembly so that it can consider the various effects subjection to VFOIA could have on higher education in Virginia.

**b. Construing independent foundations as public bodies would impede investment returns**

Among the independent foundations that support the mission of UVA and its constituencies, UVIMCO has the unique role of overseeing the investment of the long-term assets of the university and the other foundations. All of the undersigned foundations solicit funds to benefit their respective schools, alumni, or interested donor cohorts, and deposit a portion of those funds with UVIMCO to invest and manage. UVIMCO's success in this arena has provided considerable benefit to UVA, the undersigned amici, and other foundations. This, in turn, benefits the Commonwealth of Virginia and its taxpayers, who have been asked to provide a smaller portion of the university's operating budget as a result of the endowment's outperformance.

Like many other institutional investors, UVIMCO utilizes external investment managers to invest most of its assets. UVIMCO's investment returns have substantially outperformed those of its passive portfolio benchmark, as well as the benchmark returns of its public pension and

endowment peers. *See* University of Virginia Investment Management Company, *2017-2018 Annual Report* 24-25 (2018), *available at* https://www.uvimco.org/annual-report-2018. Over the past ten- and twenty-year periods, this outperformance has contributed hundreds of millions of dollars to the mission of UVA, the undersigned amici, and other independent foundations which raise private funds to support UVA. Absent substantial increases in private donations, state appropriations, or tuition, a discontinuation of these contributions would cause a significant deterioration in the quality of higher education at UVA, a valuable asset to the citizens of Virginia.

UVIMCO's existence as an independent, private corporation, rather than as a public body subject to VFOIA, has been a critical component of its ability to generate outsized investment returns. External managers such as those employed by UVIMCO place a heavy premium on an investor's ability to keep information confidential. Accepting capital from an investor subject to open records laws such as VFOIA entails accepting a risk that proprietary information will be made public. As a result, many successful investment managers – including some who have contributed

significantly to UVIMCO's investment returns – will not accept capital from investors that are subject to open records laws.

Without the ability to represent that UVIMCO is not subject to a public records law, many valuable investment opportunities will be lost. Moreover, the investment opportunities that may be foreclosed by exposure to public records laws are often the most desirable: investment managers in high demand are more likely to decline capital from investors who are subject to open records laws. Notably, this black and white position, which is commonly held by the most successful investors, is one reason the statutory exemptions in VFOIA and other open records laws are of little consolation.

To be sure, many investment managers are willing to accept capital from institutions subject to public records laws. But this too comes at a cost: such institutions are often placed in an information silo to prevent the disclosure of proprietary information to those institutions. This significantly restricts the institution's access to information regarding the making, monitoring, and divesting of an investment. Putting UVIMCO at such an information disadvantage would impair UVIMCO's ability to match the returns of its private peers who are afforded complete

information regarding their investments. It has long been the public policy of the Commonwealth to prevent such competitive disadvantages. *Am. Trad. Inst.*, 287 Va. at 342.

Overturning decades of established consensus on the status of independent foundations such as UVIMCO under the VFOIA would wreak havoc in a number of other unanticipated ways. For example, UVIMCO is subject to countless contractual obligations regarding its VFOIA status, many of which entail punitive remedies which could adversely impact the value of the funds it manages. In the context of current pressures on private donations and state appropriations, this is an additional cost that Virginia cannot afford. Indeed, the undersigned amici suggest that this is a significant reason the General Assembly declined two years ago to make the legislative change now asked of this Court.

## III. Reliance on the public records laws and public policy concerns of other states is misplaced

Appellants and their amici rely on cases from other states which, they assert, subject foundations in those states to public records laws. *See* Op. Br. at 24-25. According to the amici, "a growing number of states" have found that university foundations are public agencies. Brechner

Center Br. at 14-18. In addition, the amici include a lengthy discussion of public policy concerns that have arisen in other states, including the corruption and mismanagement of private foundations supporting higher education. *See id.* at 6-13.

The cases that Appellants and their amici cite, however, do not indicate a growing trend of subjecting university foundations to public records laws. Instead, they indicate the uncontroversial and the obvious: whether a state's public records laws apply to a university or college foundation depends on the nature of the entity, the text of the law, and the public policy of the jurisdiction. *See, e.g.*, *Weston v. Carolina Research & Dev. Found.*, 401 S.E.2d 161, 163 (S.C. 1991) (finding university foundation to be a "public body" because the statutory definition encompassed all entities "supported . . . in part by public funds"); *State v. Univ. of Toledo Found.*, 602 N.E.2d 1159, 1161-62 (Ohio 1992) (holding that the university foundation was a "public office" because its history indicated it had long been the "soliciting arm" of the university); *Gannon v. Bd. of Regents*, 692 N.W.2d 31, 40 (Iowa 2005) (holding that the university foundation was subject to public records laws based on the "legislative intent" that a government body may not "contract away" its

fundraising functions). Moreover, only one of the cases cited by the amici is from within the last decade. *See Chicago Tribune v. Coll. of Du Page*, 79 N.E.3d 694, 700, 706-09 (Ill. App. Ct. 2017) (holding that a college's foundation performed a "government function," which term was undefined, based on the sharing of employees, payment of benefits, and contractual agreement between the foundation and the college).

Ultimately, Appellants' reliance on foreign authority and scandals from other states serves primarily to highlight the conspicuous lack of Virginia law, public policy, or current events supporting their position. The foreign jurisdictions relied on by Appellants and their amici fail to consider Virginia's statutes and public policy directly controlling the question of whether a university foundation is a "public body." *See, e.g., Cape Publ'n, Inc. v. Univ. of Louisville Found., Inc.*, 260 S.W.3d 818, 822 (Ky. 2008) (holding that the university and foundation were "one and the same" because "the Foundation was established, created, and wholly controlled by the University.").

Moreover, the amici's stories of scandal and mismanagement ignore that exposing college and university foundations to VFOIA would impede effective management and governance by making it harder to recruit

well-qualified individuals to serve on their boards. Foundation boards of directors are comprised of volunteers – donors themselves – who receive no salary to offset the risks and inconveniences of open records and open meetings. Recruitment and retention of dedicated and experienced directors would be more difficult under an open records regime, undermining the effectiveness of the organization's independent governing board. Such a result would increase, rather than decrease, the risk of the types of mismanagement cited by Appellants' amici. Strong corporate governance through an experienced board of directors is a much more effective check on mismanagement than reliance on open records requests.

## IV. Whether to expose public colleges and universities to VFOIA is a public policy question for the General Assembly

Even if the decisions of other jurisdictions were compelling, opting to follow the same path is a decision for the General Assembly. With the express encouragement of that body, Virginia's public colleges and universities have for decades depended on a network of separate, nonprofit foundations, including the undersigned amici, to source, administer, and invest private funds. These organizations participate unimpeded in the competitive market for private dollars, to the vital

benefit of the schools that they support. As a result, Virginia's public colleges and universities have benefited from private donations and investment returns competitive with those available to peer private institutions and exceeding those available to most public schools in other states. Only the General Assembly, and not the courts, should alter this landscape.

### a. The General Assembly has not shown an intent to make independent foundations subject to VFOIA

Independent foundations which exist to support public university constituencies have operated for decades under a well-settled statutory framework that places them squarely outside the purview of VFOIA. Given their separate governance and operations, and their independence from the control of the universities they support, foundations such as the undersigned amici are not in any sense alter egos of the universities they support. On the contrary, as discussed above, the General Assembly has expressed its support for the separate existence and work of these foundations. *See supra*, Part I.

In support of their claim, Appellants stress the inclusion of the following language within VFOIA's definition of a "public body": "any committee, subcommittee, *or other entity however designated*, of the

public body created to perform delegated functions of the public body." Code § 2.2-3701 (emphasis added); Op. Br. at 37-42. However, the phrase "or other entity however designated" was added to VFOIA during a recodification in 2001. *See* Va. Code Comm'n, Recodification of Titles 2.1 and 9 of the Code of Virginia, H.D. No. 51 (2001).

This Court has maintained for a century that language introduced to a statute during a recodification is presumed not to substantively modify that statute, unless there is strong evidence of legislative intent to the contrary. *See, e.g., Chapman v. Richardson*, 123 Va. 388, 391 (1918) ("The general rule of construction of statutes is . . . that where there has been a revision of the laws the presumption is that the old law was not intended to be changed unless a contrary intention plainly appears in the new."); *Waldrop v. Commonwealth*, 255 Va. 210, 214 (1998) (same). Moreover, to determine whether such intent was noted, this Court has repeatedly turned to recodification reports of the Virginia Code Commission. *See, e.g., REVI, LLC v. Chicago Title Ins. Co.*, 290 Va. 203, 210 (2015) (citing the recodification report to hold that no substantive change was intended); *Waldrop*, 255 Va. at 214 (same).

In this instance, the recodification report establishes a complete absence of legislative intent to substantively modify VFOIA. The report states that the only substantive change in law during the recodification relates to an act other than VFOIA, and the note associated with the addition of "or other entity however designated" describes it as a "technical correction only." See Va. Code Comm'n, Recodification of Titles 2.1 and 9 of the Code of Virginia, H.D. No. 51 at 334. The "other entity" language cited by Appellants, therefore, merely clarified that a committee or subcommittee of directors or officers within a public body would not escape VFOIA if the group is given a different name. Pursuant to the principle in *Chapman* and *Waldrop*, and contrary to Appellants' claims, the recodification did not substantively expand the scope of "public body" to encompass any independent organization with some unspecified relationship to a public body. To adopt this interpretation of the statute would expand the scope of VFOIA and create uncertainty where there is none, all in the absence of any legislative mandate.

**b. Expanding the scope of VFOIA to independent foundations is a task best suited for the legislature**

Whether to alter this well-established system of funding by exposing these private foundations to VFOIA is a quintessential question

of public policy for the General Assembly to consider. As the brief of the GMU Foundation sets forth, nothing in the text of the VFOIA or this Court's case law supports a finding that a private, nonprofit organization is a "public body" subject to VFOIA. Holding that it is would cripple the existing system of funding for public colleges and universities and create new challenges for sustaining higher education in Virginia by foreclosing access to significant investment opportunities and impairing the ability to compete for private funding.

To expose private foundations to VFOIA now would upset established expectations and practices. In the 50 years since VFOIA's enactment, enormous legal, financial, and other institutional edifices have been erected in reliance on the understanding that VFOIA does not apply to appropriately organized foundations. During that time, neither this Court, the Attorney General, nor the VFOIA Advisory Council has issued an opinion, and the General Assembly has enacted no legislation, questioning this reality. In fact, just the opposite: in 2017, the General Assembly considered and rejected a bill that would have amended VFOIA to expressly apply to the private foundations that support public higher

education. *See* Va. Legislative Info. Sys., 2017 Session, SB1346, *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?171+sum+SB1436.

Furthermore, public records requests are a clumsy and redundant way to manage and oversee the private foundations that support public universities. Foundations supporting public universities are charitable organizations organized under and subject to not only state corporate law, but also the state and federal tax and charitable giving laws governing tax-exempt organizations. The Internal Revenue Service and state agencies have authority, which they often exercise, to investigate and penalize nonprofit corporations for misconduct related to their tax exemptions.[4] These organizations are also contractually subject to annual audits by independent accountants, and their employees are subject to continuing scrutiny by their independent boards of directors. Each foundation and endowment, in other words, is already subject to

[4] *See* Code § 2.2-507.1 (outlining the authority of the Attorney General to "act on behalf of the public" with respect to the assets of charitable organizations); Lloyd Hitoshi Mayer & Brendan M. Wilson, *Regulating Charities in the Twenty-First Century: An Institutional Choice Analysis*, 85 Chi.-Kent L. Rev. 479, 489-90 (2010) ("Governments regulate charities in a variety of ways and through a variety of government agencies," including the Internal Revenue Service, the Federal Trade Commission and "various state officials, usually but not always within the Attorney General's office.").

oversight by several authorities and stakeholders. Whether the additional oversight that comes with being subject to VFOIA is worth the costs is a legislative and public policy question. The undersigned believe the answer is an emphatic "no" and urge this Court to leave the issue to the General Assembly to decide.

## CONCLUSION

Appellants' attempt to effect a sea change in the scope of VFOIA through the courts, rather than the General Assembly, makes policy considerations particularly salient in this case. The interests at stake here are not abstract. A judicial expansion of VFOIA would result in significant cost to the private foundations supporting public universities, decrease funds available to those institutions, and increase the cost of higher education in Virginia. It is likely that the long-term costs of such an expansion of the statute would number in the hundreds of millions of dollars. Virginia's public policy dictates a better approach: encourage, rather than inhibit, the voluntary donation and effective investment of private funds for the benefit of public schools in the Commonwealth.

At the heart of VFOIA is a mandate of open government; it governs the activities of the government and allows citizens the opportunity to

witness government's operations. Foundations govern no one. They derive neither their powers nor their revenues from the state; rather, they use the privileges of corporate personhood to put private dollars to work for public colleges and universities. *See, e.g.*, Virginia Freedom of Information Advisory Council, Op. A0-09-09 (Oct. 23, 2009) ("[N]onprofit fundraising corporations . . . do not receive public funds – they do the opposite, by collecting private donations and gifts and then passing them on to the public entities").

The undersigned amici agree that the business of government is best conducted in the open: laws should not be made, nor judicial decisions handed down, nor taxpayer money spent, "in an atmosphere of secrecy." Code § 2.2-3700(B). But to obtain and invest private dollars is a private activity, even where performed for a public purpose. To impose on private foundations strictures meant to prevent waste and misuse of public resources will result instead in the waste and misuse of private resources. That is not the intent of the General Assembly, the public policy of the Commonwealth, or the law of Virginia.

The decision of the circuit court should be affirmed.

Dated: May 17, 2019

Respectfully submitted,

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## CERTIFICATE

I hereby certify that on this 17th day of May, 2019, the foregoing Brief *Amici Curiae* complies with Rule 5:26. Counsel also certifies that this same day, and pursuant to Rule 5:26, three paper copies of the Brief *Amici Curiae* have been hand-filed with the Clerk of the Supreme Court of Virginia and electronic copy of the brief was filed, via VACES. On this same day, an electronic copy of the brief was also served, via email, on the following:

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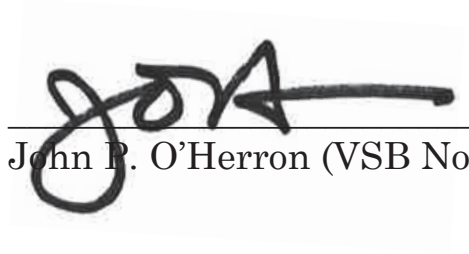

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