IN THE SUPREME COURT OF VIRGINIA

Board of Supervisors of Fairfax County, Virginia, Appellant, v. Rita M. Leach-Lewis, Trustee of the Rita M. Leach-Lewis Trust 18MAR13, Appellee.	Record No. 230491

MOTION OF THE INSTITUTE FOR JUSTICE, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, AND AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

COMES NOW *amici curiae* Institute for Justice, American Civil Liberties Union, and the American Civil Liberties Union Foundation of Virginia, who, pursuant to Supreme Court of Virginia Rule 5:30, move for leave to file a brief in support of Defendant-Appellee. In support, *amici* state as follows:

1. The Institute for Justice (IJ) is a nonprofit, public-interest law firm dedicated to defending the basic principles of a free society. As part of that mission, IJ litigates to protect private-property rights in state and

federal courts around the country, including in this court. *See City of Charlottesville v. Regulus Books, LLC*, 873 S.E.2d 81 (Va. 2022). To that end, IJ challenges warrantless searches of people and their property as part of its Project on the Fourth Amendment. *E.g., Snitko v. United States*, No. 22-56050 (9th Cir., argued Dec. 7, 2023). And because IJ believes the Fourth Amendment's property protections are meaningless if officials face no consequences for violating them, IJ litigates to ensure the exclusionary rule's role as a backstop for our search-and-seizure rights. *E.g., Long Lake Township v. Maxon*, No. 164948 (Mich., argued Oct. 18, 2023).

2. The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to protecting the principles embodied in the state and federal Constitutions and our nation's civil rights laws. The ACLU frequently litigates and files amicus curiae briefs in cases involving the fundamental rights protected by the Fourth Amendment and its state constitutional analogue.

3. The American Civil Liberties Union Foundation of Virginia (ACLU of Virgina) is a statewide, nonprofit, nonpartisan organization with approximately 22,000 members. The ACLU of Virginia appears frequently before the state and federal courts of this Commonwealth, both as counsel and as *Amicus Curiae*. Since its founding, the ACLU of Virginia has been a forceful advocate for civil liberties and civil rights, including the fundamental rights protected by the Fourth Amendment of the United States Constitution.

4. The issues in this appeal are thus issues on which *amici* and their members and supporters have unique interest and expertise. *Amici*'s expertise will assist the Court in clarifying exclusionary-rule doctrine.

5. A copy of the proposed brief is attached to this motion.

6. Pursuant to Rule 5:30(c)(2), *amici* have sought and received consent to file this motion from all parties to this appeal.

For the foregoing reasons, as well as those set forth in the attached brief, *amici* Institute for Justice, American Civil Liberties Union, and the American Civil Liberties Union Foundation of Virginia respectfully request

that the Court grant this motion for leave to file the accompanying brief *amici curiae*.

Dated: January 23, 2024. Respectfully submitted,

/s/ Robert Frommer
Michael Greenberg (DC Bar No. 1723725)*
Robert Frommer (VSB No. 70086)
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
Tel.: (703) 682-9320
Fax: (703) 682-9321
mgreenberg@ij.org
rfrommer@ij.org

Counsel for Amicus Curiae Institute for Justice

Bridget Lavender*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 17th Floor
New York, NY 10004
(212) 549-2500
blavender@aclu.org

Counsel for Amicus Curiae American Civil Liberties Union

Vishal Agraharkar (VSB #93265)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA
701 E. Franklin Street, Ste. 1412

Richmond, VA 23219
(804) 523-2151
vagraharkar@acluva.org

Counsel for Amicus Curiae American Civil Liberties Union of Virginia

*Motion for admission pro hac vice forthcoming

CERTIFICATE OF SERVICE

On January 23, 2024, a copy of this Motion for Leave to File Brief Amici Curiae was emailed to all counsel for the Appellant at the addresses below:

Elizabeth D. Teare (VSB No. 31809)
T. David Stoner (VSB No. 24366)
Laura S. Gori (VSB No. 65907)
Sara G. Silverman (VSB No. 77317)
Office of the Fairfax County Attorney
12000 Government Center Parkway, Suite 549
Fairfax, VA 22035
elizabeth.teare@fairfaxcounty.gov
david.stoner2@fairfaxcounty.gov
laura.gori@fairfaxcounty.gov
sara.silverman@fairfaxcounty.gov

On January 23, 2024, a copy of this Motion for Leave to File Brief Amici Curiae was emailed to all counsel for the Appellee at the addresses below:

Gifford R. Hampshire (VSB No. 28954)
James R. Meizanis, Jr. (VSB No. 80692)
BLANKINGSHIP & KEITH, P.C.
4020 University Drive, Suite 300
Fairfax, Virginia 22030
ghampshire@bklawva.com
jmeizanis@bklawva.com

/s/ Robert Frommer

In the Supreme Court of Virginia

Record No. 230491

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA

Appellant,

v.

RITA M. LEACH-LEWIS, TRUSTEE OF THE RITA M. LEACH-LEWIS TRUST 18MAR13,

Appellee.

BRIEF OF AMICI CURIAE THE INSTITUTE FOR JUSTICE, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLEE

Michael Greenberg*
Robert Frommer (VSB No. 70086)
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
Tel.: (703) 682-9320
Fax: (703) 682-9321
mgreenberg@ij.org
rfrommer@ij.org

Bridget Lavender*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 17th Floor
New York, NY 10004
(212) 549-2500
blavender@aclu.org

Counsel for Amici Curiae
Additional counsel listed on inside cover
***Motion for admission pro hac vice forthcoming**

Vishal Agraharkar (VSB #93265)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA
701 E. Franklin Street, Ste. 1412
Richmond, VA 23219
(804) 523-2151
vagraharkar@acluva.org

Counsel for Amicus Curiae American Civil Liberties Union of Virginia

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Ms. Leach-Lewis alleges that a Fairfax County zoning officer barged into her private home without consent or a warrant and rifled through the property searching for evidence. If this telling is correct—as *amici* assume—the officer's actions are a grave violation of both the U.S. Constitution's Fourth Amendment and Article I, § 10 of the Virginia Constitution. Excluding evidence derived from that unlawful search is warranted.

Amici submit this brief to highlight the bedrock role the exclusionary rule plays in deterring such grave violations of our essential liberties. The exclusionary rule exists to "compel respect" for Fourth Amendment rights in the "only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). Yet Fairfax County sweepingly claims that the exclusionary rule is "inapplicable" in any case that happens to bear a "civil" label. County Br. 15. But the County provides no good reason for this novel, far-reaching proposal, which directly conflicts with the U.S. Supreme Court's well-established standard

for assessing whether to apply the exclusionary rule. That standard focuses not on the civil or criminal label placed on the proceeding, but on a "rigorous weighing of its costs and deterrence benefits." *Davis v. United States*, 564 U.S. 229, 238 (2011). The County makes no effort to either apply that balancing test or supply a good reason for departing from it. (**Part I.A.**)

Properly applying that standard shows that exclusion is warranted here. Suppressing the fruits of zoning officers' warrantless snooping through private homes here would deter their warrantless snooping through private homes in the future. And none of the costs the U.S. Supreme Court says caution against applying the exclusionary rule exist here. (**Part I.B.**)

In contrast, the County's suggestion that the exclusionary rule is categorically inapplicable in civil cases would impose massive costs on the people's right to be "secure in their persons, houses, papers, and effects[] against unreasonable searches and seizures." U.S. Const. amend. IV. Throughout history, citizens have enjoyed a wide array of measures to

deter officials from encroaching on their rights. But today, deterring Fourth Amendment violations through means other than the exclusionary rule, like damages suits, is harder than ever. Indeed, the County effectively admits (*see* County Br. 15 & n.56) that it seeks a ruling allowing its officers to barge into private homes with impunity whenever they are looking for civil violations. This Court should not let government officials deliberately violate the Fourth Amendment without consequence. **(Part I.C.**)

Even if this Court is not convinced that the exclusionary rule applies under the Fourth Amendment, it should hold that exclusion is the proper remedy to address the analogous violation of Article I, § 10 of the Virginia Constitution alleged here. The drafters of the Virginia Constitution sought to protect citizens' liberty and privacy in their homes, and this Court should honor that by adopting an exclusionary rule for violations of the state Constitution. (**Part II.**)

STATEMENT OF THE CASE

Amici adopt the Statement of the Case laid out by Ms. Leach-Lewis. *See* Leach-Lewis Br. 1–3.

STATEMENT OF FACTS

Amici adopt the Statement of Facts laid out by Ms. Leach-Lewis. *See* Leach-Lewis Br. 4–6.

STANDARD OF REVIEW

Whether the exclusionary rule applies in a civil matter to address a search-and-seizure violation is a question of law that this Court reviews de novo. *Grafmuller v. Commonwealth*, 778 S.E.2d 114, 116 (Va. 2015).

ARGUMENT

I. THE FOURTH AMENDMENT EXCLUSIONARY RULE APPLIES TO THIS CIVIL ZONING ENFORCEMENT ACTION.

A. The exclusionary rule's applicability turns on weighing the deterrence benefits of suppression against its costs, not the label of the government's enforcement action.

1. The County's lead argument for reversal is that "[t]he exclusionary rule does not apply in civil cases." County Br. 13. But that is

plainly wrong: As the U.S. Supreme Court has repeatedly explained, the test for whether to apply the exclusionary rule has everything to do with deterrence and nothing to do with the County's criminal vs. civil standard.

Indeed, rather than zeroing in on the *label* placed on the ultimate enforcement proceeding, the U.S. Supreme Court has determined whether the exclusionary rule applies by "focus[ing] on the efficacy of the rule in deterring Fourth Amendment violations in the future." *Herring v. United States*, 555 U.S. 135, 141 (2009). Under well-established law that the County ignores, the exclusionary rule applies to address Fourth Amendment violations when "the benefits of deterrence [] outweigh the costs." *Id.*; *see also United States v. Janis*, 428 U.S. 433, 454 & n.27 (1976) (focusing on the "likelihood of deterring the conduct … that [] outweighs the societal costs imposed by the exclusion"); *United States v. Leon*, 468 U.S. 897, 906–07 (1984) (explaining that whether exclusionary rule applies "must be resolved by weighing the costs and benefits"); *Davis v. United States*, 564 U.S. 229, 238 (2011) (detailing requirement for a "rigorous weighing of

[rule's] costs and deterrence benefits"). Consistent with the U.S. Supreme Court's repeated holdings, courts ignore the civil or criminal label of the enforcement proceeding in which the government wants to use ill-gotten evidence. Instead, they ask whether suppressing that unconstitutionally obtained evidence will deter the searching officer going forward.

Anything else would make little sense. The Fourth Amendment constrains more than criminal-law investigators pursuing criminal-law investigations. *Camara v. Municipal Ct.*, 387 U.S. 523, 530 (1967) ("It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."). As Ms. Leach-Lewis's experience shows, flagrantly unconstitutional searches occur in a broad range of settings. *See, e.g.*, Va. Code Ann. §§ 15.2-2286(A)(16) (establishing procedures for zoning officers to obtain warrants), 22.1-289.033 (same for child-care regulators), 10.1-610(B) (same for dam-safety regulators); *see also*, *e.g.*, *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374–77 (2009) (holding "embarrassing,

frightening, and humiliating" strip search of student by middle school administrators violated Fourth Amendment); *Zadeh v. Robinson*, 928 F.3d 457, 474 (5th Cir. 2019) (Willett, J., concurring) (recounting medical-board investigators who, "without notice and without a warrant, entered a doctor's office and demanded to rifle through the medial records of 16 patients"). All Fourth Amendment violations, especially egregious ones, can be—and should be—deterred. By ignoring the rule's deterrence-based rationale, the County's argument contravenes decades of U.S. Supreme Court precedent.

2. Adopting the County's argument would also make this Court an outlier among courts around the country that have applied the exclusionary rule to deter Fourth Amendment misdeeds outside of criminal proceedings.

To start, both state and federal appellate courts have directly rejected the civil vs. criminal distinction for applying the Fourth Amendment exclusionary rule that the county urges here. *In re Burch*, 294 P.3d 1155,

1162 (Kan. 2013) ("The goal of the exclusionary rule is deterrence; therefore, whether the exclusionary rule should be applied cannot turn solely on whether the proceeding is civil or criminal."); *Grimes v. Comm'r*, 82 F.3d 286, 290 (9th Cir. 1996) (focusing on a "common sense deterrence inquiry" and criticizing "undue reliance on [the] civil/criminal distinction"); *Tirado v. Comm'r*, 689 F.2d 307, 312 (2d Cir. 1982) (explaining that the "proper way to assess the likelihood of marginal deterrence" does not depend on whether the "proceeding is civil"); *see also Ahart v. Colo. Dep't of Corr.*, 964 P.2d 517, 523 (Colo. 1998) ("In civil proceedings, courts must decide whether the exclusionary rule applies on a case by case basis.").

Many other cases have applied the exclusionary rule in civil proceedings with ease. For example, the U.S. Supreme Court has applied the rule to civil forfeiture proceedings for over half a century. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 & n.7 (1965); *see also United*

States v. James Daniel Good Real Prop., 510 U.S. 43, 49 (1993) ("the exclusionary rule applies to civil forfeiture").

Other state and federal courts have followed suit. Indeed, this Court has acknowledged "several lower courts" to conclude the Fourth Amendment exclusionary rule applies to civil cases. *Commonwealth v. E.A. Clore Sons, Inc.*, 281 S.E.2d 901, 904 n.4 (Va. 1981). That acknowledgment was well-founded: Several state supreme courts have done so.[1] So have

[1] *E.g.*, *Olson v. Comm'r of Pub. Safety*, 371 N.W.2d 552, 553, 556 (Minn. 1985) (applying exclusionary rule to driver's license suspension proceeding); *Goldin v. Pub. Util. Comm'n*, 23 Cal. 3d 638, 668–69 & nn.18–19 (Cal. 1979) (applying rule to public-utilities commission proceedings); *Jefferson Parish v. Bayou Landing, Ltd.*, 350 So. 2d 158, 161 (La. 1977) (applying rule to civil nuisance-abatement proceedings); *Carson v. State ex rel. Price*, 144 S.E.2d 384, 387 (Ga. 1965) (same); *Carlisle v. State ex rel. Trammell*, 163 So. 2d 596, 598 (Ala. 1964) (same); *Finn's Liquor Shop, Inc. v. State Liquor Auth.*, 249 N.E.2d 440, 443 (N.Y. 1969) (applying rule to liquor-license suspension hearings; anything less would leave "no way to protect licensees from abuse and harassment at the hands of [agency's] employees or agents"). As discussed in Part II, some of these state supreme courts' holdings relied on both federal and state constitutional analysis.

federal circuit courts.[2] And federal district courts too.[3] As a leading treatise summarizes, nothing in the caselaw "casts serious doubt upon the applicability of both the Fourth Amendment and its exclusionary rule to the[] investigative activities" of "nonpolice" civil investigators like "building inspectors" and "OSHA inspectors." Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 1.8(e) (6th ed. 2022). The County cannot be right unless each of these authorities is wrong.

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[2] *E.g.*, *Savina Home Indus. v. Sec'y of Lab.*, 594 F.2d 1358, 1362–63 (10th Cir. 1979) ("Certainly considerations of … deterring official lawlessness do not become inconsequential simply because an illegal search is conducted by the Department of Labor instead of by the Department of Justice."); *Pizzarello v. United States*, 408 F.2d 579, 586 (2d Cir. 1969) ("Absent an exclusionary rule, the Government would be free to undertake unreasonable searches and seizures in all civil cases without the possibility of unfavorable consequences … . [I]t seems clear, even under a view of the law most favorable to the Government, that evidence so obtained would be excluded.").

[3] *E.g.*, *Pike v. Gallagher*, 829 F. Supp. 1254, 1263–66 (D.N.M. 1993) (excluding evidence from a warrantless drug test of a municipal employee in an employment disciplinary proceeding); *Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223, 239 (E.D. Tex. 1980) ("The failure to apply a corollary of the exclusionary rule in this context would leave school officials free to trench upon the constitutional rights of students in their charge without meaningful restraint or fear of adverse consequences.").

3. The County's sole authority for limiting the exclusionary rule to criminal proceedings is *County of Henrico v. Ehlers*. County Br. 13–15 & nn.50, 53 (citing 379 S.E.2d 457, 462 (Va. 1989)). But *Ehlers* self-consciously "has nothing whatever to do with the Fourth Amendment." 379 S.E.2d at 460. The individual in that civil case alleged that officers violated his Fifth Amendment right against self-incrimination under *Miranda v. Arizona*, 384 U.S. 436 (1966), not that they had conducted an illegal search under the Fourth Amendment. *Ehlers*, 379 S.E.2d at 460.

The distinction is significant. While the Fifth Amendment's self-incrimination clause requires courts to exclude evidence obtained through unconstitutionally coerced confessions, *Dickerson v. United States*, 530 U.S. 428, 434–35 (2000), its guarantee expressly applies only in "criminal case[s]," U.S. Const. amend. V. By contrast, the Fourth Amendment's safeguard against unreasonable searches and seizures applies across the board. *See Camara*, 387 U.S. at 530; pp. 6–7, above.

Moreover, *Ehlers* held that "there was no Fifth Amendment violation," so there was nothing to exclude under any portion of the U.S. Constitution, much less the Fourth Amendment. 379 S.E.2d at 461. Accordingly, the Court's passing "opinion" that "the Fourth Amendment exclusionary rule should not be extended from criminal cases to civil cases," *id*. at 462 (quoted in County Br. 15 n.53)—in a case having "nothing whatever to do with the Fourth Amendment," *id*. at 460—is not "binding precedent." *Jones v. Commonwealth*, 795 S.E.2d 705, 721 (Va. 2017); *see also Sarafin v. Commonwealth*, 764 S.E.2d 71, 77 (Va. 2014); *Vasquez v. Commonwealth*, 781 S.E.2d 920, 926 (Va. 2016).

The context of that passing statement, moreover, makes it unlikely the Court intended to do anything more than preclude painting a Fourth Amendment-style exclusionary rule onto *Fifth Amendment* cases. After all, the relevant section of the opinion begins by chiding the trial court for "apply[ing] Fourth Amendment principles by analogy to … a Fifth Amendment problem." *Ehlers*, 379 S.E.2d at 461. In fact, the Court *lauded*

the exclusionary rule as the only "effective way to protect the rights preserved by the Fourth Amendment." *Id*. at 462. The County's reading—that the Court would so broadly foreclose the exclusionary rule while so loudly singing its praises—simply does not make sense.

In sum, the U.S. Supreme Court has held again and again that whether the exclusionary rule should be applied in any given case turns on a "rigorous weighing of its costs and deterrence benefits." *Davis*, 564 U.S. at 238. Courts around the country have applied that standard and have consequently excluded unlawfully obtained evidence in a wide range of civil proceedings. To hold otherwise here—or to hold that *Ehlers* mandates that result—would require a significant break from precedent.

B. The benefits of deterring zoning officers from rifling through private homes without a warrant outweigh the minimal cost of suppression here.

The U.S. Supreme Court has identified factors informing how to balance the exclusionary rule's deterrence benefits against its costs. Through its cases, it has outlined circumstances in which the deterrence

benefits of suppression would be too marginal, or the costs too high, to justify applying the rule. Applying that standard here, none of the circumstances cautioning against suppression are present.

1. ***Deterrence.*** The very "purpose" of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *United States v. Calandra*, 414 U.S. 338, 347 (1974) (citation omitted). Excluding the evidence Officer Enos gathered from his warrantless search of Ms. Leach-Lewis's home would deter him and other zoning officers from similar unconstitutional conduct going forward.

a. The U.S. Supreme Court has recognized that the exclusionary rule best serves its deterrence goal when the "punishment" of exclusion "is the removal of [] evidence" from a case within "the offending officer's zone of primary interest." *United States v. Janis*, 428 U.S. 433, 458 (1976). Where the exclusion would occur *outside* that zone of interest—that is, in a case

that the searching officer would not have had in mind when he conducted the search—the rule's application may not be justified.

In *Janis*, for example, the searching state-level criminal-law investigator was already "punished" for his illegal search "by the exclusion of the evidence in [a] state criminal trial." *Id*. at 448. So the Court held that exclusion of that same evidence from a subsequent federal tax proceeding, brought by a different agency and outside the officer's "zone of primary interest," was "unlikely to provide significant … additional deterrence." *Id*. at 448, 458. Here, by contrast, the County zoning officer barged into a person's home solely to obtain evidence for the County's enforcement of its zoning code.[4] The exclusionary rule would self-evidently serve its deterrence purpose here.

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[4] Again, *amici* recite the facts as recounted by Ms. Leach-Lewis. Because of the BZA's and Circuit Court's erroneous belief that the search's legality was irrelevant, no factfinder has yet weighed in on Officer Enos's contrary story that he obtained valid consent to enter and scour Ms. Leach-Lewis's home. Should a factfinder give credence to his version of events on remand, there would be no basis to exclude the fruits of a search if it was, in fact, lawful. *Cf*. p. 12, above (discussing *Ehlers*'s holding).

b. Some courts are also more reluctant to suppress evidence obtained in good-faith reliance on an outside source of authority. But that is not what happened here.

In *United States v. Leon*, for example, the U.S. Supreme Court held that suppressing evidence investigators had gathered "in objectively reasonable reliance" on a later-invalidated search warrant (because it was issued without probable cause) would not meaningfully deter future illegal searches by those same investigators. 468 U.S. 897, 922 (1984). The Court explained that it is a "magistrate's responsibility to determine whether the officer's allegations establish probable cause." *Id*. at 921. An officer who otherwise followed proper procedures in applying for a warrant, the Court held, "cannot be expected to question" the magistrate's conclusion, and it would not make sense to "[p]enaliz[e] the officer" by excluding evidence for "the magistrate's error." *Id*.

Similarly, in *Herring v. United States*, the U.S. Supreme Court held that exclusion would not deter an officer whose search of a defendant was

unlawful only because the information in a police database he relied on, which showed an active arrest warrant for the defendant, turned out to be inaccurate. 555 U.S. 135, 137 (2009). The Court stated that "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it," and because the search's illegality stemmed from the "isolated negligence" of a clerical employee, rather than the officer's misdeeds, the Court concluded that the search at issue did not fit the bill. *Id*. at 137, 144.[5]

Unlike these examples, Officer Enos did not rely on a warrant that turned out to be invalid. He did not apply for a warrant at all. Nor is it plausible that he relied in good faith on the warrant the police had for an unrelated investigation. The police explicitly "clarified that the zoning department could 'not go off their warrant.'" *Leach-Lewis v. Bd. of Supervisors*, No. 0815-22-4, 2023 WL 3956770, at *1 (Va. Ct. App. June 13,

[5] As discussed below (at p. 39 n.7), many state courts decline to follow this federal-law exception and suppress evidence obtained in violation of search-of-seizure protections even if an officer relied on an outside source of authority for his actions.

2023). Zoning officers had no authority to be inside Ms. Leach-Lewis's home, and any "objectively reasonable" officer should have known it. *Herring*, 555 U.S. at 142 (citing *Leon*, 468 U.S. at 922 n.23). Suppressing the fruits of that unreasonable entry will serve the exclusionary rule's purpose of providing "pressure" on zoning officials to "adhere[]" to the Fourth Amendment's requirements going forward. *Ehlers*, 379 S.E.2d at 462.

2. ***Costs.*** The costs of achieving the deterrence benefits of exclusion here would be minimal, further supporting application of the exclusionary rule.

a. Unlike applying the exclusionary rule in criminal cases, which may result in "letting … dangerous defendants go free," *Herring*, 555 U.S. at 141, excluding evidence in zoning-code proceedings like those here—where Ms. Leach-Lewis is alleged to have used her home as a church office—risks nothing close to that level of societal harm.

Other important differences between criminal law and zoning law illustrate those minimal costs. Unlike criminal law, the purpose of zoning

enforcement is not to punish past transgressions, but—as Fairfax County's zoning ordinance explains—to "ensure compliance with the provisions" of the zoning code. Fairfax County Zoning Ordinance (FCZO) § 1108.1(G)(4). Moreover, in criminal cases, where evidence from an illegal search is suppressed and results in acquittal, the Fifth Amendment's Double Jeopardy Clause bars retrying a defendant for that same crime. But by its own terms, that protection does not apply to civil cases. *See* U.S. Const. amend. V. Accordingly, in the zoning context, if the County has probable cause to believe a violation remains ongoing after evidence is suppressed, it can come back (with a warrant, this time) and investigate again. Va. Code Ann. § 15.2-228(A)(16) (establishing procedures for zoning-inspection warrants). If the condition no longer exists, the County has gotten what it wanted: It has "ensure[d]" the property owner's "compliance with the provisions" of the zoning code. FCZO § 1108.1(G)(4). And if the condition persists, the County can "[b]ring legal action" anew to remedy the

condition, *id*. § 1108.1(G)(3), (4)—this time presenting evidence it gathered in compliance with the constitution's demands.

Seeking to inflate the costs, the County suggests that *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1046 (1984), holds that the exclusionary rule does not "require the courts to close their eyes to ongoing violations of the law." County Br. 15 n.53. But *Lopez-Mendoza* gives examples of the kinds of costly ongoing harms the Court was referring to: The exclusionary rule should not bar "ordering corrective action at a leaking hazardous waste dump" or require the return of "explosives." 468 U.S. at 1046. The societal costs of aesthetic zoning violations contained within a private home rise nowhere near that level. Indeed, if a zoning case were to involve environmentally toxic chemicals or other genuinely dangerous conditions, that is precisely why the "exigent circumstances" exception to the warrant requirement exists. *E.g.*, *United States v. Lindsey*, 877 F.2d 777, 781 (9th Cir. 1989) ("Exigent circumstances are frequently found when dangerous explosives are involved."). The County has not argued for that exception here.

b. Application of the exclusionary rule in zoning proceedings would also be easily administrable under the current enforcement process, further confirming that the costs of the rule are exceedingly low here.

The first stop in Virginia zoning litigation is a hearing before the Board of Zoning Appeals, and the Board is competent to take in the facts necessary to decide a suppression motion. The General Assembly has equipped the Board with the power to compel witnesses to attend hearings and testify under oath. Va. Code Ann. § 15.2-2312. In addition, whatever the Board's ability to render constitutional legal conclusions on exclusion of evidence, the circuit courts—which hear felony criminal cases every day—are no doubt accustomed to doing so. And property owners have an as-of-right appeal from the Board's zoning proceeding to the circuit court, where they may introduce evidence anew under normal rules of evidence and have "any arguments on questions of law" heard de novo. Va. Code Ann. § 15.2-2314. *Cf. Leach-Lewis*, 2023 WL 3956770, at *2 (describing the Circuit Court proceedings as a "trial").

The zoning-enforcement process thus does not resemble proceedings that have raised workability concerns for the exclusionary rule in other contexts. The U.S. Supreme Court, for example, declined to apply the exclusionary rule to parole-revocation proceedings because those hearings are typically not "entirely adversarial" or governed by "traditional rules of evidence," and the people who would rule on Fourth Amendment issues may not even be "judicial officers or lawyers." *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363–66 (1998). Similar concerns animated the Court's refusal to apply the exclusionary rule to immigration-removal proceedings. *Id*. (citing *Lopez-Mendoza*, 468 U.S. at 1050). It likewise rejected the exclusionary rule for grand-jury proceedings because they are "secret" and "unrestrained by [] technical procedural and evidentiary rules." *United States v. Calandra*, 414 U.S. 338, 343 (1974). In contrast, as discussed above, the Board and circuit court could easily apply the exclusionary rule in their existing proceedings.

In any event, the workability of holding suppression hearings was not dispositive; in those three cases, special factors not present here further limited the basis for the exclusionary rule. In both the grand-jury and parole-revocation context, for instance, it is likely that there will be a subsequent criminal trial, and deterrence can be achieved by excluding ill-gotten evidence in those subsequent proceedings. *Scott*, 524 U.S. at 366–67; *Calandra*, 414 U.S. at 351. As the County admits, though, criminal prosecutions stemming from zoning violations are "unlikely." County Br. 25. Deterrence will be achieved by suppressing the unlawfully obtained evidence here or it will not be achieved at all. Further, both immigration-removal and parole-revocation cases arise from contexts where Fourth Amendment protections are already relaxed—so, in the Court's view, there was simply less to deter.[6] Whatever the merits of the Court's holdings in

[6] *See Samson v. California*, 547 U.S. 843, 850 (2006) (holding suspicionless searches of parolees are valid because parolees remain under "state-imposed punishment[]"); *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (holding that "searches made at the border … are reasonable simply by virtue of the fact that they occur at the border").

those contexts, the zoning officers here searched Ms. Leach-Lewis's private home. And for Fourth Amendment purposes, the home is treated as "first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

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In sum, the exclusionary rule would provide maximum deterrence benefits here with minimal costs. *See Davis*, 564 U.S. at 238 (requiring a "rigorous weighing of its costs and deterrence benefits"). Accordingly, under established precedent, the rule should be applied here.

C. Historical and modern context spotlights the exclusionary rule's essential role in securing Fourth Amendment rights.

Historical and modern context shows that adopting the County's proposal to gut the exclusionary rule in all civil cases would open the door to "manifest neglect, if not [] open defiance" of our right to be free from unreasonable searches and seizures. *Weeks v. United States*, 232 U.S. 383, 394 (1914).

Start with history. Since before the Founding, the right to be secure against unreasonable searches and seizures has occupied a cardinal place

in our system of ordered liberty. "[T]he patriot James Otis's 1761 speech condemning writs of assistance was 'the first act of opposition to the arbitrary claims of Great Britain' and helped spark the Revolution itself." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018); *see also* 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 176–77 (1974) (noting that Otis's arguments had a "profound" impact on "colonial thinkers" which bore "fruit in the constitutions that they drafted").

But if no remedial mechanism deters officials from disregarding the right to be free from unreasonable searches, the right becomes "valueless." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). This principle influenced the Founders' views of how the Fourth Amendment would be enforced. Roger Roots, *The Originalist Case for the Exclusionary Rule*, 45 Gonz. L. Rev. 1, 38 (2010). And it is reflected in the decisions of early American courts, which refused to consider evidence gathered (or refused to try defendants arrested) in violation of search-and-seizure protections. *See, e.g.*, *Frisbie v. Butler*, 1 Kirby 213, 213–15 (Conn. Super. Ct. 1787); *Grumon v. Raymond*, 1

Conn. 40, 40–41 (1814*); Miller v. Grice*, 31 S.C.L. (2 Rich.) 27, 27–28 (S.C. 1845). Indeed, Virginia's courts were no exception. *See Jones v. Commonwealth*, 40 Va. 748, 750 (1842) (ordering end to criminal perjury prosecution because the defendant's arrest was unlawful).

And exclusionary remedies were not the only mechanism propping up search-and-seizure rights in early America. The threat of civil damages, payable by officials who violated those rights, also stood as a bulwark. "[T]hrough the 19th century and into the 20th," individuals could "test the legality of government conduct by filing suit against government officials for money damages payable by the officer." *Tanzin v. Tanvir*, 592 U.S. 43, 49 (2020) (cleaned up); *see* Joseph Story, *Commentaries on the Constitution* § 1671 (1833) ("[If] any agent of the government shall unjustly invade the property of a citizen under colour of a public authority, he must, like every other violator of the laws, respond in damages."). Strict liability was the rule. Even officials who claimed to rely on instructions from the President were not "excuse[d]" from personal liability for illegal seizures. *Little v. Bareme*, 6

U.S. (2 Cranch) 170, 178–79 (1804). Nor could claims of "a mistaken sense of duty" (rather than "ill design") preclude a damages award for an unlawful arrest. *See Perrin v. Calhoun*, 4 S.C.L. (2 Brev.) 248, 250 (S.C. 1808).

Today, by contrast, a series of roadblocks often makes the threat of holding officers accountable through damages suits a hollow one. For instance, all government officials enjoy qualified immunity from civil damages suits under 42 U.S.C. § 1983. That immunity—designed to insulate officials from even having to "stand trial or face the other burdens of litigation"—forecloses liability unless a plaintiff can show the rights violation was a "clearly established" one. *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009). The U.S. Supreme Court has interpreted that immunity to make it "increasingly difficult for plaintiffs to show that defendants have violated clearly established law." Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1814 (2018). As a result, in practice, it can often be impossible for the threat of damages suits to deter even obvious Fourth Amendment violations, simply because no official has yet

faced reprimand for that specific conduct in a published appellate decision. *See, e.g.*, *Jessop v. City of Fresno*, 936 F.3d 937, 939 (9th Cir. 2019) (granting qualified immunity to officers who allegedly stole $225,000 in cash and rare coins because "[a]t the time of the incident, there was no clearly established law holding that officers violate the Fourth or Fourteenth Amendment when they steal property seized pursuant to a warrant").

In short, the threat of civil damages provides little security against unconstitutional searches today. The exclusionary rule is often the only reliable incentive modern officials have to take care in respecting citizens' Fourth Amendment rights. This Court should decline the County's invitation to eviscerate that critical incentive.

II. AT A MINIMUM, THE VIRGINIA CONSTITUTION REQUIRES THAT THE EXCLUSIONARY RULE APPLY TO THIS ZONING ENFORCEMENT ACTION.

Although this Court can and should decide that the Fourth Amendment's exclusionary rule applies here, the Court could, in the alternative, hold that a state exclusionary rule applies to protect rights declared in Article I, § 10 of the Virginia Constitution, irrespective of the

rule's application as a matter of federal law. "[E]ven when principles of federal and state constitutional law share common ground, there is no good reason not to look first to Virginia's Constitution for the safeguards of the fundamental rights of Virginians." *Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 716 (Va. 2023) (cleaned up). As this Court recently observed, Virginia's constitution may "offer more protection" than the federal one, and "state courts are absolutely free to interpret state constitutional provisions to accord greater protection than federal-court interpretations of similar provisions of the United States Constitution." *Id.* at 716 (cleaned up). Similarly, state courts can fashion remedies for state constitutional violations that are more expansive than remedies available under the federal constitution.

Here, the relevant provision of the Virginia Constitution, Article I, § 10, provides at least as much protection as the Fourth Amendment. While this Court has in the past interpreted § 10 to be coextensive with the Fourth Amendment, *see, e.g.*, *Lowe v. Commonwealth*, 337 S.E.2d 273, 274 & n.1 (Va.

1985); *Henry v. Commonwealth*, 529 S.E.2d 796, 798 (Va. App. 2000) (collecting cases), there are good reasons for this Court to consider search-and-seizure protections with a fresh eye. As the Iowa Supreme Court recently acknowledged, "Fourth Amendment jurisprudence is in flux," and "[t]here are competing, inconsistent doctrines governing seizure and search law." *State v. Wright*, 961 N.W.2d 396, 411 (Iowa 2021). Like Iowa, this Court should decide that "[g]iven the uncertainty and lack of clarity in federal search and seizure jurisprudence, … it is no longer tenable to follow federal precedents in lockstep." *Id.* at 411–12. Moreover, this is not a case in which the U.S. Supreme Court has foreclosed relief under the Fourth Amendment, as it has never addressed the availability of suppression as a means for deterring Fourth Amendment violations by zoning inspectors. Thus, this Court is not in a position where it must depart from settled U.S. Supreme Court jurisprudence; it can and should freely interpret the Virginia Constitution in a manner robustly protecting Virginians' rights. *See State v. Leonard*, 943 N.W.2d 149, 155–56 & n.9 (Minn. 2020) (noting that

"[i]n the absence of controlling Fourth Amendment precedent," the court is tasked not with determining whether the state constitution is broader than the Fourth Amendment, but with independently analyzing the state constitution). This Court should honor Virginia's commitment to protecting its citizens' constitutional rights of liberty and privacy and hold that the exclusionary rule applies in these civil proceedings under Article I, § 10 of the state constitution.

A. The drafters of the Virginia Constitution sought to protect citizens' liberty and privacy in their homes and papers.

"Since at least the mid-eighteenth century, protections against arbitrary searches and seizures have been 'permanent monuments' of Anglo-American law." 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 174 (1974). The drafters of the Virginia Constitution sought to protect Virginians from such oppressive measures used by the British in both England and the colonies. *Id.* at 175–76. At the time, the Crown was regularly issuing general warrants to enforce the Navigation Acts and tax colonial trade. *Id.* at 176. The colonists "detested"

this practice, *id.*, and, in Virginia, responded with Article I, § 10 of the Virginia Constitution, which provides "[t]hat general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

While § 10's language focused on prohibiting "general warrants" due to the political climate at the time, this Court has long recognized that the concerns underpinning § 10 apply equally to warrantless searches. Historical concerns about general warrants were that "officers might search private homes and seize private papers and persons indiscriminately, unrestrained by previous judicial sanction." *McClannan v. Chaplain*, 116 S.E. 495, 499 (Va. 1923). These concerns are "precisely the same with respect to searches and seizures by officers without a search warrant." *Id.* In both situations, Virginia has consistently sought to protect "the personal and

political liberty of the citizen, especially the privacy of his home and papers." *Id.*

B. The exclusionary rule is a necessary state-law remedy to compel respect for Article I, Section 10.

For many of the same reasons described with respect to the Fourth Amendment, *see* Part I, above, an exclusionary rule is necessary to deter violations of Virginia's prohibition on unlawful searches and seizures. The facts alleged here—that a zoning officer entered and searched a private home without a warrant—provide a key case in point.

Application of the rule here as a matter of state law would be consistent with this Court's recognition that deterrence is the main rationale supporting the application of an exclusionary rule. *County of Henrico v. Ehlers*, 379 S.E.2d 457, 461 (Va. 1989). And this need for deterrence is just as necessary in the zoning context as it is in the criminal context. Without application of the exclusionary rule, officials like Mr. Enos could enter and search private property without any probable cause. This sort of violation is equally invasive whether the results are used for

criminal or civil proceedings, and it violates the same fundamental rights of liberty and privacy that Article I, § 10 sought to protect.

This Court's decision in *Hall v. Commonwealth*, 121 S.E. 154 (Va. 1924), is no impediment to application of the exclusionary rule as a matter of state law here. *Hall* reasoned that police officers "acting without a warrant, or under a void warrant," act alone and are solely "responsible for [their] illegal acts." *Id.* at 155. Because the Virginia Search and Seizure Act provided for punishment of these officers, as well as civil liability to those aggrieved, the Court reasoned that suppression of evidence was not "necessary for the protection of the citizens against illegal searches and seizures" under Virginia state law. *Id.* at 156.

Even if this view were true in 1924, it is plainly not true today. First, unconstitutional searches and seizures continue, as the facts alleged here demonstrate. And in this Commonwealth, some courts have held that plaintiffs do not even have a cause of action to enforce Article I, § 10 through damages suits. *See Highlander v. Va. Dep't of Wildlife Res.*, No. CL23-

4100, at 2 (Va. Cir. Ct. Oct. 27, 2023) (collecting cases), *appeal filed* (Va. Ct. App. Dec. 6, 2023).

Moreover, while Virginia Code § 19.2-59 still prohibits warrantless searches and provides that those who violate it "shall be guilty of malfeasance in office," this statute has been consistently interpreted by Virginia courts as "provid[ing] only the same protection as that afforded by the Fourth Amendment." *Cromartie v. Billings*, 837 S.E.2d 247, 254 (Va. 2020). Claims under the statute are also subject to sovereign immunity, *see id.*, which makes it exceedingly difficult for plaintiffs to get any redress for constitutional harms. *See, e.g.*, Marc L. Miller & Ronald F. Wright, Criminal Procedures: The Police 425 (3d ed. 2007) (discussing theoretical existence of private remedies for those harmed by an unconstitutional search or seizure, but stating that these are not a "common method of dealing with improper searches or seizures" due to the significant obstacles plaintiffs face, such as sovereign immunity). The *Hall* court's view that citizens can adequately

"protect the sanctity" of their homes "by applying remedies which the law provides," *Hall*, 121 S.E. at 156, is simply no longer true.

C. Virginia would be in good company if it adopted the exclusionary rule to protect state constitutional rights in this context.

Adoption of the exclusionary rule as a remedy for state constitutional search-and-seizure violations would be consistent with case law in many other jurisdictions. As of 1994, at least 28 states "recognized the existence of an exclusionary rule which derived from the search and seizure provisions of their respective state constitutions." John E. Theuman, Annotation, *State Constitutional Requirements as to Exclusion of Evidence Unlawfully Seized—Post-*Leon *Cases,* 19 A.L.R.5th 470, §3[a] (1994) (collecting cases). For instance, Supreme Court of Delaware held that it was "the duty of the courts to protect constitutional guarantees," and that "[t]he most effective way to protect the guarantees against unreasonable search and seizure" in the Delaware Constitution was "to exclude from evidence any matter obtained by a violation of them." *Rickards v. State*, 77 A.2d 199, 205 (Del.

1950). The court explicitly rejected the "suggested remedy of a civil action," noting that it was "as a practical matter no remedy at all." *Id.*

The Supreme Court of Ohio has held that the state constitution both provides greater protection than the Fourth Amendment and mandates exclusion of evidence obtained in violation of those protections. *State v. Brown*, 792 N.E.2d 175, 178–79 (Ohio 2003). Many other state courts apply an exclusionary rule to protect state constitutional rights. *See, e.g.*, *State v. Reynolds*, 504 S.W.3d 283, 312 (Tenn. 2016) (discussing the "exclusionary rule that applies to violations of article I, section 7 of the Tennessee Constitution"); *Commonwealth v. Britton*, 229 A.3d 590, 609 (Pa. 2020) (Wecht, J., concurring) (noting the Supreme Court of Pennsylvania's "recognition that the exclusionary rule is essential to protect the individual rights enumerated in our own Pennsylvania Constitution" (citation omitted)).

Several state supreme courts also apply their exclusionary rule outside of criminal trials, including in civil cases. For example, the

Supreme Court of Georgia, relying on both the Fourth Amendment and the Georgia Constitution, applied the exclusionary rule in public nuisance actions because the "mandate" from United States Supreme Court precedent "was not for criminal cases only." *Carson v. State ex rel. Price*, 144 S.E.2d 384, 386 (Ga. 1965). Similarly, the Supreme Court of Utah has "extend[ed] the state exclusionary rule" and reasoned that "illegally obtained evidence should be excluded from a civil proceeding … if the exclusion is necessary to deter future unconstitutional searches." *Sims v. Collection Div. of Utah State Tax Comm'n*, 841 P.2d 6, 13 (Utah 1992). And in *State v. Lussier*, the Supreme Court of Vermont held that the exclusionary rule applied to civil license-suspension proceedings under the state constitution. 757 A.2d 1017, 1026 (Vt. 2000). The court recognized that application of the rule was necessary "to protect the core value of privacy embraced in" the state constitution. *Id.* The public interest in successfully prosecuting these cases, the court held, "may not be satisfied at the expense of" citizens' state constitutional rights. *Id.*; *see also Turner v. City of Lawton*,

733 P.2d 375, 379–82 (Okla. 1986) (applying the Oklahoma Constitution's exclusionary rule to a civil-service administrative proceeding).[7]

This Court should follow suit and apply the exclusionary rule here to assure Virginians that they retain the right to be free from unreasonable, warrantless searches and seizures by government actors *in practice*, not merely on paper. Introducing unlawfully obtained evidence "eviscerates our most sacred rights, impinges on individual privacy, perverts our judicial process, distorts any notion of fairness, and encourages official misconduct." *Lussier*, 757 A.2d at 1025. Virginia's courts should not "condone … illegality by stating it does not matter how the evidence was secured." *State v. Cline*, 617 N.W.2d 277, 289 (Iowa 2000).

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[7] Many states apply their exclusionary rule more broadly than the federal rule. For example, at least 17 state supreme courts have rejected the federal good-faith exception to the exclusionary rule under *United States v. Leon*, 468 U.S. 897 (1984). *See* LaKeith Faulkner & Christopher R. Green, *State-Constitutional Departures from the Supreme Court: The Fourth Amendment*, 89 Miss. L.J. 197, 200 & n.27 (2020). As one of those courts put it, "suppression of the evidence does not 'cure' the constitutional invasion … but it is clearly the best remedy available." *State v. Cline*, 617 N.W.2d 277, 289 (Iowa 2000).

CONCLUSION

The Court should decline the County's invitation to hold the exclusionary rule inapplicable to all civil proceedings. It should instead hold the exclusionary rule applies here, whether under the Fourth Amendment, the Virginia Constitution, or both.

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Respectfully submitted,

/s/ Robert Frommer
Michael Greenberg*
Robert Frommer (VSB No. 70086)
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
Tel.: (703) 682-9320
Fax: (703) 682-9321
mgreenberg@ij.org
rfrommer@ij.org

Counsel for Amicus Curiae Institute for Justice

Bridget Lavender*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 17th Floor
New York, NY 10004

(212) 549-2500
blavender@aclu.org

Counsel for Amicus Curiae American Civil Liberties Union

Vishal Agraharkar (VSB #93265)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA
701 E. Franklin Street, Ste. 1412
Richmond, VA 23219
(804) 523-2151
vagraharkar@acluva.org

Counsel for Amicus Curiae American Civil Liberties Union of Virginia

*Motion for admission pro hac vice forthcoming

CERTIFICATE OF COMPLIANCE

In compliance with Rule 5:26(g), counsel for Amici Curiae certify that this brief complies with the Supreme Court's rules and contains less than 8,750 words.

/s/ Robert Frommer

CERTIFICATE OF SERVICE

On January 23, 2024, a copy of this Brief of Amici Curiae was emailed to all counsel for the Appellant at the addresses below:

Elizabeth D. Teare (VSB No. 31809)
T. David Stoner (VSB No. 24366)
Laura S. Gori (VSB No. 65907)
Sara G. Silverman (VSB No. 77317)
Office of the Fairfax County Attorney
12000 Government Center Parkway, Suite 549
Fairfax, VA 22035
(703) 324-2421
elizabeth.teare@fairfaxcounty.gov
david.stoner2@fairfaxcounty.gov
laura.gori@fairfaxcounty.gov
sara.silverman@fairfaxcounty.gov

On January 23, 2024, a copy of this Brief of Amici Curiae was emailed to all counsel for the Appellee at the addresses below:

Gifford R. Hampshire (VSB No. 28954)
James R. Meizanis, Jr. (VSB No. 80692)
BLANKINGSHIP & KEITH, P.C.
4020 University Drive, Suite 300
Fairfax, Virginia 22030
ghampshire@bklawva.com
jmeizanis@bklawva.com

/s/ Robert Frommer