No. 181375
In the Supreme Court of Virginia

TRANSPARENT GMU and
AUGUSTUS THOMSON,

Appellants,

v.

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

Appellees.

UNOPPOSED MOTION FOR LEAVE
TO FILE *AMICI CURIAE* BRIEF

COME NOW *Amici* The Brechner Center for Freedom of Information, the Student Press Law Center, The National Freedom of Information Coalition, The Society of Professional Journalists, The Reporters Committee for Freedom of the Press, and the George Mason University Chapter of The American Association of University Professors, by and through their attorney, Leslie Paul Machado of the firm LeClairRyan PLLC, move the Court for leave to file an *Amici Curiae* Brief in support of Appellants in the above-captioned matter.

Pursuant to Rule 5:30(c), *Amici* contacted counsel to determine their clients' position on this request. Counsel for Appellants and Appellees consent to the filing of the *Amici Curiae* brief. A copy of the brief is being submitted in conjunction with the filing of this motion.

The Brechner Center for Freedom of Information is located at the University of Florida College of Journalism and Communications where, for 42 years, the Center's legal staff has served as a source of research and expertise about the law of access to information. The Brechner Center regularly publishes scholarly research about the public's rights under open-government laws, responds to media inquiries about the workings of public-records statutes, and conducts educational programming to inform citizens about their access rights.

The Student Press Law Center is a non-profit, non-partisan organization that, since 1974, has been the nation's only legal assistance agency devoted to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment. As such, its legal staff regularly assists in resolving disputes about access to records and informs students of their rights under public records laws.

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founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

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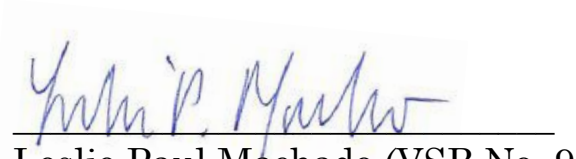
University continues to uphold the AAUP's principles of academic freedom and autonomy and shared faculty governance.

Amici share a foundational concern that journalists, and all citizens, can enjoy the full benefit of open-government laws for the purpose of keeping watch over the performance of public functions. *Amici* seek leave to file a joint *Amici Curiae* brief in this matter because of the important issue presented by this case, which is whether a foundation that operates in conjunction with a public university -- performing core functions that, but for the existence of the foundation, the university would have to perform itself -- is exempt from the Virginia Freedom of Information Act. Having many years of experience working with journalists in obtaining records from governmental and quasi-governmental institutions, particularly those in higher education, *Amici* believe that their perspective would be of value to the Court and help inform its consideration of the vital legal issues at stake.

For the reasons stated above, *Amici* respectfully request that the Court grant them leave to file the accompanying *Amici Curiae* brief in support of Appellants.

Dated: April 22, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2019, in accordance with Rules 5:4(a)(3) and 5:30, four copies of this Motion have been hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of this Motion was served, via email, upon:

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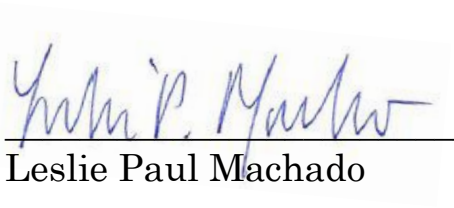

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BRIEF *AMICI CURIAE* OF THE BRECHNER CENTER FOR FREEDOM OF INFORMATION, STUDENT PRESS LAW CENTER, NATIONAL FREEDOM OF INFORMATION COALITION, SOCIETY OF PROFESSIONAL JOURNALISTS, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND THE GEORGE MASON UNIVERSITY CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

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INTEREST OF AMICI CURIAE

The Brechner Center for Freedom of Information is located at the University of Florida College of Journalism and Communications where, for 42 years, the Center's legal staff has served as a source of research and expertise about the law of access to information. The Brechner Center regularly publishes scholarly research about the public's rights under open-government laws, responds to media inquiries about the workings of public-records statutes, and conducts educational programming to inform citizens about their access rights.

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STATEMENT OF THE CASE

Gus Thomson ("Thomson"), individually and on behalf of the citizen advocacy organization Transparent GMU, filed a verified mandamus petition in the Circuit Court for Fairfax County, naming both George Mason University ("University") and George Mason University Foundation, Inc. ("Foundation") as respondents. The petition as amended pleads five claims relevant to this appeal that share the central allegation that documents Thomson requested reflecting the transaction of university business through the George Mason University Foundation are public records subject to the disclosure requirements of the Virginia Freedom of Information Act, Virginia Code § 2.2-3700, *et seq*.

The circuit court dismissed four of Thomson's claims on the pleadings alone. After further briefing and an evidentiary hearing, the circuit court issued an opinion letter dismissing the remaining count, in addition to concluding that the requested agreements were not public records.

The circuit court then entered a final order adopting the reasoning in its opinion letter. Transparent GMU and Thomson are appealing that order and the circuit court's prior rulings.

ASSIGNMENTS OF ERROR

1. The circuit court erred when it concluded that accepting, administering, and disbursing funds for the sole benefit of a public university is not a form of "public business" under the Act. [Preserved: Amended Petition para. 70]

* * *

6. The circuit court erred when it concluded that the Foundation was not an "other entity. . . of [a] public body created to perform delegated functions of the public body" under the Act. [Preserved: Amended Petition paras. 97-112]

STANDARD OF REVIEW

The circuit court's ruling on assignments of error 1 and 6 addressed a matter of law based on "stipulated and undisputed facts." Memo Op. at 4, 11. On appeal, this Court "reviews '*de novo* both the construction of the relevant statute and its application to th[ose] undisputed facts.'" *Neal v. Fairfax County Police Department*, 295 Va. 334, 343 (2018) (citation omitted).

ARGUMENT AND CITATION TO AUTHORITY

I. Access to Information About University Auxiliary Affiliates Is Essential for Civic Watchdog Journalism

University foundations at public institutions control many tens of billions of dollars of money that, for all intents and purposes, is "university money" dedicated to fulfilling university purposes. *See*

Kaitlin Mulhere, "The Wealthiest U.S. Universities Got $26 Billion Richer Last Year," *Time*, Jan. 25, 2018 (reporting that 97 universities or university systems have endowment funds exceeding $1 billion in value and that the media endowment size is $128 million). Foundations such as the one at George Mason University hold themselves out to the public as being part of the host institution -- they solicit donations "for" the university, not "for a nonprofit corporation that may decide to spend it to benefit the university" -- and they operate functionally as an extension of their institutions, enjoying special preferred status (such as the use of university marks and logos) that would not be afforded to other corporate entities.

The functioning of university foundations is manifestly a matter of public interest and concern. An international consortium of journalists recently won the prestigious George Polk Award for investigative reporting for the "Paradise Papers" series, which included articles about the investment practices of powerful institutions including university foundations. As *The New York Times* reported in part of that award-winning reporting collaboration, it has become commonplace for major universities to park millions in foundation investments overseas to avoid

tax consequences and make it harder for critics to detect unpopular investment choices. *See* Stephanie Saul, "Endowments Boom as Colleges Bury Money Overseas," *The New York Times*, Nov. 8, 2017. Behavior of this kind can implicate the honesty of the university itself, or at least tarnish the reputation of the university. So it is undeniable that how foundations invest their institutions' money is an issue of legitimate public interest and concern.

The news media has frequently reported on questionable behavior engaged in jointly by foundations and their host universities. Using public records that are accessible under Michigan's equivalent to the Virginia Freedom of Information Act, the *Detroit Free-Press* reported on what gives the appearance of a "pay to play" system at the University of Michigan's $11 billion endowment fund, where the foundation has placed billions with money management firms run by executives who have made large donations to the university or served on the foundation's board. *See* Matthew Dolan & David Jesse, "University of Michigan pours billions into funds run by contributors' firms," *Detroit Free Press*, Feb. 1, 2018. The disclosures prompted an outcry from student leaders, who signed a joint statement declaring that the foundation's investment practices

"eroded our trust" in the university. *See* Matthew Dolan & David Jesse, "University of Michigan students: Be more transparent about endowment investments," *Detroit Free Press*, Feb. 15, 2018. Thus, if members of the public are to be assured that universities operate in an honest and above-board manner, they need access not just to the universities' public records but to their foundations' records as well.

At the University of Louisville Foundation, a 2017 forensic audit disclosed rampant conflicts of interest and mismanagement, including a scheme to inflate the salary of the chief executive serving as both president of the university and president of the foundation. Andrew Wolfson, "Audit rips into U of L Foundation for bad investments, compensation, hiding payments," *The Courier Journal*, June 9, 2017. The scathing financial review disclosed that wayward foundation executives "took tens of millions of dollars from the endowment that should have supported the university," *see id.*, evidencing that the fiscal management, or mismanagement, of university foundations is hardly (as the circuit court here was persuaded) a "private" matter of no public concern.

Indeed, at the University of Wisconsin-Oshkosh, a still-unfolding scandal involving financial mismanagement at its foundation directly

affected the integrity of the university itself in multiple ways – including felony charges against the chancellor and vice chancellor of the university when they were accused of illegally committing taxpayer money to guarantee risky investment deals by the UW-Oshkosh Foundation. *See* Devi Shastri, "Former UW-Oshkosh administrators plead not guilty to felony charges," *The Oshkosh Northwestern*, June 11, 2018. Those risky investments ended up failing and bankrupting the foundation. As a result of foundation managers' improvidence, the Wisconsin state university system was forced to commit $6.3 million in public money to resolve lenders' claims against the foundation. *See* Patty Murray, "UW System To Pay $6.3M To Satisfy Lenders In Bankruptcy Negotiations With UW-Oshkosh Foundation," *Wisconsin Public Radio*, Dec. 28, 2018.

This is the reality of how foundations operate: Their finances are inextricably intertwined with those of their host institutions, and when the foundation's management is corrupt or incompetent, it detrimentally affects the public's interests just as if the wrongdoing took place at the university itself. The distinction between whether a university official or a "nonprofit corporation" official squandered $6.3 million is immaterial

to the taxpayers of Wisconsin. Investment practices of this obvious public importance cannot be concealed behind a paper veneer of incorporation.

In an illustrative case, journalists from the *Pocono Record* were forced to file suit against Pennsylvania's East Stroudsburg University Foundation to obtain access to records comparable to those sought here, in their attempt to inform the public about a scandal that resulted in the ouster of the foundation's chief fundraiser. *East Stroudsburg University Foundation v. Office of Open Records*, 995 A.2d 496 (Pa. Commw. 2010). After winning that legal challenge, the journalists used foundation records to expose irregularities in the way the university doled out scholarship money and raised questions about whether the former director misused foundation money to cultivate inappropriate personal relationships with students, over which he and the university were later sued. *See* Dan Berrett, "ESU Foundation records may hold clues to Sanders scandal," *Pocono Record*, June 30, 2013.

The East Stroudsburg story is illustrative for a different reason as well: Once the journalists obtained access to the foundation's records, they learned that the university itself was on the hook to guarantee a $15 million loan that the state advanced to the foundation to cover the

ballooning costs of a science building toward which the foundation was raising money. *See id.* They also learned that the state of Pennsylvania may have been misled into extending that loan by deceptive assurances given by the foundation and the university about their fundraising capability. *See id.* In other words, the interests of the taxpayers were directly at stake because of the special quasi-governmental status that university foundations enjoy, enabling them to take advantage of state financing benefits, and the public's interests could be protected only by making the foundation's records accessible. As reporter Dan Berrett explained in detailing the history of the scandal: "When people refuse to speak out, public records often become the only way to expose the truth. In the ongoing case of Isaac Sanders, many people have declined to speak publicly. Public documents have proven to be a lifeline in our efforts(.)" *Id.*

While East Stroudsburg provides an unusually vivid illustration of the effective public oversight that is possible only with access to foundation records, other examples abound. A student editor at Texas A&M University won a national investigative-reporting award by analyzing records of his university's endowment investments to show

how frequently the university invested donors' money in companies implicated in human-rights abuses in the developing world. *See* Spencer Davis, "The bottom line first: Without a social policy, A&M is invested in companies of unclear character," *The Battalion*, Nov. 12, 2015; University of Georgia news release, *Investigative series examining Texas A&M's investments wins 2016 Holland Award*, July 26, 2016, *available at* http://grady.uga.edu/investigative-series-examining-texas-ams-investments-wins-2016-holland-award/. In California, reporting by *The Press Democrat* in Santa Rosa prompted an investigation by the state Attorney General into the Sonoma State University Foundation, after a series of stories disclosed that the SSU Foundation made unorthodox personal loans to clients of a foundation board member and loaned the board member himself $1.25 million, which he was unable to fully repay. Nathan Halverson, "Attorney General auditing SSU loans to Carinalli," *The Press-Democrat*, July 29, 2009.

Raising money to sustain the operations of a university is a core governmental function. It is widely maintained that attracting grants and donations is the single most important and time-consuming job of the university president. *See* Melissa Ezarik, "The President's Role in

Fundraising," *University Business*, April 27, 2012 (quoting estimates that university presidents can spend as much as 70 percent of their time on fundraising). A 2013 survey of 142 public university presidents found that, by their own estimate, they spent an average of 6.7 workdays per month on fundraising and 3.85 workdays per month traveling for fundraising. *See* Robert L. Jackson, "The Prioritization of and Time Spent on Fundraising Duties by Public Comprehensive University Presidents," *Int'l J. of Leadership & Change*, Vol. 1: Iss. 1, Art. 9 (May 2013). It is not possible to transform the character of this core governmental function into a private function simply by tasking it off to a nonprofit entity of the agency's own creation. This is an "open government shell game" in which the Court should not participate.

Some of the most pressing and high-profile issues in American public life today involve higher-education institutions. Sexual assault on college campuses is a high-priority national concern that has attracted White House-level attention. Juliet Eilperin, "Biden and Obama rewrite the rulebook on college sexual assaults," *The Washington Post*, July 3, 2016. Fraternities across the country are under criminal investigation, and their members facing prosecution, for the deaths of student pledges.

Karl Etters, "Nine face hazing charges in death of Florida State pledge," *USA Today*, Jan. 16, 2018; Matthew Haag, "10 Additional Penn State Students Charged in Hazing Death of Pledge," *The New York Times*, Nov. 13, 2017. If the Court decides that a university may "spin off" a core institutional function and evade public accountability merely by creating a private shell corporation, there is nothing to stop a public university from incorporating Campus Policing, Inc., or Campus Fraternity Oversight, Inc., and throwing a cloak of secrecy over governmental activities. This cannot be the law.

II. Public University Foundations Are Arms of the State Performing a State Function and Subject to State Transparency Laws

Public university foundations are arms of the of the state performing a state function. A growing number of states with public-records statutes analogous to Virginia's have declared, either by judicial ruling or through legal opinions from state attorneys general, that university foundations qualify as public agencies or as custodians of public records.

Illinois, for instance, has determined that university foundations are subject to public records laws. In *Chicago Tribune v. College of Du*

Page, a newspaper sued a community college's nonprofit foundation for refusing to release documents related to a grand jury subpoena that was served on the foundation. 79 N.E.3d 694, 697 (Ill. App. Ct. 2017). Applying Illinois' public records law, the Court of Appeals recognized that the foundation was carrying out a governmental function in holding and managing college investments. *Id.* at 708. The court noted that, as is the case with George Mason University, the foundation was the conduit through which donations to the university were routed, and if someone tried to send a donation to the college directly, the donor would be directed to the foundation, which removed the foundation from the status of being a mere vendor or service provider. *Id.* at 708.[1] The court further

[1] A Brechner Center researcher tested the Foundation's donation platform, located online at https://giving.gmu.edu/foundation/, by submitting a $10 donation on April 17, 2019. The donation results in a thank-you email message from a GMU.edu email account that says, in pertinent part, "On behalf of our faculty, staff, students, and alumni, thank you very much for your recent gift. Your gift is an investment in the future of George Mason University." The email is signed: "Trishana E. Bowden President, George Mason University Foundation, Inc., and Vice President, University Advancement and Alumni Relations." A copy of the email is attached as Exhibit A. The co-mingling of University and Foundation could hardly be clearer. An attempt to send money to the Foundation results in a thank-you from the University. The email directs the recipient to contact the University's development office with any questions, and provides that office's phone number and email address. In

held that university records do not lose their "public" character just because they happen to be held in the physical custody of a corporate affiliate. *Id.* at 705.[2]

The same outcome has been reached in cases throughout the country, as courts have recognized that the separation between public universities and their foundations is a matter of form only and not

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no respect is a donor put on notice that the donation may be going to a private corporation separate from the university; to the contrary, the email refers to "our" faculty, students and alumni which, of course, a private corporation does not have. Plainly, neither the University nor the Foundation regard the distinction between the two entities to be of enough significance to disclose in connection with donor transactions. Indeed, it would raise significant fraud and integrity issues if the University were using its good name to induce contributors to send money to a separate corporation that the University claims to have no control over.

[2] It is worth noting that foundations and other "direct support organizations" affiliated with public universities happily embrace their status as governmental entities when doing so affords them benefits, including the benefit of immunity from tort claims that extends only to state agencies or actors. *See, e.g., Plancher v. UCF Athletics Ass'n, Inc.*, 175 So.3d 724, 725 (Fla. 2015) (granting summary judgment to public university's athletic association in claim brought by heirs of deceased college athlete, on the basis of sovereign immunity, which extends not just to state agencies but to corporations that act primarily or exclusively as an instrumentality of the state); *Autry v. Western Ky. Univ.*, 219 S.W.3d 713 (Ky. Ct. App. 2007) (granting immunity to privately incorporated university foundation that owned and managed dorm buildings in wrongful-death lawsuit by family of murdered dorm resident).

function. *See, e.g.*, *Gannon v. Board of Regents*, 692 N.W.2d 31, 32 (Iowa 2005) (private not-for-profit corporation that managed gifts to the university was subject to Iowa Freedom of Information Act due to its service agreement with university); *Jackson v. Eastern Mich. Univ. Found.*, 544 N.W.2d 737 (Mich. Ct. App. 1996) (state university foundation was a public body under freedom of information act and open meetings act); *State ex. rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 602 N.E.2d 1159 (Ohio 1992) (nonprofit corporation that solicited and received donations for public university was a public office subject to public records disclosure, including donor names); *Weston v. Carolina Research and Dev. Found.*, 401 S.E.2d 161 (S.C. 1991) (holding that private foundations that receive public funds are subject to the state freedom of information act), *Calif. State Univ., Fresno v. McClatchy Co.*, 108 Cal. Rptr. 2d 870 (Cal. Ct. App. 2001) (holding that documents revealing identities of donors were public records); *see also* N.D.A.G. Opin. 2014-O-04 (April 24, 2014) (opining that Dickinson State University's foundation is a "public entity" because it performs governmental services on behalf of a state agency and directing the

foundation to fulfill a freedom-of-information request for its CEO's email correspondence).

While foundations commonly argue that they need confidentiality to avoid compromising donors' privacy, that argument is readily disproven in two respects. First, universities and their foundations are only too happy to publicize the names of donors – even chiseling their names into the edifices of buildings – when disclosure serves their objectives. They cannot be heard to argue that disclosure is appropriate only where the information flatters the university and not where the information might be disadvantageous. Open-government laws do not allow agencies to release only those documents that they regard as strategically helpful, for obvious reasons. Second, legislators are free to fashion a narrow exemption for donor anonymity where anonymity is regarded as overridingly necessary – as Virginia has done in Va. Code § 2.2-3705.4(7). But the Appellants' requests here do not seek to unmask anonymous donors, and the Foundation does not need a blanket exemption from disclosing each-and-every document. Certainly, there is no evidence that the foundations in California, Pennsylvania or any other state subject to open-government laws have been hampered in raising

money because their records are accessible. Foundations across California, for instance, are reporting record donations, so it manifestly does not handicap these institutions to make their operations transparent. *See, e.g.,* University of California-Davis news release, "UC Davis Announces Another Record-Breaking Fundraising Year," July 25, 2017, *available at* https://www.ucdavis.edu/news/uc-davis-announces-another-record-breaking-fundraising-year; Public Affairs, UC Berkeley, "Campus sets new records for fundraising," *Berkeley News,* July 14, 2016, *available at* http://news.berkeley.edu/2016/07/14/campus-sets-new-records-for-fundraising/.

The rationale for recognizing that state open-records statutes apply to university-created foundations was well-presented by the Kentucky Supreme Court in a case brought by a news organization against the University of Louisville Foundation:

> As a public institution that receives taxpayer dollars, the public certainly has an interest in the operation and administration of the University. . . . The Foundation's stated goal is to advance the charitable and educational purposes of the University of Louisville. To this end, it solicits, receives, and spends money and other assets on behalf of the University. The public's legitimate interest in the University's operations

> then logically extends to the operations of the Foundation.

See Cape Publications, Inc. v. Univ. of Louisville Found., Inc., 260 S.W.3d 818, 822-23 (Ky. 2008) (holding that Kentucky open-records act applied even to foundation records disclosing names of certain donors).

This rationale applies with equal force in Virginia, where (according to its most recent publicly available tax return) the Foundation manages more than $400 million in assets on behalf of the University. How that money is managed is manifestly the public's business, and to interpret the Virginia Freedom of Information Act in an unnaturally narrow way to preclude access to these records would greatly dis-serve the public's need for transparency and accountability.

III. The Circuit Court Erred in Concluding That the Foundation Was Not Created to Perform a Government Function, and Operates Independently From the University

The Virginia Freedom of Information Act, Va. Code § 2.2-3700, provides that an otherwise-private entity may be regarded as a "public body" subject to the Act if it meets one of several criteria, including most significantly for this case that entity is "created to perform delegated functions" of a public body. This provision is tailor-made for the

Foundation; indeed, it is difficult to think of an entity to which the description more fittingly applies.

Appellants have thoroughly set forth the myriad ways in which the Foundation is inextricably intertwined with, and financially subsidized by, the University. Those facts need not be repeated here. *Amici* write separately to emphasize that the circuit court plainly erred in failing to find that the Foundation performs a delegated public function so as to be amenable to requests for its records.

The circuit court's illogically narrow reading of "public function" risks producing absurd and dangerous results that the legislature could not have intended. The circuit court reached its understanding of the "public function" of a state university by looking to the dictionary definition of a university (Opinion Letter at 8), but conferring academic degrees is not the sole "public function" of an institution of higher education. By that understanding, a university could literally contract out every aspect of its operations other than the issuance of degrees – hiring, budgeting, facility management, student discipline, athletics, dining, housing, extracurricular activities, auditing, administration and so on – and none of those functions would be subject to public oversight.

Indeed, if the only "public function" of a university is the issuance of degrees, then the university literally could "privatize" the offices of all of the administrators not directly involved in instruction – such as the Vice President for Communications and Marketing or the Vice President for Administration and Finance – and decide that those administrators are now performing their so-called "non-public functions" behind closed doors and beyond public scrutiny. Plainly, this cannot be what the legislature meant.

Tellingly, the circuit court did not quote any Virginia statute for the assertion that the purpose of a state university is "to educate students, approve programs, and confer degrees." *Id.* That is because no such statute exists. The circuit court cannot insist to be adhering to "the plain statutory expressions by the General Assembly" when the language cited for the purported limits on a university's "public functions" does not come from a statute at all. *Id.* at 9.

A look at Virginia's higher education code, Title 23.1, shows that – unlike its approach to other subunits of state and local government – the legislature did not set forth the purposes and functions of public

universities in one single statutory provision.[3] Rather, Title 23.1 enumerates a number of "functions" that universities are empowered to perform, including those beyond granting degrees. *See, e.g.,* Va. Code § 23.1-1100 *et seq.* (authorizing universities to issue bonds and other financial instruments). Perhaps most notably, Va. Code § 23.1-1103 – titled "Institutions; powers generally" – enumerates a number of university support functions going beyond the issuance of degrees, including holding real property, issuing legal documents, entering into legal obligations, along with catch-all authority to perform "any act that [a university] deems necessary or convenient to carry out the powers and purposes" recognized by statute. When a university does any of these things, then, by the very definition that the circuit court adopted, the university is performing a statutorily defined "public function." For all of

[3] Compare, for instance, how the General Assembly has dealt with municipal police departments, whose functions are set forth in Va. Code § 15.2-1704(A): "The police force of a locality is hereby invested with all the power and authority which formerly belonged to the office of constable at common law and is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances." There is no exact analog for higher education, and certainly not one that limits university "functions" to the granting of degrees.

these reasons, raising the money necessary to operate a public university is a "public function," and the circuit court erred in concluding otherwise.

Nor can it be credibly maintained, as the circuit court found, that the Foundation "operates independently" from the University. Any "independence" is a pure matter of form over function. Most importantly, the Foundation would not be free to, for instance, decide that it is no longer interested in financially supporting George Mason University and to send its money to the University of Virginia instead. The Foundation's inability to make autonomous decisions about core functions – *i.e.,* who receives money – distinguishes the Foundation from a genuinely independent business. When the University has a contractual relationship with a *truly* independent entity – an accounting firm, a law firm, a construction company – those entities are free to cease doing business with George Mason University at any time and, indeed, to do all of their business with competing institutions if they so choose. The Foundation has no such independence.

The University itself classifies the Foundation as one of the "component units of the University" for purposes of reporting its finances as part of the University's annual financial audit. *See* George

Mason University, Audited Financial Statements for the Year Ended June 30, 2018, at 19, n.1A, *available at* https://fiscal.gmu.edu/wp-content/uploads/2019/04/FY18-Audited-Financial-Statements.pdf. The financial statements of the University and the Foundation are replete with transactions evidencing the symbiotic relationship between the purportedly separate entities, including (among many examples), that the Foundation has purchased a $564,586 annuity contract to provide supplemental retirement benefits to the former president of the University and his spouse (something no "independent" corporate entity would or could do), and that the Foundation receives some $91,000 worth of free office space on the University's main campus (a subsidy that a state agency could not provide for a truly "independent" corporate entity). *See* Consolidated Financial Statements and Report of Independent Certified Public Accountants, George Mason University Foundation, Inc. and Subsidiaries, June 30, 2017, at 41, 43, *available at* https://giving.gmu.edu/wp-content/uploads/2019/03/GMUF-FS-2017-Final-Report.pdf.

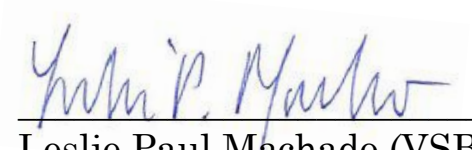
From the services of a chief executive who is also paid full-time to serve as a vice president of the University to the use of University

websites, intellectual property, email accounts, office space and other benefits, nothing about the Foundation is "independent" from the University. Nor do either the Foundation or the University give any outward public indication on their websites or in their donor correspondence that the Foundation has an independent existence. There is no indication that donors to the Foundation are told that their donations might go anywhere other than to the University – because everyone knows that they will not. The General Assembly expressly provided for extending the Virginia Freedom of Information Act to entities, regardless of corporate form, that exist to perform governmental functions. It is contrary to the plain wording and intent of the Virginia Freedom of Information Act to enable a public university to evade disclose of core university functions by the artifice of a corporate "component" that is, for all practical purposes, a core unit of the institution.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's ruling and the case should be remanded for further proceedings.

Respectfully submitted,



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I hereby certify that on this 22nd day of April, 2019, 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 an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of this Brief was served, via email, upon:

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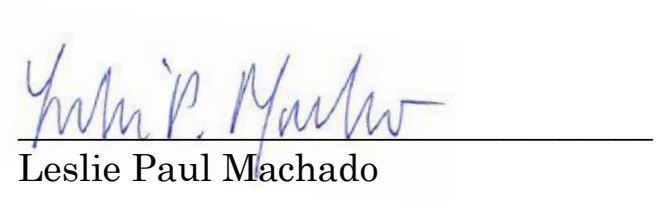

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Acknowledgment of your Gift to George Mason University

1 message

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