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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2016-000455

DomainsNewMedia.com, LLC, ... Respondent,

v.

Hilton Head Island-Bluffton
Chamber of Commerce, ... Appellant.

BRIEF OF *AMICUS CURIAE* OF THE MYRTLE BEACH AREA CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Myrtle Beach Area Chamber of Commerce ("Myrtle Beach Chamber") is a membership organization supported by more than 2,700 businesses and nonprofit organizations. Its members include retailers, restaurants, hotels, professionals, service businesses, property owners, civic organizations, and concerned members of the community. The common thread of the Myrtle Beach Chambers' members is that they care about business. Through the Myrtle Beach Chamber, these organizations, and the individuals representing them, join together for the purpose of promoting the civic and economic progress of our community. There are three primary functions performed by the Myrtle Beach Chamber:

- ***Promote Business***. The Myrtle Beach Chamber serves as the primary destination marketing organization and promotes the tourism industry out-of-market. The Chamber also provides numerous opportunities for local businesses to promote themselves to visitors, residents and other businesses.

- ***Protect Business.*** The Myrtle Beach Chamber seeks to influence legislation and regulation by local, state and federal governments in a proactive manner, supporting legislation that benefits businesses and the communities they reside in and, where necessary, opposing legislation that unnecessarily inhibits businesses.

- ***Improve Business.*** The Myrtle Beach Chamber offers a multitude of programs and services that assist businesses and/or individuals.

The Myrtle Beach Chamber of Commerce encompasses convention and visitor bureau functions. Like the Appellant in this case, the Myrtle Beach Chamber provides services to local governments as a designated marketing organization (DMO) under S.C. Code Ann. § 6-4-10(3) (2003 & Supp. 2015). For this reason, the Myrtle Beach Chamber is directly concerned with the issues raised in this litigation.

Although it supports reversal of the lower court's ruling in this case, the Myrtle Beach Chamber is no foe of public access to information regarding the use of accommodations tax revenues. In fact, the Myrtle Beach Chamber voluntarily provides free public access to all aspects of its work as a DMO. Among other things, the Myrtle Beach Chamber:

- Publishes a quarterly list of expenditure details, including dollar amounts, payees, and descriptions;
- Provides public notice of committee meetings, and publishes minutes of such meetings;
- Publishes research and statistical analysis used to make recommendations regarding the use of funds and to evaluate marketing efforts; and
- Provides an online "dashboard" with year-to-year comparisons of user sessions, lodging referrals, and advertiser referrals from the CVB's website, *visitmyrtlebeach.com*.

Moreover, all of this information is easily accessible at a single online location, www.myrtlebeachareamarketing.com.[1]

The Myrtle Beach Chamber recognizes that the public is vitally concerned (and rightfully so) with openness and transparency in the administration of the State's tax dollars, and it concurs wholeheartedly in the General Assembly's finding "that it is vital in a democratic society that public business be performed in an open an public manner." S.C. Code Ann. § 30-4-15 (2007). Openness and transparency can be achieved, however, without subjecting private entities like a chamber of commerce to the FOIA. *Accord Glassmeyer v. City of Columbia*, 414 S.C. 213, 223, 777 S.E.2d 835, 841 (Ct. App. 2015) (recognizing that in construing the FOIA, the "public's need to know" must be balanced

[1] All of this is in addition to the public oversight built into the statutory scheme established by the General Assembly, as discussed in Part I(C)(2) of this brief.

against other legitimate interests). The Myrtle Beach Chamber believes that the analysis set forth in this brief of *amicus curiae*, which is informed by its direct knowledge and experience as a DMO, will aid the Court as it considers and resolves the issues presented by this appeal.

STATEMENT OF ISSUES ON APPEAL

Amicus Curiae adopts the Statement of Issues on Appeal by Appellant Hilton Head Island-Bluffton Chamber of Commerce.

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case of Appellant Hilton Head Island-Bluffton Chamber of Commerce.

STATEMENT OF FACTS

Amicus Curiae adopts the Statement of Facts of Appellant Hilton Head Island-Bluffton Chamber of Commerce.

ARGUMENT

This case presents the question of whether a private entity—here, the Hilton Head Island-Bluffton Chamber of Commerce ("Chamber")—becomes a "public body" subject to the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. §§ 30-4-10 to 30-4-165 (2007 & Supp. 2013), by providing services to a local government entity as a designated marketing organization ("DMO") pursuant to S.C. Code Ann. § 6-4-10(3), governing the use of accommodations tax ("A-Tax") revenues.

Relying on a five-factor test derived from this Court's decision in *Weston v. Carolina Research and Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991), the circuit court concluded that the Chamber is a public body subject to the extensive transparency requirements of the FOIA. For the reasons discussed in Part I, *infra*, the circuit court misconstrued *Weston* and failed to understand the nature of the concerns that animated the decision in that case. Properly understood, *Weston* mandates the conclusion that the Chamber is *not* a public body, precisely the opposite of the result reached by the circuit court.

In addition to wrongly interpreting the FOIA and *Weston*, the circuit court failed to recognize that its ruling would vastly expand the reach of the FOIA and other statutes.[2] As discussed in Part II, the circuit court's ruling (if affirmed by this Court) would subject private entities that do business with state and local governments to a myriad of requirements and regulations designed to ensure that government business is

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[2] As discussed in Part II, *infra*, the circuit court's ruling that the Chamber is a public body has implications that go well beyond the FOIA. The FOIA's definition of "public body" also appears in the Public Records Act, S.C. Code Ann. §§ 30-1-10, *et seq.* (2007); the South Carolina Whistleblower Act, S.C. Code Ann. §§ 8-27-10, *et seq.* (Supp. 2015); and the statutory provisions applicable to the State Auditor, *see* S.C. Code Ann. §§ 11-7-10, *et seq.* (2010 & Supp. 2015).

not conducted in secret. The application of these laws to private entities would impose enormous costs on those entities without creating any benefit to the public in terms of furthering the goals of the FOIA. The extreme imbalance between costs and benefits supports the conclusion that the FOIA does not apply in cases like this one.

I. THE CHAMBER IS NOT A "PUBLIC BODY" UNDER THE FOIA.

A. Applicable Standard

The outcome of this appeal turns on the correct interpretation of the FOIA's definition of "public body":

> "Public body" means ... any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, ***or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds,*** including committees, subcommittees, advisory committees, and the like of any such body by whatever name known ...

S.C. Code Ann. § 30-4-20(a) (emphasis added). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature," the best evidence of which is the statutory text. *Palmetto Co. v. McMahon*, 395 S.C. 1, 5, 716 S.E.2d 329, 331 (Ct. App. 2011) (internal quotation marks omitted). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). "The real purpose and intent of the lawmakers will prevail over the literal import of particular words." *Sloan v. S. Carolina Bd. of Physical Therapy Examiners*, 370 S.C. 452, 468–69, 636 S.E.2d 598, 606-07 (2006).

The core purpose of the FOIA is to ensure that governmental functions are not performed in secret. *See, e.g., Brock v. Town of Mt. Pleasant*, 415 S.C. 625, 628, 785 S.E.2d

198, 200 (2016); *see also* S.C. Code Ann. § 30-4-15 ("The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy."). Without question, the importance of the interests served by the FOIA justifies the established rule that the FOIA's reach should be construed broadly and its exceptions narrowly.

Even so, the FOIA does not provide access solely for access's sake; it is intended to meet citizens' need for information regarding governmental actions, not to satisfy the public's curiosity. Proof of this is found in the fact that the FOIA's mandate of openness is accompanied by a variety of exemptions and exceptions shielding certain types of information and proceedings. *See, e.g.*, S.C. Code Ann. § 30-4-40; *id.* § 30-4-70. For example, while the discussions that occur during an executive session may be of vital interest to concerned citizens, such information is exempt from the FOIA's mandatory disclosure rules. *See generally Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 281, 580 S.E.2d 163, 166 (Ct. App. 2003) ("The FOIA meets the demand for open government while preserving workable confidentiality in governmental decisionmaking." (internal quotation marks omitted)).

The General Assembly thus recognized, even as it enacted the FOIA, that the interest in open government must be balanced against various competing considerations, such as the need to protect sensitive information or to preserve individual privacy. Consistent with this balancing of interests, the Court's duty to adopt a liberal construction of the FOIA applies only so far as necessary to "further the FOIA's purpose

of protecting the public from secret government activity." *Glassmeyer*, 414 S.C. at 223, 777 S.E.2d at 841.

B. *Weston v. Carolina Research & Development Foundation*

Weston, decided in 1991, presented the question whether the Carolina Research and Development Foundation—a nonprofit entity "operate[d] exclusively for the benefit of the University of South Carolina," 303 S.C. at 400, 401 S.E.2d at 162—was a "public body" subject to the FOIA on the basis that it was supported in whole or in part by public funds or expended public funds. The Court answered this question by examining four transactions:

- The Foundation's receipt of a portion of the profits from the sale of University-owned property, apparently without providing any consideration in return;
- The Foundation's receipt of federal grant money for the construction of the Swearingen Engineering Center. The funds were "originally earmarked for the University, but [were] directed to the Foundation after the University's General Counsel represented to the granting federal agency that the University was 'acting through' the Foundation.
- The Foundation's acceptance of real property and a cash grant for the construction of the Koger Center for Performing Arts. The Koger Center is located on the University campus, provides a performance venue for the University's dance department and school of music, and describes itself as "the cultural heart of the University."[3]
- The University's routing research and development contracts "through the Foundation, which retained 15% to 25% of the total contract amount." The Foundation claimed it earned this money by administering the contracts but could not provide any proof that it had actually performed any services.

Id. at 401-03, 401 S.E.2d at 163-64. On these facts, the Court concluded that the Foundation was a public body under the FOIA because it was supported by public funds. *See id.* at 403, 401 S.E.2d at 164. Although the Court noted that "[t]he common law

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[3] *See* http://www.kogercenterforthearts.com/about.shtml, *last visited Aug. 20, 2016.*

concept of 'public' versus 'private' corporations is inconsistent with the FOIA's definition of 'public body,'" *id.*, it emphasized that its decision "does not mean that the FOIA would apply to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arms length [sic] basis." *Id.* at 404, 401 S.E.2d at 165.

> In that situation ... access to the public body's records would show how the money was spent. However, when a block of public funds is diverted *en masse* to from a public body to a related organization, or when the related organization undertakes the management or expenditure of public funds, the only way the public can determine with specificity how the funds were spent is through access to the records and affairs of the organization receiving and spending the funds.

Id. The situation before the Court in *Weston* clearly fell into the latter category: millions of dollars in public funds were transferred to an entity created for the sole purpose of serving the University but which, if the Foundation had had its way, would be subject to none of the public-disclosure obligations imposed on the University.

C. The circuit court erred in its application of *Weston*.

The circuit court correctly recognized the importance of the *Weston* Court's analysis to the determination of whether the Chamber should be classified as a "public body" under the FOIA. Reviewing the analysis and holding of *Weston*, the circuit court concluded,

> To apply *Weston* to the facts of the present case ... requires the Court to consider five separate factors:
>
> 1. Has there been a diversion of public funds?
> 2. To a related organization?
> 3. By means of an *en masse* transfer?
> 4. With no public access to information regarding how the funds were spent?

5. Does the private entity supply goods or services on an arm's length basis?"

Order at 7. Ultimately, the circuit court found that each of the five factors was satisfied. The court's analysis, however, does not withstand scrutiny.

1. There has been no "diversion" or "*en masse* transfer" of public funds.

Although the circuit court identified "diversion of public funds" and "*en masse* transfer" of public funds as separate factors, they are really two different ways of identifying the same problem, namely, the handing over of large sums of money to a private entity, with no control or oversight of how the funds are used.

The *Weston* Court's use of the terms "diversion" and "*en masse* transfer" to describe the conveyance of funds from the University to the Foundation clearly conveyed the Court's skepticism regarding the legitimacy of these exchanges. In each of the four transactions considered by the Court, money that should have gone to the University's coffers—*e.g.*, the proceeds of the sale of University-owned property, grant money awarded to the University, payments under contracts between the University (not the Foundation) and third parties—went instead to the Foundation. The *Weston* Court plainly viewed such legerdemain as an attempt to avoid public scrutiny. For example, the Court noted that the University told the federal government that it was "acting through" the Foundation to build the Swearingen Engineering Center and that "the Foundation used University personnel on University payroll in conjunction with the construction project." *Weston*, 303 S.C. at 402, 401 S.E.2d at 163. The Court also noted that the Foundation received 15 to 25 percent of funds payable to the University for research and development contracts, even though the Foundation "did not present any evidence that its personnel actually performed any services to earn this fee." *Id.* at 402-

03, 401 S.E.2d at 164. The University apparently exercised no continuing control over the Foundation's use of the funds and did not require the Foundation to provide any information, much less a detailed accounting, regarding how the funds were used. In short, once transferred to the Foundation, the funds essentially disappeared from public view. *Id.* at 404, 401 S.E.2d 165.

The transfer of funds in this case bears no resemblance to the fiscal sleight-of-hand in *Weston*. In this case, both the transfer of funds and the permissible uses of those funds are dictated by statute. Applicable law provides, *inter alia*, that a specific percentage of A-Tax revenues "must be allocated to a special fund and used only for advertising and promotion of tourism." S.C. Code Ann. § 6-4-10(3). Further,

> To manage and direct the expenditure of these tourism promotion funds, the municipality or county ***shall select*** one or more organizations, such as ***a chamber of commerce,*** visitor and convention bureau, or regional tourism commission, which has an existing, ongoing tourist promotion program.

Id. (emphasis added). The organization selected (the "designated marketing organization" or "DMO") must report to the municipality or county regarding its planned and actual uses of the A-Tax funds:

> Before the beginning of each fiscal year, [a DMO] shall submit for approval a budget of planned expenditures. At the end of each fiscal year, [a DMO] shall render an accounting of the expenditure to the municipality or county which distributed them.

Id. In short, and in stark contrast to *Weston*, DMOs have little or no discretion in the use of A-Tax revenues, which at all times remain under the close supervision and control of local government bodies.

2. The public has ample access to information regarding how funds are spent.

Moreover—and again, unlike in *Weston*—information regarding the use of A-Tax funds is readily available to the public; in fact, accessibility is built into the statutory scheme. Each year, a DMO must submit a detailed itemization of proposed uses of A-Tax funds, which must be approved by the local government. *See* S.C. Code Ann. § 6-4-10(3). Thereafter, the funds must be spent exactly as detailed in the approved plan,[4] and at the end of the year the Chamber must provide an accounting to the local government to establish its compliance with the approved plan. *See id.* The plan and the accounting, as well as associated governmental records, are indisputably subject to disclosure pursuant to the local government's FOIA obligations. Additionally, the local government must publicly account for its expenditure of tax funds through reports to the Tourism Expenditure Review Committee (TERC), which is empowered to conduct investigations and impose penalties for noncompliance. *See* S.C. Code Ann. § 6-4-35 (2010 & Supp. 2015).[5]

The statutory scheme thus ensures that little or nothing about the use of A-Tax revenues is concealed from public view. Nevertheless, the circuit court dismissed the entirety of this complex regulatory system based on its subjective view that the year-end accounting "fails to describe 'with specificity how those funds were spent' pursuant to

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[4] The record in this case indicates that the Chamber could revise the spending plan for amounts up to $10,000 without prior approval. Thompson Dep. 20:5-21:4. While this amount may seem high in the abstract, in actuality it is only ***.2 percent*** of the total budget amount of $4.9 million. Thomas Dep. 21:7.

[5] The fact that the local government, not the DMO, is accountable for how tourism funds are spent further distinguishes this case from *Weston*, where the *en masse* transfer of funds allowed the University to *avoid* accounting for how the money was spent.

the *Weston* Court's holding." Order at 11. However, the court did not explain why a detailed budget and year-end accounting by the DMO, plus the local government's annual report to the TERC, were inadequate to satisfy the FOIA's goals—a question made especially pertinent by the fact that the General Assembly evidently thought these requirements established sufficient controls over the expenditure of A-Tax revenues.

If, indeed, the statutorily required information is insufficient to satisfy the FOIA, the remedy for this problem is not to deem private entities "public bodies" subject to the FOIA. Rather, the appropriate remedy lies in the political process: Citizens can, for example, demand that local governments obtain more detailed information from DMOs. Alternatively, citizens can seek a general strengthening of statutes governing the expenditure of A-Tax revenues

3. The Hilton Head Chamber is not a "related organization" to the local governments it serves.

A critical factor in the *Weston* Court's analysis was the nature of the relationship between the University and the Foundation. The Foundation "operate[d] exclusively for the benefit of the University," lacking any independent function or existence. *Weston*, 303 S.C. at 400, 401 S.E.2d at 162. Elsewhere in the opinion, the Court described the Foundation as a "related organization" to the University. *Id.*at 404, 401 S.E.2d at 165.

The relationship between the Chamber and the local governments it serves as DMO bears no resemblance to the relationship between the University and the Foundation in *Weston*. First, the Chamber does not exist exclusively, or even primarily, for the benefit of the local governments. Rather, the Chamber's mission is to advance the common interests of its 2,700 members through various activities, including "networking opportunities, referrals, governmental advocacy, and educational

programs."[6] The circuit court recognized as much in its order, noting that the Hilton Head Chamber "provides services to its membership that are completely separate and apart from the services it provides in its capacity as DMO." Order at 9. The circuit court nevertheless concluded that the Chamber is a "related organization" of the type that concerned the *Weston* Court because it "works for the benefit of" the local governments by serving as a DMO. *Id.*

In reaching this conclusion, the circuit court employed too broad an understanding of the term "related." On the circuit court's reasoning, any private entity that provides services to a public body is "related" to that body. Correctly understood, however, relatedness is a much narrower concept, denoting common ownership or control. *See, e.g., Preservation Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 312, 751 S.E.2d 256, 257 (2013) ("a related entity owned by the same group of investors"). One entity does not become "related" to another merely by entering into a contract for the provision of services.

4. The Chamber provides services as a DMO on an arm's-length basis.

The circuit court correctly defined an "arm's-length" relationship as one involving parties (1) who are not related; (2) who have roughly equal bargaining power; and (3) who are not in a confidential relationship, Order at 12, but then incorrectly applied that definition to the facts before it. The circuit court recognized the absence of a confidential relationship between the Chamber and the local governments, *see id.*, and for the reasons discussed above, they are not "related" entities. Further, the circuit court

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[6] http://www.hiltonheadchamber.org/about-the-chamber/, *last visited August 24, 2016.*

did not find an imbalance of bargaining power. By all indications, therefore, the Chamber and the local governments dealt with each other at arm's length.

In concluding that the relationship was not an arm's-length exchange, the circuit court pointed to the absence of a written contract governing the Chamber's status as DMO. *See id.* First, a written agreement is not a *sine qua non* of an arm's length relationship. Second, and more importantly, the Chamber's duties as DMO are entirely defined by § 6-4-10(3) and by the budget approved by the local governments. To the extent a written agreement is necessary in light of the governing statute, the approved budget fulfills that function.

II. APPLYING THE FOIA TO PRIVATE ENTITIES THAT PROVIDE SERVICES TO LOCAL GOVERNMENTS IS BOTH UNNECESSARY AND UNWISE.

In considering whether to subject private entities to the FOIA, the Court should bear in mind that the impact of being designated as a "public body" goes far beyond a duty to disclose records related to a particular transaction. Although a single transaction may be enough to subject an otherwise private entity to the FOIA, *see Weston*, 303 S.C. at 403, 401 S.E.2d at 164, once an entity is deemed to be a "public body," that status applies to the entity in its entirety, and for all purposes. Thus, the entity would be required to disclose its employees, operations, and plans to any member of the public (including a competitor), shielded only by the fig leaf of the trade secrets exemption, S.C. Code Ann. § 30-4-40(a)(1). The entity would also have to open its meetings to the public, S.C. Code Ann. § 30-4-60 (2007); publicly post the agenda for each meeting at least 24 hours ahead of time, *id.* § 30-4-80 (Supp. 2015); make available the written minutes of every meeting, *id.* § 30-4-90(a) (2007); and permit anyone in attendance to record a meeting, *id.* § 30-4-90(c) (2007).

Although essential to the operation of a democratic government, such extensive public scrutiny is, at best, a hindrance to the operation of a private company; at worst, it may devastate the company's ability to compete.[7] At a minimum, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *United States v. Nixon*, 418 U.S. 683, 705 (1974).

Additionally, an entity that is a "public body" for purposes of the FOIA would be a "public body" under other statutes that define "public body" in the same way as the FOIA. Such statutes include the Public Records Act, S.C. Code Ann. §§ 30-1-10, *et seq.* (2007); the South Carolina Whistleblower Act, S.C. Code Ann. §§ 8-27-10, *et seq.* (Supp. 2015); and the statutory provisions applicable to the State Auditor, *see* S.C. Code Ann. §§ 11-7-10, *et seq.* (2010 & Supp. 2015).

Each of these provisions imposes burdens that may be necessary to ensure good government but which should not be applied to private entities without substantial reason for doing so. For example, State law mandates that every public body must be audited by the State Auditor every year. *See* S.C. Code Ann. § 11-7-20(A) (2010). Also, the Whistleblower Act restricts public bodies' ability to terminate employees, in contravention of the at-will employment doctrine. *See* S.C. Code Ann. § 8-27-20(A). Further, any entity deemed to be a "public body" is subject to the requirements of the Public Records Act, which imposes a host of statutory and regulatory requirements on the

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[7] A private company that is deemed to be a "public entity" subject to the FOIA must, for example, throw open its records and its meetings to its competitors, with only limited exceptions. Aside from this, the cost of compliance may be more than the company can bear.

management and retention of virtually every document or electronic transmission created or received by the entity.

The Myrtle Beach Chamber respectfully suggests that in light of these potential real-world ramifications, the Court should be reluctant to affirm the circuit court's decision. Any increase in transparency resulting from affirmance would likely be nominal, given that the A-Tax statute already imposes substantial disclosure and oversight requirements. At the same time, however, affirmance would effectively create a public-access regime of unprecedented breadth, under which private entities would surely hesitate to enter into any but the most mundane contractual relationship with a governmental body, for fear of being subjected to such an onerous and intrusive scheme.

CONCLUSION

The circuit court's decision is an incorrect and unwarranted expansion of the FOIA. *Amicus Curiae* urges the Court to reverse.

Respectfully submitted,

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September 16, 2016
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THE STATE OF SOUTH CAROLINA
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Michael G. Nettles, Circuit Court Judge

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PROOF OF SERVICE

The undersigned certifies that on this, the 16th day of September, 2016, she served a copy of the foregoing **Brief of *Amicus Curiae*** on counsel for the parties via electronic mail and via United States Mail, postage prepaid, addressed as follows:

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