IN THE
SUPREME COURT OF VIRGINIA

Record No. 130934

THE AMERICAN TRADITION INSTITUTE, and
THE HONORABLE DELEGATE ROBERT MARSHALL,
Appellants,

v.

RECTOR AND VISITORS OF
THE UNIVERSITY OF VIRGINIA, et al,
Appellees,

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 17 MEDIA ORGANIZATIONS, IN SUPPORT OF APPELLANTS

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STATEMENT OF CONSENT

Pursuant to Va. Sup. Ct. R. 5:30, the Reporters Committee for Freedom of the Press, through undersigned counsel, respectfully submit this brief as amicus curiae in support of appellants American Tradition Institute, et al. Pursuant to Va. Sup. Ct. R. 5:30 (b)(2), this brief is filed with the consent of all parties.

STATEMENT OF INTEREST

Amici curiae, described fully in Appendix A, are The Reporters Committee for Freedom of the Press, Allbritton Communications Company, The Associated Press, Atlantic Media, Inc., Belo Corp., Dow Jones & Company, Inc., First Amendment Coalition, Gannett Co., Inc., National Press Photographers Association, National Public Radio, Inc., News Corp, Newspaper Association of America, North Jersey Media Group Inc., POLITICO LLC, Radio Television Digital News Association, Reuters America LLC, Student Press Law Center, and The Washington Post.

This case, while specifically concerned with the issue of the release of climate researcher Michael Mann's email communications with other academics, involves two issues of critical importance to the media and the public: whether a Virginia public institution may withhold from the public any documents it creates or manages, and whether a state may charge requesters for the cost of exemption review. As advocates for the media and the media's ability to disseminate information to the public, *amici* have a strong interest in ensuring journalists and members of the public can access government documents.

By defining an exemption to the Virginia Freedom of Information Act ("VFOIA") as broadly as the lower court has done, this Court would be, in

effect, removing almost all public documents from the ambit of the records law. This case has implications beyond the outcome for these parties in that it will serve to define the scope of the "proprietary nature" exception to the public records act, and *amici* have an interest in seeing that definition carefully and thoughtfully crafted.

In addition, *amici* have a strong interest in ensuring members of the media and members of the public have affordable access to public records. Keeping access affordable requires limiting fees associated with requests, including prohibiting agencies from charging requesters for the cost of agency exemption review. Sunshine laws are not based on the foundation that people interested in viewing government records must underwrite the system; instead, public records laws are meant to ensure a public right to examine government actions as a check in a democratic system.

Amici respectfully request that this Court reverse the decision below regarding the definition of "of a proprietary nature" and the imposition of exemption review fees.

SUMMARY OF THE ARGUMENT

Exemptions to VFOIA must be narrowly interpreted to comply with the legislative intent behind the law and to ensure the public and the news media sufficient access to the government to promote an understanding of its operations. Public universities are necessarily included in VFOIA, and the media has a strong interest in being able to monitor university spending and operations. While truly proprietary information in the possession of a public university should not be subject to request under VFOIA and in fact is properly exempted, email among professors is not entitled to a blanket treatment as proprietary. Instead, such communications are an essential part of the functioning of the university and must be subject to public scrutiny. Because such communications have been held not to implicate academic freedom, and because the type of email at issue here does not include unpublished information in which the professors or the university have a competitive interest, it must be subject to VFOIA. The lower court's broad definition of "proprietary nature" cannot stand if VFOIA is to retain any meaning.

It is also important that requesters not be responsible for paying the costs of redaction review. Such a review does not fall under any of the actions agencies are statutorily permitted to charge requesters for, and this

Court should not read in an additional fee system to VFOIA. The purpose of a public records law is best served when the public truly has the right to check its government, and the government should not be allowed to require requesters to overcome additional cost barriers when it chooses to restrict access to information.

ARGUMENT

I. This Court should define the phrase "of a proprietary nature" narrowly to comply with the spirit of VFOIA.

This case concerns email exchanged among public university professors, and whether those may be withheld from the public as "proprietary" information. In examining the scope of a VFOIA exemption, a narrow reading is essential to meet the statute's goal of public openness. In order to enable the public to properly check its government, and to allow the media to effectively report on government activities, there must be a more workable definition of "proprietary nature" than the lower court has put forward. If that definition were accepted broadly, neither journalists nor members of the public would have access to any government documents.

A. The lower court's definition of "of a proprietary nature" is overly broad and would exempt from disclosure under VFOIA every document the University of Virginia produces or maintains.

The Circuit Court of Prince William County defined "of a proprietary nature" to mean "a thing or property owned or in the possession of one who manages and controls them." (Order, Apr. 2, 2013, ¶ 7). This literally writes into the exemption the very definition of a public record in Virginia. VFOIA defines "public records" as:

> *all 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. Records that are not prepared for or used in the transaction of public business are not public records.

Va. Code § 2.2-3701 (emphasis added). Under the lower court's interpretation, no public university record would qualify for release under VFOIA because all university documents are presumably "things" and would be "owned or in the possession of" the university.

The lower court's overly broad definition provides no guidance to state agencies as to what they may withhold under this exemption. It effectively makes the exemption larger than the rule by omitting from the definition of "proprietary" the requirement that the communication arise "in the transaction of the public business." That clause, which ordinarily serves to give VFOIA important context, now simply makes "public records" a subset of "proprietary records."

The lower court here has allowed the exception to swallow the rule. Such an interpretation cannot be what the Virginia Legislature intended when it granted Virginia citizens access to government records. In fact, the Legislature explicitly stated the law was to be "liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government," and that "[a]ny exemption from public access to records or

meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt." Va. Code § 2.2-3700(B).

Because the legislature clearly did not contemplate providing universities with such a broad escape from disclosure requirements, the lower court's decision should not stand.

B. "Of a proprietary nature" should protect universities' competitive rights, but should not reach beyond those concerns.

Journalists have a compelling interest in access to government documents, and Virginia's public universities are among the biggest government operations in the Commonwealth. Members of the media would be remiss in not providing the public with comprehensive coverage of Virginia's public universities, and VFOIA should help reporters in that mission. It is important, though, to balance the public interest in government institutions against the universities' clear competitive interest in work that may eventually be eligible for copyright, trademark, or patent protection. Only in the realm of intellectual property should the universities' competitive rights trump the public's right to understand the workings of its government.

1. In other contexts, Virginia law associates "proprietary" with intellectual property.

Although the lower court declined to review the definition of "proprietary" in the context of other portions of the Virginia statute, doing so indicates a clear preference for an intellectual property interpretation. *See e.g.* Va. Code § 2.2-3711(A)(22) (defining "proprietary" as "business related"); *id.* §§ 2.2-4342(F), 38.2-3434, and 54.1-3401 (relating it to "trade secrets"); and *id.* § 45.1-285 (indicating "proprietary" relates to "competitive rights").

Much like the businesses the statute seeks to protect in those sections, universities do have competitive interests that deserve protection. *Amici* do not argue the interest must be a commercial one in order for the government agency to claim an exemption to VFOIA. A university's competitive interests extend to its professors' research work. In fact, the very exemption at issue here, Va. Code § 2.2-3705.4(4), takes those interests into account by exempting from release only information "where such data, records or information has not been publicly released, published, copyrighted or patented." That qualifier provides important context for interpreting the phrase "of a proprietary nature." The concern the legislature appears to be addressing in that section is that universities would sacrifice their competitive interests in research if forced under VFOIA

to release all related communications. It indicates the exemption was limited to documents that would clearly implicate those competitive interests and compromise important research.

The "proprietary nature" exemption should reflect the context of VFOIA and also the other uses of "proprietary" elsewhere in the Virginia Code. To accomplish a consistent interpretation of the word throughout the code, it must be limited in the VFOIA exemption to such documents as are related to protecting the university's competitive interest in its professors' academic work.

2. Other states' open records laws use "proprietary" to exempt trade secrets and other sensitive business material.

While every state has some public records exemption for proprietary information either in case law or explicitly in its open records statute, none defines the term as broadly as the lower court has done in this case. In fact, most reference "proprietary" in the context of protecting information that gives the holder a competitive advantage over others in the field. Alaska's definition is among the more thorough:

> "[P]roprietary," when used to describe information, means that the information is treated by an applicant as confidential and the public disclosure of that information would adversely affect the competitive position of the applicant or materially diminish the commercial value of the information to the applicant.

Alaska Stat. Ann. § 43.90.900(20).

Other states simply associate "proprietary" information with trade secrets and "commercially sensitive information." *See e.g.* Cal. Gov't Code § 6254.15 ("Nothing in this chapter shall be construed to require the disclosure of records that are any of the following: corporate financial records, corporate proprietary information including trade secrets"); 65 Pa. State Ann. § 67.708 (excluding any "record that constitutes or reveals a trade secret or confidential proprietary information"); *Doe v. State*, 290 P.3d 1277 (Idaho 2012) (exempting "trade secrets or similar proprietary information" from release in Idaho).

Virginia would be an outlier among states in adopting an interpretation of "proprietary" as broad as the lower court suggested. This Court should instead note the consistency of the word's use in other state codes and case law, and apply a similarly narrow interpretation to Virginia's law.

3. Academic freedom interests in email correspondence can be protected in ways that better honor the goals of VFOIA.

Although *amici* embrace the notion that academic freedom – the independence to research, write about, and teach any subject – is critical to

a democratic society, it is important to also note that faculty debates via email have typically not been held to fall under that umbrella.

> Teaching plainly encapsulates classroom speech, curriculum, activities, documents, and textbooks. Similarly, research includes the notes, data, papers, reports, and other preparatory activities associated with scholarly publication. But it is unlikely that either teaching or research includes scholarly email exchanges. No court has held as much, and no matter how loosely one defines "teaching" or "research," political email exchanges between faculty members cannot reasonably fit within the scope of either basis that is advanced in favor of an expansive notion of academic freedom.

William K. Briggs, "Open Records Requests for Professors' Email Exchanges: A Threat to Constitutional Academic Freedom?", 39 J.C. & U.L. 601, 611 (2013). While academic freedom must protect pre-publication research – which is exactly the type of "proprietary" information VFOIA protects from disclosure – "[t]he only conclusion [from existing case law] is that scholarly email exchanges are not protected by constitutional academic freedom." *Id.* at 617. The lower court in this case properly came to the same conclusion in determining that "such correspondence does constitute a public record when the faculty members engaging in it are government employees on government property using government facilities for government purposes." (Order, Apr. 2, 2013, ¶ 3). However, the lower court's conclusion that the "proprietary nature" exemption applies to these email exchanges is flawed.

Rather than use the "proprietary nature" exemption in VFOIA to protect preliminary discussions among academics researching a topic, Virginia could have adopted a provision similar to the federal "deliberative process" exemption found in 5 U.S.C. § 552(b)(5). That section exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Agencies seeking to withhold documents under (b)(5) must show "the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency." *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1126 (D.C. Cir. 2007) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). Thus, the purpose of that exemption is to protect federal employees in the process of drafting policies and encourage open and honest communication. The Virginia legislature could have adopted a similar provision for communication among public university faculty members. While these exemptions are often over-applied, the existence of such a provision in VFOIA would have indicated legislative intent to exempt the types of communications at issue here. But absent such an exemption in the statute, this Court must assume the types of communications at issue here are public and subject to VFOIA.

II. The burden of paying for exemption review should fall on the agencies subject to VFOIA, not on individual requesters.

The purpose of Sunshine Laws generally is to improve public understanding and oversight of government decisions and spending. Records that should clearly be available because they concern the most newsworthy or controversial government operations will often be subject to the greatest amount of exemption review for the same reasons. By the lower court's logic, those critically important records would now become the most difficult and expensive to obtain. Private citizens would be priced out of requesting records that require redaction, and, because Virginia lacks a fee waiver for media or public interest groups, journalists would not be able to fill that gap in public understanding without paying unknown sums of money for redaction review before agencies would release records.

A. Honoring the legislative intent behind VFOIA requires allowing the public to access government records with the fewest fees possible.

The Virginia legislature made clear in enacting Va. Code § 2.2-3700 that VFOIA was intended to give the public as much access as possible to the workings of Virginia's government:

> The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any

> other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open.

Va. Code § 2.2-3700. In order to respect the legislature's intent, it is necessary to keep the costs to requesters under VFOIA as low as possible. Fees in Sunshine Laws are meant to cover out-of-pocket expenses, not to pay the overhead costs of an open government.

The Supreme Court of Wisconsin, for example, has recognized the importance of placing redaction costs on the agency. In doing so, the Wisconsin court looked to the intent of the legislature in adopting the statute, which, like Virginia's, emphasizes openness. The court also, though, pointed to the language of the fee statute, which allowed agencies only to collect fees for reproducing, transcribing, copying, locating, mailing or shipping records. Wis. Stat. § 19.35(3)(a)-(d). In explaining why review and redaction costs should be exempted from the fee structure, the court found:

> 21 Wisconsin Stat. § 19.36(6) demonstrates that when it enacted the Public Records Law in 1981, the legislature was well aware that some requests would require an authority to delete information [. . .] If the legislature had wanted to allow an authority to impose fees for a broad range of tasks, or if it had wanted to include the task of redaction as a task for which fees may be imposed, it would have said so. It did not.

Milwaukee Journal Sentinal v. City of Milwaukee, 815 N.W.2d 367, 372, 375 (2012). Specifically, the court found no "commonly understood meaning" of "locating" or "reproduction" was broad enough to include redaction review. *Id.* at 373.

Other states have reached different conclusions about whether agencies may charge for redaction review. *See e.g.* Me. Rev. Stat. tit. I, § 408(3)(B) (2011); Or. Rev. Stat. § 192.440(4)(b) (2010); *Data Tree, LLC v. Meek*, 279 Kan. 445, 109 P.3d 1226 (2005); and *Griffin–Spalding Cnty. Hosp. Auth. v. Radio Station WKEU*, 240 Ga. 444, 241 S.E.2d 196 (1978). However, the language in the Maine and Oregon statutes specifically provides for fees for reviewing and redacting portions of records. Me. Rev. Stat. tit. I, § 408(3)(B) (2011); Or. Rev. Stat. § 192.440(4)(b) (2010). In Kansas, the court concluded reviewing and redacting could be part of the "actual cost of furnishing copies," and in Georgia, the court allowed collection of reviewing fees only in very limited circumstances (medical histories in ambulance records). *Data Tree*, 109 P.3d at 1239; *Griffin-Spalding Cnty Hosp. Auth.*, 241 S.E.2d at 199. Additionally, Maine and Oregon have specific public interest exemptions from fees for certain requesters, and Kansas allows for discretionary waiver of fees. Me. Rev.

Stat. tit. I, § 408(6); Or. Rev. Stat. 192.440(5); Kan. Op. Atty. Gen. 93-132 (1993). Virginia has no waiver provision in the fee portion of VFOIA.

Much like the Wisconsin law, VFOIA allows fees only for "actual cost incurred in accessing, duplicating, supplying, or searching" for records. Va. Code § 2.2-3704(F). None of the actions described in the statute is broad enough to encompass redaction review in its commonly understood meaning. The Circuit Court of Nelson County recognized as much in 2005 when it held that "[t]he statute does not grant any reimbursement for the cost of reviewing or redacting the records" because "time spent reviewing and redacting the records [is] not properly chargeable as an expense for accessing, duplicating, supplying, or searching for the requested records." *Albright v. Woodfin*, 68 Va. Cir. 115 at *1, 2005 Va. Cir. LEXIS 103 (Va. Cir. Ct. Nelson County 2005).

B. Advisory opinions by legislative advisory councils are not binding on this Court and should not dictate this Court's interpretation of VFOIA.

The lower court's decision on fees for redaction review cited an advisory opinion from the Virginia Freedom of Information Advisory Council that interpreted Va. Code § 2.2-3704(B)(3) to act on § 2.2-3704(F). (VFOIA Advisory Council Opinion No. A0-02-07). The first of those sections requires redaction of certain information from publicly released documents;

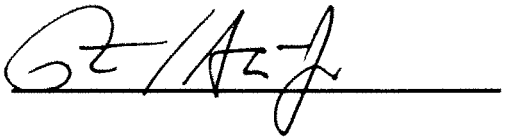
the second, as previously discussed, is the VFOIA fee system. The Advisory Council opinion considered review and redaction to be part of "supplying" the record, and therefore eligible for fees. *Id.*

The Advisory Council was created to "encourage and facilitate compliance" with VFOIA (Va. Code § 30-178(A)), and has done an admirable job interpreting the statute in many cases. However, the Council's advisory opinions carry the same weight as a circuit court opinion; they do not supersede existing circuit court authority. In this case, this Court should adopt the reasoning and judgment of the Circuit Court of Nelson County and hold that VFOIA does not permit state agencies to collect fees for redaction review. This Court should rely on the words found in the statute, and on its own ultimate authority to interpret VFOIA consistent with the Legislature's intent that it be "liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government," and that "[a]ny exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt." Va. Code § 2.2-3700(B).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the decision below.

Respectfully submitted,



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APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Allbritton Communications Company is the parent company of entities operating ABC-affiliated television stations in the following markets: Washington, D.C.; Harrisburg, Pa.; Birmingham, Ala.; Little Rock, Ark.; Tulsa, Okla.; and Lynchburg, Va. In Washington, it operates broadcast station WJLA-TV, the 24-hour local news service, NewsChannel 8 and the news website WJLA.com. An affiliated company operates the ABC affiliate in Charleston, S.C.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP's members and subscribers include the

nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Atlantic Media, Inc. is a privately held, integrated media company that publishes The Atlantic, National Journal, Quartz and Government Executive. These award-winning titles address topics in national and international affairs, business, culture, technology and related areas, as well as cover political and public policy issues at federal, state and local levels. The Atlantic was founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others.

Belo Corp. owns 20 television stations that reach more than 14% of U.S. television households, including WVEC-TV, the ABC affiliate in Hampton/Norfolk.

Dow Jones & Company, Inc., a global provider of news and business information, is the publisher of The Wall Street Journal, Barron's, MarketWatch, Dow Jones Newswires, and other publications. Dow Jones

maintains one of the world's largest newsgathering operations, with 2,000 journalists in more than fifty countries publishing news in several different languages. Dow Jones also provides information services, including Dow Jones Factiva, Dow Jones Risk & Compliance, and Dow Jones VentureSource. Dow Jones is a News Corporation company.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

Gannett Co., Inc. is an international news and information company that publishes 82 daily newspapers in the United States, including USA TODAY, as well as hundreds of non-daily publications. In broadcasting, the company operates 23 television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is

customized for the market served and integrated with its publishing or broadcasting operations.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

National Public Radio, Inc. is an award-winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations that are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly

newscasts, special features and 10 years of archived audio and information.

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

North Jersey Media Group Inc. ("NJMG") is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: The Record (Bergen County), the state's second-largest newspaper, and the Herald News (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties and a family of glossy magazines, including (201) Magazine, Bergen County's premiere magazine. All of the newspapers contribute breaking news, features,

columns and local information to NorthJersey.com. The company also owns and publishes Bergen.com showcasing the people, places and events of Bergen County.

POLITICO LLC is a nonpartisan, Washington-based political journalism organization that produces a series of websites, video programming and a newspaper covering politics and public policy.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reuters, the world's largest international news agency, is a leading provider of real-time multi-media news and information services to newspapers, television and cable networks, radio stations and websites around the world. Through Reuters.com, affiliated websites and multiple

online and mobile platforms, more than a billion professionals, news organizations and consumers rely on Reuters every day. Its text newswires provide newsrooms with source material and ready-to-publish news stories in twenty languages and, through Reuters Pictures and Video, global video content and up to 1,600 photographs a day covering international news, sports, entertainment, and business. In addition, Reuters publishes authoritative and unbiased market data and intelligence to business and finance consumers, including investment banking and private equity professionals.

Student Press Law Center ("SPLC") is a nonprofit, nonpartisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

WP Company LLC (d/b/a The Washington Post) publishes one of the nation's most prominent daily newspapers, as well as a website,

www.washingtonpost.com, that is read by an average of more than 20 million unique visitors per month.

APPENDIX B

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Brief of *Amici Curiae* the Reporters Committee for Freedom of the Press and 17 Media Organizations, in Support of Appellants in Record No. 130934 was sent U.S. Mail and e-mail delivered on this 12th day of November, 2013, to the following:

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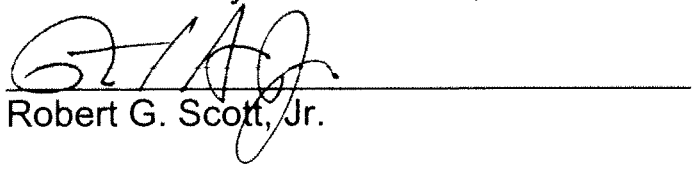
I declare under penalty of perjury of the laws of the Commonwealth of Virginia that the foregoing is true and correct.

Signed this 12th day of November, 2013.



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