IN THE

Supreme Court Of Virginia

RECORD NO. 130934

AMERICAN TRADITION INSTITUTE, and
THE HONORABLE DELEGATE
ROBERT MARSHALL,
***Appellant-Petitioners*,**

v.

RECTOR AND VISITORS OF THE
UNIVERSITY OF VIRGINIA, et al.,
Appellees-Respondents.

PETITION FOR REHEARING

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PETITION FOR REHEARING

The American Tradition Institute respectfully requests a rehearing.

In this Virginia Freedom of Information Act (VFOIA) case involving the University of Virginia, the Opinion of this Court sought to interpret the Legislature's intent to protect Virginia's public universities' and colleges' research activities in a manner that does not place the schools at a competitive disadvantage in relation to private schools, while, nevertheless, preserving citizens' right to transparency of university activities the Legislature intended when it passed the VFOIA. The Opinion as written, however, creates significant unintended consequences. First, the Opinion will thwart the Legislature's intent to ensure some measure of transparency in university and faculty research activities. Second, it creates a significant barrier to citizens seeking application or further judicial interpretation of the research exemption. Third, it adds to the confusion about whether or not the VFOIA limits speech under the First Amendment. And finally, it has already resulted in misinterpretation of Virginia law by other jurisdictions.

We ask this Court to grant this rehearing in order to consider two issues, wholly consistent with the intent of this Court and its Opinion. First, to find that many of the records withheld by the University are associated with faculty service activities the Legislature placed beyond the reach of the

research exception. This Court accepted this issue as an error for review but never examined the distinction between research and faculty service to outside organizations. With regard to those records not involving research sponsored by the university, we would ask this Court to remand this case to the trial court for specific consideration of whether these emails in fact involve research sponsored or cosponsored by the University, as opposed to faculty service to organizations outside the University. In the absence of this, lower courts will apply the research exclusion to all faculty emails.

Second, to recognize that the Court's definition of proprietary rises from ATI's arguments, which sought to protect UVA's full competitive advantage, and that the Opinion rejected the far broader definition put forward by the University and accepted by the trial court.

Absent a rehearing, the unintended consequences of this Opinion will exempt from public view far more than the Legislature or this Court intended; establish unprecedented First Amendment limitations on use of the VFOIA absent jurisprudential examination of this issue; and constructively bar citizens from seeking judicial assistance regarding university records the Legislature intended be open to public inspection.

The Unintended Consequences

First, without question, the Legislature intended Virginia universities

and colleges to be subject to FOIA and some public records associated with research to be open to the public. The Opinion as written removes all faculty emails, and no doubt many other kinds of records, from public reach. In the future, the publicly available emails placed before the Court in this case will serve as the standard by which other courts will determine what is exempted under the research exclusion. Inspection of those emails show that they relate to matters far afield from research. The Legislature could not have intended a result that allows withholding of non-research emails, as exemptions are to be narrowly interpreted (Code § 2.2-3700(B).)

Furthermore, the Court's Opinion does not ensure that only emails related to research--and particularly research sponsored or cosponsored by the University–are withheld. This is easy to correct by simply looking at the emails to which ATI cited and recognizing that they had nothing to do with UVA sponsored research. By not examining the emails, the Opinion as written will allow public colleges and universities to keep secrets the Legislature never intended them to keep and create an incentive for faculty to behave in ways those who pay their salaries would never approve.

Secondly, the Opinion as written constructively bars citizens from seeking judicial assistance regarding university records the Legislature intended be open to public inspection. As discussed below, the Court

adopted the interpretation of the term “proprietary” offered by ATI and rejected the interpretation offered by both the university and the trial court, but did not credit ATI for its contribution. As a result, ATI is unable to recoup the reasonable costs of this litigation that the Legislature intended citizens to obtain. This establishes a functional precedent that lower courts will apply to place a thumb on the scale in favor of universities even when the courts adopt citizens’ arguments. This Opinion as written allows citizens to succeed in their arguments but forces them to pay for that success. This is not what the Legislature intended (*see* § 2.2-3713(D).) Under these circumstances, this creates a heavy disincentive for citizens seeking to use the authorities provided by the Legislature to obtain judicial review of universities’ self-interested decisions under VFOIA.

Third, the Opinion as written states that release of emails would cause “impairment of free thought and expression” and is part of the “overarching principle guiding application of the exemption.” (Opinion at 15.) This statement adds to the confusion about whether or not the VFOIA limits speech under the First Amendment. As the Fourth Circuit explained, “Lacking definition or guiding principle, the doctrine [of free thought and expression in the form of academic freedom] floats in the law, picking up decisions as a hull does barnacles. As a result, decisions invoking

academic freedom are lacking in consistency and courts invoke the doctrine in circumstances where it arguably has no application."[1]

Because the trial court chose not to reach this issue, it was not before this Court and incorporation of this principle in the Opinion results in the unintended consequence of a clear lack of due process. If this Court wishes to reach the issue, it may send the question back to the trial court, specifically with respect to those emails withheld by the University but beyond the reach of the research exemption.

And fourth, the Opinion as written has already resulted in mis-interpretation of Virginia law by other jurisdictions. In the matter of *E&E Legal v. Arizona Board of Regents* (Pima County Superior Court, No. C2013-4963), Defendants attempt to use this Court's Opinion as written to suggest this Court concluded that faculty emails were subject to an expectation of privacy; confidential emails were not subject to release; and that release of the emails would impair academic freedom and constitutionally protected thought and expression. (Defendants' "Explanatory Memorandum" May 1, 2014.) All parties in the case before this Court agree that there was no expectation of privacy in the emails, that there were no "confidential" emails before this Court and that the Court did

[1] *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000)

not entertain arguments about academic freedom and First Amendment rights. The Court can correct these misinterpretations by clearly stating these issues were not before it and are not reached by it.

We fear that the effect of this Opinion as written will create a climate under which no university will ever again have any duty under the VFOIA because the Opinion as written allows the research exemption to swallow VFOIA whole, thus frustrating the Legislature's intent to extend VFOIA's reach to universities

This Court Adopted ATI's Arguments

The Opinion bases its decision on a conclusion that "ATI limited its concept of competitive advantage to disclosures that would cause pecuniary harm." Opinion at 6. This does not comport with the record. Here is what ATI actually stated before this Court:

> [T]he exclusion focuses on the **competitive advantage inherent** in the academic scientific process, rather than financial or commercial interests the university might have. In other words, the research data exclusion protects the competitive advantage within the marketplace of ideas rather than the marketplace of goods and services.

Opening Brief at 20 (emphasis added). It is worth saying twice – "**the research data exclusion protects the competitive advantage within the marketplace of ideas.**" ATI went well beyond "pecuniary harm." ATI meant what it said, to wit "competitive advantage in the marketplace of

ideas," protecting not just the ideas, but the people and institutions that trade in that marketplace. The entire competitive advantage.

In contrast the University categorically rejected the definition and interpretation ATI and this Court gave. Indeed, review of UVA's brief shows the University argued ***five times*** that "there was no legislative intent to limit § 2.2-3705.4(4)'s protections to records the disclosure of which would harm a university's competitive position." Brief of Appellees at 8. *And see*, at 8-9, "evince no legislative intent to make harm to competitive position a necessary part of that exclusion;" *id.* at 9, note 5; *id.* at 12, "§ 2.2-3705.4(4) . . .does not depend upon competitive advantage;" *id.* at 16, "competitive harm is not a necessary element of the exclusion;" *and*, *id*. at 28, "**competitive advantage [has] no support in the literal language of the section, its legislative history, or the particular needs of universities in the conduct of science and scholarship that animate and inspire its application**" (emphasis added).

Notably, though the Court adopted ATI's definition, it didn't clearly harmonize this finding with the way the word is used in the remainder of the Act. *See id* at 19-20. Had the Court done so, perhaps by adopting ATI's arguments relating the various sections of the law, the concerns raised in Justice Mims' concurring opinion regarding the over-broadening of the

term, and the unintended consequence raised would be greatly eased.

Nor did the Court attribute ATI's harmonization of *Green* with the Court's (and ATI's) definition of "proprietary." **Only ATI** explained that UVA and the trial court's definition was too broad and failed to incorporate this Court's holding in *Green*. Recall the exact words of the trial court:

> Proprietary nature within § 2.2-3705.4(4) is capable of and is interpreted to mean what has been argued by the University, to wit: a thing or property owned or in the possession of one who manages and controls them, in this case, the University.

J.A. 673, ¶ 7. Compare this with ATI's harmonization:

> "*Green* categorically explains: '[a] proprietary right is a right customarily *associated with* ownership, title and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls.'"

Opening Brief at 18 (*emphasis in the original*). These are the words this Court used to apply its "competitive advantage" definition within the ambit of *Green*. (Opinion at 6.) These are ATI's words. These are also the Court's words. These are the same words, used the same way, making the same point and constituting the core holding of the opinion. They are neither the University's words nor those of the trial court.

Most significantly, the trial court did not adopt ATI and this Court's interpretation. Instead, it took the plain words of *Green* and refused to expand on those words. Indeed, when the University suggested the

Court adopt a broader statement on the meaning of the term "proprietary," specifically to include "intellectual property, patents and copyrights" (J.A. at 660-61), the trial court stated, "I tried to simplify this decision. . . . And to the extent, again, that an appellate court wants [a broader definition] addressed, they know where to find me and you." J.A. at 663. This is manifestly not the Court's (nor ATI's) interpretation.

Records on Faculty Service are outside the Exception

The Court never examined the key distinction between two fundamentally different faculty activities, research and service. The trial court ignored this distinction, and by not addressing it the Opinion as written does grave harm to the Legislative intent. The Opinion as written failed to grapple with this issue and this Court simply wrote that the trial court concluded that the "emails were scientific and scholarly." However the trial court did no such thing. The trial court held that "the research done is in the scientific or scholarly issues category." It never addressed the fact that most of the emails involved faculty service rather than research.[2] ATI assigned error for this failure to address the fact that the service related

[2] During drafting of the final order in this case, ATI specifically requested, in writing, the trial court to clarify whether the service related emails associated with the UN (PE-1, PE-3 to PE-5, PE-15 & PE-16, J.A. 218, 225-244,271-279) and the World Meteorological Organization (PE-6, J.A. 245) were sponsored or cosponsored by the university. The trial court declined that opportunity and never addressed the issue.

emails were not associated with research and more specifically research sponsored or cosponsored by the university. Recognizing how important this distinction is, this Court accepted the error for review; however the Opinion never addressed this point.

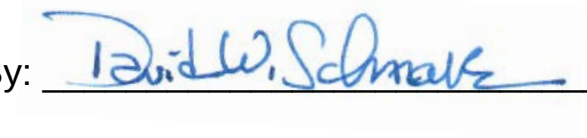
This Court clearly understood that the FOIA exception only applied to research sponsored or cosponsored by the university. Indeed in citing and relying heavily on UVA Provost John Simon's affidavit, the exclusive focus is on research and only research. Opinion at 15-16. Never once was service discussed.

This Court properly explained the standard of evidence in determining the sufficiency of the evidence on this issue ("plainly wrong or without evidence to support it.") *Id*. at 17. UVA never offered any evidence that 16 of the 22 emails involved UVA sponsored or cosponsored research and indeed could not because the emails themselves show they do not. *See*, Opening Brief at 28. Petitioners' Exemplar 8 and Respondents' Exemplar 2 are particularly clear examples of records not collected by or for UVA sponsored research.

We ask the Court to grant our petition for rehearing.

Respectfully submitted May 16, 2014,

THE AMERICAN TRADITION INSTITUTE
and
THE HONORABLE ROBERT MARSHALL

By: 

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CERTIFICATE of SERVICE

I hereby certify that on May 16, 2014, the below listed counsel have been provided electronic service of this Petition for Rehearing.

Pursuant to VA. Sup. Ct. Rule 5:37(d), I certify that the Petition for Rehearing does not exceed 10 pages in length.

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