IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 130934

AMERICAN TRADITION INSTITUTE, ET AL.,

Petitioner-Appellant,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA ET AL.,

Respondent-Appellee.

BRIEF *AMICI CURIAE* OF THE AMERICAN COUNCIL ON EDUCATION, THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, THE ASSOCIATION OF AMERICAN UNIVERSITIES, THE ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES, THE ASSOCIATION OF PUBLIC AND LAND-GRANT UNIVERSITIES, AND THE NATIONAL ACADEMY OF SCIENCES IN SUPPORT OF RESPONDENT-APPELLEE

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INTEREST OF AMICI

Amici are seven associations of colleges, universities, educators, trustees, scientists, researchers, and other representatives of higher education in the United States. *Amici* represent public, independent, large, small, urban, rural, denominational, non-denominational, graduate, and undergraduate institutions and faculty. American higher education institutions enroll over 20 million students. For decades *amici* have worked to foster and promote academic freedom as vital to our Nation's higher education institutions.

Amicus American Council on Education ("ACE") represents all higher education sectors. Its approximately 1,800 members include a substantial majority of United States colleges and universities. Founded in 1918, ACE seeks to foster high standards in higher education, believing a strong higher education system to be the cornerstone of a democratic society. ACE regularly contributes *amicus* briefs on issues of importance to the education sector. Academic freedom, which is at the core of American higher education, is a basic concern of ACE and its members.

In addition to ACE, *amici curiae* include the American Association of State Colleges and Universities, the Association of American Medical Colleges, the Association of American Universities, the Association of

Governing Boards of Universities and Colleges, the Association of Public and Land-grant Universities, and the National Academy of Sciences. Each of these *amicus curiae* and their deeply held commitment to protecting academic freedom are detailed in the Appendix to this brief.

The Virginia Freedom of Information Act's proprietary exemption (Va. Code § 2.2-3805.4(4)) is grounded in concepts of academic freedom and the protection of research. For centuries, these concepts have made it possible for the universities and colleges that *amici* represent to engage in the research, science, and innovation that benefits the Commonwealth and the Nation. Because the proprietary exemption safeguards academic freedom and research, *amici* urge the Court to affirm the circuit court's decision.[1]

STATEMENT OF CASE AND FACTS

On January 6, 2011, the American Tradition Institute ("ATI") and Delegate Robert Marshall ("Marshall") filed a records request (the "Request") with the University of Virginia ("UVA" or "University") under the Virginia Freedom of Information Act, Va. Code §§ 2.2-3700 through 2.2-

[1] Pursuant to this Court's Rule 5:30, counsel for all parties have provided written consent to the filing of this amicus brief. The written consents are included as attachment A to this brief.

3714 (“Act” or “FOIA”). Joint Appendix (“JA”) at 22. The eleven-page Request broadly sought all materials that Professor Michael Mann, a climate scientist and former UVA professor, had produced and/or received while he was employed at the University.

From January to March 2011, UVA worked with ATI and Marshall to clarify the Request’s scope and to reach an accord on reimbursement of costs associated with the Request, which UVA estimated would be $8,500. On March 16, 2011, after the parties reached certain agreements on scope and reimbursement, UVA commenced to gather responsive documents. JA at 33-59.

On May 16, 2011, ATI and Marshall filed a Verified Petition for Mandamus and Injunctive Relief against UVA in Prince William Circuit Court (the “Petition”). JA at 1. The Petition sought the same records as the Request.

The next day, May 17, 2011, UVA produced to ATI and Marshall the first installment of documents responsive to the Request. On August 22, 2011, UVA produced the second and final installment of responsive documents.

UVA omitted from its productions certain records on the ground that they were not subject to FOIA disclosure requirements. Most of those

documents were communications to and from Dr. Mann relating to research that had not been released or published. UVA asserted that FOIA exempts such communications from disclosure under a provision referred to as the "proprietary exemption". The proprietary exemption applies to the following records:

> Data, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such data, records or information has not been publicly released, published, copyrighted or patented.

Va. Code § 2.2-3805.4(4). UVA also withheld certain documents on the grounds that such documents were not public records or fell under the Act's exemptions for "scholastic records" (§ 2.2-3705.4(1)) or "personnel records" (§ 2.2-3705.1(1)).

The proceedings below focused on the records that UVA did not produce because they were either exempt from or not subject to the Act. Based on review of 31 exemplar documents that the parties selected and presented to the court, the circuit court judge held in an order dated April 2, 2013 that UVA had properly withheld the challenged records under FOIA. JA at 670-75.

The circuit court's analysis focused primarily on the proprietary exemption.[2] The court interpreted "proprietary" to mean "a thing or property owned or in the possession of one who manages and controls them, in this case, the University," and it concluded that "the overwhelming majority [of the exemplars] contain data, records or information of a proprietary nature collected by or for the University faculty or staff in the conduct of or as a result of research." JA at 671, 673 (Order ¶¶ 4, 7). Although the court found it unnecessary to address directly the parties' academic freedom and First Amendment arguments, the court explained that the proprietary exemption "arise[s] from the concept of academic freedom and from the interest in protecting research." *Id.* at 673 (Order ¶ 9). As the court explained, "early research is protected for a variety of reasons. The concept of the churn of intellectual debate, evolving research, suddenly going up a dead end in your paths of inquiry, having the ability to come back, all this is part of the intellectual ferment that is protected" by the proprietary exemption. *Id.* That decision was correct and should be affirmed.

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[2] The court also found that some exemplars were not public records or were exempt from disclosure under the Act's scholastic- or personnel-records exemptions.

In a second ruling on appeal to this Court, the circuit court held that FOIA authorizes reimbursement of costs related to a public agency's response to a public records request. JA at 106-110. The court's decision, which relied in part on an Advisory Opinion of the Virginia Freedom of Information Advisory Council,[3] was also correct and should be affirmed.

STANDARD OF REVIEW

"[A]n issue of statutory interpretation is a pure question of law which [the Court] review[s] de novo." *Conyers v. Martial Arts World of Richmond, Inc.,* 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007). This Court presumes that the circuit court applied the law correctly to the facts before it. The circuit court's application of the law to the facts should be viewed in the light most favorable to the prevailing party below—here, UVA. *Bottoms v. Bottoms*, 249 Va. 410, 414, 457 S.E.2d 102, 105 (1995) (citation omitted).

ARGUMENT

I. The Circuit Court Correctly Interpreted the Proprietary Exemption Consistent with Academic Freedom Principles

The circuit court interpreted the proprietary exemption—consistent with the statute's plain language—to protect research that has not been "released, published, copyrighted or patented." Va. Code § 2.2-3805.4(4).

[3] The Advisory Opinion is available at http://foiacouncil.dls.virginia.gov/ops/07/AO_02_07.htm/.

Appellee's brief thoroughly details how the statute's plain language and purpose support the circuit court's holding. *Amici* submit this brief to address a separate but related point counseling in favor of affirmance: The circuit court's interpretation is grounded in longstanding and settled principles of academic freedom, is consistent with the First Amendment of the U.S. Constitution, and promotes important interests of Virginia public universities, Virginia citizenry, and the Nation.

A. The proprietary exemption is solidly grounded in academic freedom principles.

As the circuit court recognized, the proprietary exemption "arise[s] from the concept of academic freedom and from the interest in protecting research." JA at 673 (Order ¶ 9). Academic freedom and research protection have a well-established, storied place in our Nation's history and jurisprudence. Indeed, they serve vital interests essential to our democracy and constitutional tradition.

Beginning with Chief Justice Marshall's opinion in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), the U.S. Supreme Court has accepted the intellectual independence of American colleges and universities as a feature of its constitutional jurisprudence. The U.S. Supreme Court has recognized that academic freedom is a

cherished right in our society and protected by the First Amendment of the U.S. Constitution. For example, in *Sweezy v. New Hampshire*, the U.S. Supreme Court explained that "[t]he essentiality of freedom in the community of American universities is almost self-evident." 354 U.S. 234, 250 (1957). The reason for this is simple: To "impos[e] any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation," because "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust." *Id.*; *see also Grutter v. Bollinger,* 539 U.S. 306, 307 (2003) ("[A]cademic freedom . . . 'long has been viewed as a special concern of the First Amendment.'") (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (Powell, J.)); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985); *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

Lower federal courts and state appellate courts nationwide have repeatedly affirmed this principle. *See*, *e.g.*, *McMillan v. Togus Reg. Office, Dep't of Veterans Affairs*, 294 F. Supp. 2d 305, 318 (E.D.N.Y. 2003), *aff'd*, 120 F. App'x 849 (2d Cir. 2005) ("[S]ociety has a profound interest in the research of its scholars, work which has the unique potential to facilitate change through knowledge. . . . Compelled disclosure of confidential information would without question severely stifle research into questions of

public policy, the very subjects in which the public interest is greatest.") (quoting *Richards of Rockford* v. *Pac. Gas & Elec. Co.*, 71 F.R.D. 388, 390 (N.D.Cal.1976)); *Williams v. Texas Tech Univ. Health Sci. Ctr.*, 6 F.3d 290, 293 (5th Cir. 1993) ("A state university has a significant interest in having reasonable discretion to administer its educational programs."); *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) ("Federal judges should not be ersatz deans or educators."); *Henderson State Univ. v. Spadoni*, 848 S.W.2d 951, 953 (Ark. Ct. App. 1993) ("There is a general policy against intervention by the courts in matters best left to school authorities."); *Miller v. Loyola Univ. of New Orleans*, 829 So. 2d 1057, 1061 (La. Ct. App. 2002) ("Universities must be allowed the flexibility to manage themselves."); *Corr v. Mazur*, No. LL-3250-4, 1988 WL 619395, at *2 (Va. Cir. Ct. Nov. 22, 1988) (describing academic freedom as "basic to our society").

Academic freedom is embedded in the fabric of our social and political structures. Numerous state public records laws reflect such values through protections for research and study. As one example, the exemption under South Carolina law is nearly identical to Virginia's proprietary exemption. *See* S.C. Code 1976 § 30-4-40(a)(14)(A). Similarly, Oklahoma law provides in part that "a public body may keep confidential: 1. [a]ny information related to research, the disclosure of which

could affect the conduct or outcome of the research . . . ." 51 OKLA. STAT. § 24A.19. And as a third example, Nebraska law protects "[t]rade secrets, academic and scientific research work which is in progress and unpublished". *See*, *e.g.*, NEB. REV. STAT. § 84-712.05(3).

The same protections for academic research are embodied at the federal level too. Respect for confidentiality in the research process permeates policies and practices of federal agencies that fund and manage scientific research. For instance, the National Institutes of Health ("NIH") instructs peer reviewers that "*[a]ll material under review is privileged information*" that "should not be shared with anyone unless necessary to the review process" and "should not be copied and retained or used in any manner by the reviewer" absent consent to do so. NIH, Guidelines for the Conduct of Research in the Intramural Research Program at NIH 13 (4th ed., May 2007) (emphasis added)*, available at* http://sourcebook.od.nih.gov/ethic-conduct/Conduct%20Research%206-11-07.pdf. Likewise, the National Science Foundation ("NSF") requires reviewers to "Maintain the Confidentiality of Proposals and Applicants". NSF, *Conflict-of-Interests and Confidentiality Statement for NSF Panelists* (Feb. 2004) ("The Foundation receives proposals in confidence and protects the confidentiality of their contents. For this reason, you must not

copy, quote, or otherwise use or disclose to anyone, including your graduate students or post-doctoral or research associates, any material from any proposal you are asked to review."), *available at* http://www.nsf.gov/pubs/2002/form1230p/form1230p.pdf.

B. The proprietary exemption serves vital interests of universities and colleges in Virginia and around the Nation.

Because Virginia's proprietary exemption is in step with this country's venerable respect for the independence of academic research, teaching, and study, it furthers numerous interests vital to universities and colleges in Virginia and across the Nation.

The proprietary exemption provides crucial support for the collaborative research process. Science and innovation depend on the free flow of ideas. In today's world, scientific research involves collaborations among individuals from many different institutions who contribute different viewpoints, experiences, and expertise. As ACE President Molly Broad explained, the research process is held together by an expectation that the exchange of ideas will be confidential and protected from disclosure: "Any trepidation that the uninhibited and free exchange of ideas will be subject to intrusion at the behest of litigants would tend to dampen scholars' willingness to participate in the process . . . . Such a result is bound to

have adverse consequences for the quality, productivity, and utility of research that are the hallmarks of American higher education." JA at 470 (Declaration of Molly Corbett Broad ("Broad Declaration") ¶ 4); *see also id.* at 461 (Affidavit of John L. Gittleman, Dean of University of Georgia Odum School of Ecology and Genetics ¶ 7) ("[I]f there were a breach of any protection of the communication among scientists, particularly at the formative stages of this process, then the freedom and creativity that lie at the heart of the scientific give-and-take would be hampered and create an air of paranoia, very possibly eliminating the benefits of collaboration."). By shielding confidential research communications from public disclosure, the proprietary exemption promotes the free exchange of ideas—and thus the innovation, debate, consideration, and advancement that inexorably result.

The proprietary exemption promotes collaboration among faculty at Virginia public universities and faculty at private and other public institutions outside Virginia and the United States. Research at private colleges and universities and at many public universities is not subject to public disclosure laws. If the proprietary exemption were interpreted to require disclosure of confidential research communications, fear of public disclosure would discourage faculty at those institutions to engage in joint research efforts with faculty from Virginia public institutions, again

threatening the benefits that flow from research and collaboration. *See*, *e.g.*, JA at 470-71 (Broad Declaration ¶ 6) ("[C]ollaboration and deliberation between researchers at public institutions and private or international institutions—which are not subject to state FOIA laws—will be adversely affected if those laws are interpreted to lack protections for informal and unpublished scholarly and scientific exchanges.").

The proprietary exemption also helps ensure that Virginia's public universities remain competitive in their efforts to recruit and retain outstanding faculty. John Simon, UVA Provost and former Vice Provost at Duke University, explained: "I can state unequivocally that recruitment of faculty to an institution like the University of Virginia will be deeply harmed if such faculty must fear that their unpublished communications . . . are subject to involuntary public disclosure. We will also lose key faculty to recruitments from other institutions – such as Duke . . . ." JA at 448-49 (Affidavit of John Simon ("Simon Affidavit") ¶¶ 21, 22). Without the exemption's protection for research, Virginia public institutions would be at a competitive disadvantage relative to peer private institutions as well as relative to peer public institutions in other states that provide strong safeguards for research.

Finally, the proprietary exemption provides economic benefits to Virginia's public universities and citizenry. In particular, the proprietary exemption is integral to the patent process. *Id.* at 446-47 (Simon Affidavit ¶ 14) ("Disclosure of research data and communications that a scientist or scientific collaborative group has chosen to not yet make public can imperil future patenting of research."). It ensures that public universities are able to license their intellectual property. *Id.* 447 (Simon Affidavit ¶ 15) ("It is virtually impossible for a university to license intellectual property to a private sector company if the data or research results have been prematurely released and are already publically available."). And it facilitates the publication and dissemination of research. *Id.* at 445 (Simon Affidavit ¶ 11) ("Scholarly reputations are built on the formal publications, grants, or public presentations submitted voluntarily and intentionally by scientists. . . . Loss of the ability to decide when to publish would translate into risk-adverse research decisions and a loss of bold and creative exploration."). Without the proprietary exemption, the Virginia citizenry would not benefit as fully from the many economic benefits flowing from public universities in the Commonwealth.

C. Appellants' interpretation of the proprietary exemption would chill academic inquiry and interfere with academic debate.

The proprietary exemption serves core First Amendment interests. Academic freedom is a "special" First Amendment concern. *Bakke*, 438 U.S. at 312. Infringement of academic freedom entails "[a] chilling effect upon the exercise of vital First Amendment rights." *Keyishian*, 385 U.S. at 604. Through maintenance of confidentiality in the research process, the proprietary exemption encourages the free flow of ideas that the First Amendment protects.

ATI and Marshall argue that the proprietary exemption applies only when the disclosure of records would be "harmful to the competitive position" of a Virginia public university. Petition for Review at 15. This proposed interpretation has no basis in the statutory language or its purpose. Not only does it track a rejected legislative proposal rather than the enacted statute,[4] but in addition, accepting it would choke academic

[4] As UVA points out, Appellants' interpretation is contrary to the legislative history of the proprietary exemption. The statutory language that evolved to become the current statutory text was introduced on January 22, 1982 as part of Senate Bill No. 162. The original proposed language, which was rejected, closely resembles Appellants' interpretation: "Data or records, other than financial or administrative, *having proprietary value,* produced or collected by faculty or staff of state institutions of higher education in the conduct of scientific, technical, medical or scholarly

speech for the reasons explained above by Broad, Simon, and Gittleman. *See, e.g., supra* Sec. I.B.

Without clear protection of their academic speech, researchers will be deterred from robust participation in the exchange of ideas essential for collaboration and innovation. They may think twice before they propose to colleagues new and innovative ideas—ideas that require critique of, and input from, others to germinate into discovery and advancement. They may not delve into a controversial area of research out of fear that their every communication will be subject to scrutiny before the research has been developed. In other words, as Justice Frankfurter explained, ATI and Marshall's interpretation would "check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor" and therefore run afoul of the First Amendment. *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring).

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activities the results of which have not been released, published, copyrighted or patented, *when the disclosure of such data or records may result in a substantial loss to the individual or institution*." *Id.* (emphasis added). The Legislature ultimately rejected such formulation and enacted the current exemption.

II. The Circuit Court Correctly Held that FOIA Authorizes Reimbursement of Cost for Review and Redaction

The circuit court held that FOIA authorized UVA to obtain reimbursement of the costs the University would incur to review and redact the multitude of documents responsive to ATI and Marshall's FOIA request. For the reasons explained by UVA, that interpretation is correct and should be affirmed. Such holding also appropriately balances the public's important interest in transparency and accountability with the practical reality that public records requests and related response obligations place significant financial and administrative burdens on Virginia public universities.

Public universities in Virginia, like universities across the country, have limited resources to fulfill their educational missions. Reimbursement ensures that precious resources are not unduly siphoned from an institution's core functions of education and research to administrative tasks such as culling and redacting documents. Those administrative tasks are appropriate in the interest of transparency where FOIA mandates disclosure, but so is reasonable reimbursement, which recognizes the significant effort entailed in responding to a far-reaching, multi-year FOIA request.

Reimbursement also serves an important winnowing function. It encourages requestors to tailor public records requests to the specific information needed or desired. Though FOIA does not prohibit the type of broad requests that ATI and Marshall submitted in this case, reimbursement ensures that FOIA is a shared responsibility between the requester and the responder and that the burden of response does not fall solely on Virginia public universities.

CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court's decision.

Date: December 13, 2013

Respectfully submitted,

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APPENDIX: OTHER *AMICI* ON THIS BRIEF

The American Association of State Colleges and Universities ("AASCU") includes as members more than 400 public colleges, universities, and systems whose members share a learning- and teaching-centered culture, a historic commitment to underserved student populations, and a dedication to research and creativity that advances their regions' economic progress and cultural development. AASCU members hold free inquiry, an essential component of academic freedom, as a fundamental value that governs their operations. Academic freedom is the principle that ensures scientific and intellectual integrity.

The Association of American Medical Colleges ("AAMC") represents all 141 accredited U.S. and 17 accredited Canadian medical schools; nearly 400 major teaching hospitals and health systems; and 90 academic and scientific societies. Through these institutions and organizations, the AAMC represents 128,000 faculty members, 75,000 medical students, and 110,000 resident physicians. The AAMC is committed to the continuing improvement of health care and the continuing medical education of physician practitioners based on sound scientific evidence. These goals require, and AAMC strongly supports, policies that promote unfettered generation and dissemination of new, validated scientific knowledge, while

safeguarding the confidentiality, privacy, and proprietary information of patients, physicians, and scientists who participate in research. Academic freedom is the cornerstone of such policies.

The Association of American Universities ("AAU") is an association of 61 leading public and private research universities in the United States and Canada. Founded to advance the international standing of U.S. research universities, AAU today focuses on issues that are important to research-intensive universities, such as funding for research, research policy issues, and graduate and undergraduate education. AAU believes that academic freedom is the freedom of university faculty to produce and disseminate knowledge through research, teaching, and service, without undue constraint.

The Association of Governing Boards of Universities and Colleges ("AGB") serves the interests and needs of academic governing boards, boards of institutionally related foundations, and campus CEOs and other senior-level campus administrators on issues related to higher education governance and leadership. Its mission is to strengthen, protect, and advocate on behalf of citizen trusteeship that supports and advances higher education. Governing board accountability includes the protection of

higher education's central value of academic freedom. Academic freedom lies at the heart of our mission.

The Association of Public and Land-grant Universities ("APLU") is a research and advocacy organization of public research universities, land-grant institutions, and state university systems with member campuses in all 50 states, U.S. territories, and the District of Columbia. APLU members hold free inquiry, an essential component of academic freedom, as a fundamental value that governs their operations. Academic freedom is the principle that ensures scientific and intellectual integrity.

The National Academy of Sciences ("NAS") is a private nonprofit membership corporation created by an Act of Congress in 1863 to elevate American science, to recognize distinguished advances in research, and to advise the government on any matter for which science, engineering and medicine can improve the public good [see 36 U.S.C. § 150303]. The NAS is not an agency of the federal government nor does it receive a Congressional appropriation. As the preeminent American scientific society, the NAS has approximately 2,500 members, all of whom have been elected for their distinguished achievements in scientific research. The NAS fulfills its mission of advising the U.S. Government through hundreds of projects supported by federal agencies. It also carries out

projects for state governments, foundations, and private entities. Every year more than 7,000 NAS members and other experts work on these projects as volunteers and without compensation. Many are faculty members and researchers in state institutions throughout the Nation. Because of its mission, the NAS has a strong interest in supporting the academic freedom that is necessary to pursue scientific research, advance new knowledge, and improve the human condition.

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on this 13th day of December, 2013, three printed copies of the foregoing were served by U.S. Postal Service Priority Mail on:

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I further certify that I have caused to be filed 15 printed copies of the foregoing with the Clerk of this Court and I have filed an electronic PDF copy of the foregoing with the Clerk via e-mail to scvbriefs@courts.state.va.us. I also certify that the foregoing brief does not

exceed 50 pages and that I have otherwise complied with Rules 5:26 and 5:30 of the Rules of the Supreme Court of Virginia.

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