No. 20-1007

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HUSCH BLACKWELL LLP,

Plaintiff-Appellant,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia, No. 1:19-cv-00880

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 23 MEDIA ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT

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**Of counsel*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1007 Caption: Husch Blackwell LLP v. Washington Metropolitan Area Transit Authority

Pursuant to FRAP 26.1 and Local Rule 26.1,

Reporters Committee for Freedom of the Press and 14 media organizations (see attachment for list of relevant parties)
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Bruce D. Brown Date: May 12, 2020

Counsel for: Amici curiae

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1. ALM Media, LLC
2. The Associated Press
3. Atlantic Media, Inc.
4. International Documentary Assn.
5. Investigative Reporting Workshop at American University
6. The Media Institute
7. MPA - The Association of Magazine Media
8. National Newspaper Association
9. National Press Photographers Association
10. The News Leaders Association
11. Online News Association
12. Reveal from The Center for Investigative Reporting
13. Society of Environmental Journalists
14. Society of Professional Journalists

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 20-1007 Caption: Husch Blackwell LLP v. Washington Metropolitan Area Transit Authority

Pursuant to FRAP 26.1 and Local Rule 26.1,

Buzzfeed
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
If yes, identify all such owners:
National Broadcasting Company (NBC)

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Bruce D. Brown Date: May 12, 2020

Counsel for: Amici curiae

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No. 20-1007 Caption: Husch Blackwell LLP v. Washington Metropolitan Area Transit Authority

Pursuant to FRAP 26.1 and Local Rule 26.1,

The E.W. Scripps Company, The New York Times Company
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☑ YES ☐ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

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No. 20-1007 Caption: Husch Blackwell LLP v. Washington Metropolitan Area Transit Authority

Pursuant to FRAP 26.1 and Local Rule 26.1,

Gannett Co., Inc.
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☑ YES ☐ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
If yes, identify all such owners:
BlackRock, Inc.; the Vanguard Group, Inc.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

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Counsel for: Amici curiae

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No. 20-1007 Caption: Husch Blackwell LLP v. Washington Metropolitan Area Transit Authority

Pursuant to FRAP 26.1 and Local Rule 26.1,

Los Angeles Times Communications LLC
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:

Los Angeles Times Communications LLC is wholly owned by NantMedia Holdings, LLC.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Bruce D. Brown Date: May 12, 2020

Counsel for: Amici curiae

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Pursuant to FRAP 26.1 and Local Rule 26.1,

POLITICO LLC
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:

Capitol News Company

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Bruce D. Brown Date: May 12, 2020

Counsel for: Amici curiae

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No. 20-1007 Caption: Husch Blackwell LLP v. Washington Metropolitan Area Transit Authority

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Tully Center for Free Speech
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:

The Tully Center for Free Speech is a subsidiary of Syracuse University

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Bruce D. Brown Date: May 12, 2020

Counsel for: Amici curiae

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 20-1007 Caption: Husch Blackwell LLP v. Washington Metropolitan Area Transit Authority

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Washington Post
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:

The Washington Post is a wholly-owned subsidiary of Nash Holdings LLC, a holding company owned by Jeffrey P. Bezos. WP Company LLC and Nash Holdings LLC are both privately held companies with no securities in the hands of the public.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

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Counsel for: Amici curiae

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No. 20-1007 Caption: Husch Blackwell LLP v. Washington Metropolitan Area Transit Authority

Pursuant to FRAP 26.1 and Local Rule 26.1,

Dow Jones & Company, Inc.
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:

Dow Jones & Company, Inc. ("Dow Jones") is an indirect subsidiary of News Corporation, a publicly held company. Ruby Newco, LLC, an indirect subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones. News Preferred Holdings, Inc., a subsidiary of News Corporation, is the direct parent of Ruby Newco, LLC.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Bruce D. Brown Date: May 12, 2020

Counsel for: Amici curiae

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press, ALM Media, LLC, The Associated Press, Atlantic Media, Inc., BuzzFeed, Dow Jones & Company, Inc., The E.W. Scripps Company, Gannett Co., Inc., International Documentary Assn., Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, The Media Institute, MPA - The Association of Magazine Media, National Newspaper Association, National Press Photographers Association, The New York Times Company, The News Leaders Association, Online News Association, POLITICO LLC, Reveal from The Center for Investigative Reporting, Society of Environmental Journalists, Society of Professional Journalists, Tully Center for Free Speech, and The Washington Post. Lead amicus the Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources.[1] Today, its attorneys provide *pro bono* legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

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[1] Full descriptions of the amici are included as Appendix A.

This case concerns access to certain records of Defendant-Appellee Washington Metropolitan Area Transit Authority ("WMATA") under its Public Access to Records Policy ("PARP") and, specifically, the applicability of PARP Exemption 6.1.5 to those records. PARP provides that it is to be interpreted and applied "consistent with" the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* ("FOIA"). Because PARP Exemption 6.1.5 is the equivalent of FOIA Exemption 5, 5 U.S.C. § 552(b)(5), the district court based its decision below on its interpretation of Exemption 5 of FOIA.

As members of the news media and organizations who advocate on behalf of journalists and the press, amici frequently rely on FOIA and other public records provisions like PARP to gather information about government in order to report on matters of public concern. Accordingly, amici have a strong interest in ensuring that PARP Exemption 6.1.5 and FOIA Exemption 5 are interpreted in accordance with statutory intent. Applying the so-called "consultant corollary" theory under PARP Exemption 6.1.5 and FOIA Exemption 5, as the district court did below, is contrary to the plain language of these provisions and hinders the news media's ability to keep the public informed about government affairs.

SOURCE OF AUTHORITY TO FILE

Plaintiff-Appellant consents to the filing of this amicus brief. Defendant-Appellee stated that it does not oppose the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(a)(4)(E) STATEMENT

Amici declare that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than amici, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court held that a third-party consultant's report is an "intra-agency" record of Defendant-Appellee Washington Metropolitan Area Transit Authority ("WMATA") that may be withheld from disclosure under Exemption 6.5.1 of WMATA's Public Access to Records Policy ("PARP"). The district court's holding, premised on its adoption of the so-called "consultant corollary" theory, does not comport with PARP's plain text and relied on an erroneous interpretation of this Court's decision in *Hunton & Williams v. United States Department of Justice*, 590 F.3d 272, 280 (4th Cir. 2010) ("*Hunton*"). This Court should reject the consultant corollary theory based on the plain text of PARP Exemption 6.1.5 and Freedom of Information Act ("FOIA") Exemption 5, 5 U.S.C. § 552(b)(5).

PARP is modeled after the federal FOIA, 5 U.S.C. § 552 *et. seq.* *See Amendments to Public Access to Records Policy and Adoption of Privacy Policy*, WMATA (Oct. 1, 2005), https://perma.cc/G3PB-CJ7K. And, according to its provisions, PARP is to be interpreted and applied in manner that is "consistent with" FOIA. PARP § 1.0. PARP Exemption 6.1.5 is nearly identical to FOIA Exemption 5. *Compare* PARP § 6.1.5, *with* 5 U.S.C. § 552(b)(5).

Amici agree with Plaintiff-Appellant Husch Blackwell LLP ("Husch Blackwell") that FOIA's text makes unequivocally clear that government agencies'

communications with third parties do not fall within the scope of FOIA Exemption 5. The Supreme Court has repeatedly emphasized the importance of interpreting FOIA's exemptions according to their plain text. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019); *Milner v. Dep't of the Navy*, 562 U.S. 562, 580 (2011). Because the district court's decision does not comport with the plain text of FOIA Exemption 5 or PARP Exemption 6.1.5, it must be reversed.

Some federal appellate courts have expanded the reach of FOIA Exemption 5 in conflict with its plain text, applying the so-called "consultant corollary" theory to conclude that certain documents prepared by outside consultants, though not "intra-agency" communications, should nevertheless be treated as such for purposes of the deliberative process privilege. *See Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); *but cf. Rojas v. Fed. Aviation Admin.*, 927 F.3d 1046, 1056–57 (9th Cir. 2019) (rejecting consultant corollary theory), *reh'g en banc granted*, 948 F.3d 952 (9th Cir. 2020). Contrary to the district court's decision below, however, *see* JA-149 (citing *Hunton*, 590 F.3d at 280), this Court has never adopted the consultant corollary theory, though it has applied a separate and distinct doctrine known as the "common interest doctrine." *Hunton*, 590 F.3d at 280. Neither can be applied here. Particularly in light of the Supreme Court's recent decision in *Food Marketing Institute*, 139 S. Ct. at 2364, this Court should

reject the consultant corollary theory as incompatible with the plain text of FOIA Exemption 5 and PARP Exemption 6.1.5, and reverse the district court's decision.

Even setting aside the plain language of FOIA Exemption 5 and PARP Exemption 6.1.5, which precludes adoption of the consultant corollary theory, *see Rojas*, 927 F.3d at 1058, FOIA's legislative history only underscores that Congress *intended* for records exchanged between third-party consultants and agencies to be disclosed under FOIA. Indeed, an atextual expansion of FOIA Exemption 5 to include records that are neither inter- nor intra-agency could be justified only by engaging in a highly "selective tour of the legislative history." *Food Mktg. Inst.*, 139 S. Ct. at 2364. And the rationales underlying the Federal Advisory Committee Act ("FACA") further highlight Congress's intent to ensure that the public can access government records related to the work of consultants. *See* Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972).

Finally, the consultant corollary theory strips the public of valuable information about the government's work. Reporters and news organizations often rely on FOIA to obtain public records created by consultants paid for by taxpayer dollars. News outlets use these records to inform the public about how the government conducts the public's business and uses public funds. The records at issue in this case, in particular, would shed light on construction issues that have plagued WMATA's Silver Line Expansion Project and may implicate public

safety. Rejecting the consultant corollary theory will ensure that records regarding government activity are accessible to the public, enhancing the public's understanding of how government works.

For the reasons herein, amici urge the Court to reverse the district court's order granting summary judgment in favor of WMATA.

ARGUMENT

I. The Supreme Court has repeatedly, including as recently as last year, underscored the importance of adhering to the Act's plain text when interpreting FOIA's exemptions.

While there is nothing novel about "begin[ning] by analyzing the statutory language," *Rotkiske v. Klemm*, 140 S. Ct. 355 (2019), the Supreme Court recently underscored the importance of plain text analysis in interpreting the scope of FOIA's exemptions in *Milner*, 562 U.S. at 570, 572–73, and *Food Marketing Institute*, 139 S. Ct. at 2364. In both cases, the Supreme Court defined the scope of two of FOIA's statutory exemptions, making clear that FOIA's exemptions must be interpreted according to their plain text. *Milner*, 562 U.S. at 580; *see also Food Mktg. Inst.*, 139 S. Ct. at 2364.

In *Milner*, the Court overturned the decisions of a number of federal courts of appeals that had adopted an atextual interpretation of Exemption 2,[2] noting that

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[2] The Court in *Milner* overturned decisions from the Courts of Appeals for the Second, Seventh, Ninth, and D.C. Circuits. *See Milner*, 562 U.S. at 567 n.2.

those decisions had focused on FOIA's "overall design" and "common sense," 562 U.S. at 566, but gave "comparatively little attention" to "the provision's 12 simple words," *id.* at 569. The Supreme Court made clear that "nothing in FOIA either explicitly or implicitly grants courts discretion to expand (or contract) an exemption." *Id.* at 571 n.5. Atextual applications of FOIA, the Court said, stray from "[t]he judicial role," which "is to enforce [the] congressionally determined balance" between the interests in public disclosure and in government secrecy, "rather than . . . to assess case by case, department by department, and task by task whether disclosure interferes with good government." *Id.*

More recently, the Supreme Court in *Food Marketing Institute* reiterated that when interpreting FOIA's exemptions, courts must start with "the ordinary meaning and structure of the law itself" and if "that examination yields a clear answer, judges must stop." *Food Mktg. Inst.*, 139 S. Ct. at 2364. Like *Milner*, *Food Marketing Institute* abrogated decisions from several circuit courts of appeals that had strayed from FOIA's plain text, this time in interpreting Exemption 4.[3]

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[3] The Supreme Court abrogated the D.C. Circuit's opinion in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Both this Court and Courts of Appeals for the First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits had relied upon the *National Parks*' interpretation of Exemption 4. *See Contract Freighters, Inc. v. Sec. of U.S. Dep't of Transp.*, 260 F.3d 858, 861 (8th Cir. 2001) (collecting cases).

In accordance with this Supreme Court precedent, courts must interpret Exemption 5 and, accordingly, PARP Exemption 6.1.5 according to their plain text. Amici agree with Husch Blackwell that the plain language of PARP Exemption 6.1.5, like FOIA Exemption 5, does not permit WMATA to withhold a report by a third-party consultant. *See* Br. of Appellant at Section I (discussing the meaning of "intra-agency" and "inter-agency"). Accordingly, the district court's decision must be reversed.

II. This Court should reject the consultant corollary theory applied by the district court below, which arose out of an atextual interpretation of FOIA.

Some courts have expanded the scope of Exemption 5 by adopting the consultant corollary theory, interpreting "intra-agency" in a manner that is wholly inconsistent with the phrase's ordinary meaning. The district court's decision below, however, was incorrect to state that *this Court* adopted the consultant corollary theory in *Hunton*. JA-149. This Court in *Hunton* considered the application of the common interest doctrine—a separate and distinct doctrine—to FOIA Exemption 5. *See Hunton*, 590 F.3d at 280. Because courts must interpret FOIA's Exemption 5 and, accordingly, PARP Exemption 6.1.5, in accordance with the ordinary meaning of the statutory language, the Court should reject the consultant corollary theory and reverse the district court.

A. The consultant corollary theory conflicts with the plain text of FOIA Exemption 5.

The D.C. Circuit created the consultant corollary theory in *Soucie v. David*, in which it held that a report evaluating the federal government's program for development of a supersonic transport aircraft could be considered "intra-agency" for purposes of FOIA Exemption 5 "even if it was prepared" by outside consultants. 448 F.2d at 1078 n.44. *Soucie* was decided at a time when FOIA did not yet contain a definition of "agency." *Id.*; *see also* Pub. L. No. 93-502, 88 Stat. 1564 (1974), *available at* https://perma.cc/N5M6-VFX7 (adding definition of "agency" to FOIA).[4] And, instead of basing its decision on the text of FOIA Exemption 5 and the ordinary meaning of the term "intra-agency," the D.C. Circuit created the consultant corollary based on what it viewed to be the policy rationale underpinning the exemption. *Soucie*, 448 F.2d at 1078 n.44 (stating that "[t]he rationale of the exemption for internal communications indicates that [FOIA Exemption 5] should be available . . . even if [the requested record] was prepared for an agency by outside experts").

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[4] In *Soucie*, the D.C. Circuit briefly discussed the Administrative Procedure Act's definition of "agency" to hold that the Office of Science and Technology was an agency subject to FOIA. 448 F.2d at 1073. It did not base its adoption of the consultant corollary theory on this definition. *Id.* at 1078 n.44.

Other federal courts of appeals that have adopted the consultant corollary theory also did not meaningfully consider FOIA's plain language. They either simply adopted the D.C. Circuit's reasoning in *Soucie* or the issue was not contested by the parties. *See Stewart v. U.S. Dep't of Interior*, 554 F.3d 1236, 1245 (10th Cir. 2009) (citing D.C. Circuit precedent in holding that paid consultants are akin to agency employees); *Gov't Land Bank v. Gen. Servs. Admin.*, 671 F.2d 663, 666 (1st Cir. 1982) ("Both parties agree that a property appraisal, performed under contract by an independent professional, is an 'intra-agency' document for purposes of the exemption."); *Lead Indus. Ass'n, Inc. v. Occupational Safety & Health Admin.*, 610 F.2d 70, 83 (2d Cir. 1979) (adopting the consultant corollary theory and stating, "we have nothing that can usefully be added to Chief Judge Bazelon's statement in [*Soucie*]"); *Wu v. Nat'l Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972) (adopting *Soucie*'s reasoning that, for policy reasons, FOIA Exemption 5 "should be available" to external consultants). Moreover, *all* of these cases predate the Supreme Court's guidance in both *Milner* and *Food Marketing Institute*, which made clear that courts must interpret FOIA's exemptions based on the ordinary meaning of the text.

B. This Court did not adopt the consultant corollary theory in *Hunton*.

The district court's decision below indicates that this Court adopted the consultant corollary theory in *Hunton*. JA-149. That is incorrect. The Court's

decision in *Hunton* turned on the application of the common interest doctrine in the context of Exemption 5, not the consultant corollary theory. *See Hunton*, 590 F.3d at 280.

The common interest doctrine is a privilege that "permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute or defend their claims." *Id.* at 277. In *Hunton*, the Court held that the common interest doctrine "is relevant to the question of whether the document qualifies as 'inter-' or 'intra-agency.'" *Id.* at 280. *Hunton* concerned a FOIA request for records relating to communications between the Department of Justice and a telecommunications company embroiled in litigation with another telecommunications company. *Id.* at 274–75. The records sought concerned the government's interest and participation in the ongoing litigation between the two companies. *Id.* at 274. The district court held that "a party possessing common and unitary litigation interests should be understood as 'intra-agency' for purposes of Exemption 5." *Id.* at 277. This Court affirmed the district court's holding. *Id.*

Hunton did not, therefore, depend on the application of the consultant corollary theory, as the district court claimed. Amici acknowledge that, in *Hunton*, the Court stated *in dicta* that certain D.C. Circuit cases applying the consultant corollary theory "make good sense." *Id.* at 280. However, this statement, which was not necessary for the Court's determination about the application of the

common interest doctrine, did not constitute "adoption" of the consultant corollary theory.

C. This Court should reject the consultant corollary theory.

This Court should now clearly reject the consultant corollary theory, particularly given the Supreme Court's recent emphasis on the necessity of adhering to the ordinary meaning of the statutory text in interpreting FOIA's exemptions. The D.C. Circuit cases cited in *Hunton*'s discussion of the consultant corollary theory were not based on the plain meaning of Exemption 5. *See Inst. of Military Justice v. U.S. Dep't of Defense*, 512 F.3d 677, 684 (D.C. Cir. 2008) (citing two D.C. Circuit cases to hold that under "our interpretation of Exemption 5," documents prepared by non-agency consultants may be withheld); *Public Citizen v. Dep't of Justice*, 111 F.3d 168, 170 (D.C. Cir. 1997) (citing D.C. Circuit precedent and the particular facts of the case); *Ryan v. Dep't of Justice*, 617 F.2d 781, 789 (D.C. Cir. 1980) (interpreting FOIA Exemption 5 "in light of its purpose").

Courts that have explicitly adopted the consultant corollary theory have cited *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), as support, and this Court too cited *Klamath* in *Hunton* when discussing the consultant corollary, *Hunton*, 590 F.3d at 279. Reliance on that decision, however, is misplaced. In *Klamath*, the Supreme Court explicitly *rejected* the government's

attempt to withhold communications sent between Native American tribes and the government because the tribes were not agencies under FOIA's text. *Klamath*, 532 U.S. at 13 (noting that there is "no textual justification for draining the [intra-agency or inter-agency] condition of independent vitality"). The mere fact that *Klamath* did not expressly overrule federal appellate cases—that addressed an issue not before the Court—cannot save consultant corollary theory, particularly in light of the reasoning in both *Milner* and *Food Marketing Institute*. *See id.* at 12 n.4 ("We need not decide whether either [D.C. Circuit case, *Ryan* or *Public Citizen*] should be recognized as intra-agency.").

Since *Milner* and *Food Marketing Institute*, only one federal Court of Appeals—the Ninth Circuit—has considered whether communications with third-party consultants fall within the scope of FOIA's Exemption 5.[5] In *Rojas v. Federal Aviation Administration*, the Ninth Circuit's well-reasoned opinion explained that "the consultant corollary expands Exemption 5's protections beyond the plain text of FOIA" and that if Congress intended for FOIA Exemption 5 to

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[5] In 2017, the Sixth Circuit also rejected both the common interest doctrine and the consultant corollary theory based on the plain text of FOIA and the Supreme Court's decision in *Klamath*, stating that "[t]here is . . . no textual justification for draining ["intra-agency or inter-agency"] condition of independent vitality." *Lucaj v. FBI*, 852 F.3d 541, 548–49 (6th Cir. 2017) (holding that records sent from the federal government to foreign governments are not exempt from disclosure under FOIA Exemption 5).

cover communications with third-party consultants, it would not have expressly limited the scope of the exemption to "inter-agency and intra-agency" communications. *Rojas v. Fed. Aviation Admin.*, 927 F.3d at 1055. In rejecting adoption of the consultant corollary theory, the court explained that it "allows the government to withhold more documents than contemplated by Exemption 5," contrary to FOIA's explicit language that withholdings are not appropriate "'*except as specifically stated* in this section.'" *Id.* at 1056 (quoting 5 U.S.C. § 552(d) (emphasis added)).

In sum, since 2011, the Supreme Court has made it abundantly clear that the scope of FOIA's exemptions are limited by the text of the statute. *See* Section I, *supra*. The rationale of *Soucie* that gave rise to the consultant corollary theory reflects a "bygone era of statutory construction" that the Supreme Court rejected in *Milner* and *Food Marketing Institute* as inapplicable to interpreting the scope of FOIA's exemptions. *See Food Mktg. Inst.*, 139 S. Ct. at 2364. Indeed, *Soucie* was decided only three years before the D.C. Circuit announced the *National Parks* test that the Supreme Court rejected in *Food Marketing Institute*. *See Nat'l Parks*, 498 F.2d at 767; *Food Mktg. Inst.*, 139 S. Ct. at 2364. Particularly in view of the

Supreme Court's more recent decisions, this Court should reject the consultant corollary theory here, and reverse the district court's decision below.[6]

III. FOIA's legislative history supports disclosure of the requested records.

Though the Court need not look beyond the plain text of FOIA or PARP to reject the consultant corollary theory and reverse the district court's decision below, FOIA's legislative history also supports its rejection.[7] "[T]he statutory purpose [of FOIA]" is to ensure "that the public know what its government is up to." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 162 (2004). The right of the people to know the operations and activities of their government "defines a structural necessity in a real democracy." *Id.* at 171–72 (citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). These fundamental principles are, in part, drawn from the legislative history surrounding FOIA's enactment: "The government's business is the people's business. That is why we have no reservations about the public's right to

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[6] Though the common interest doctrine is not applicable to this case, the Court should also reject the application of the common interest doctrine to the extent that it conflicts with FOIA Exemption 5's and PARP Exemption 6.1.5's plain language—which allow withholding only of inter-agency or intra-agency records.

[7] Although PARP does not explicitly rely on FOIA's legislative history, it provides that its provisions are to be interpreted and applied "consistent with" FOIA. PARP § 1.0. FOIA's legislative history is thus instructive.

know, with a minimum of restriction, what its Government is doing and why." 121 Cong. Rec. S22729–30 (daily ed. Dec. 18, 1975) (statement of Sen. Kennedy).

The Supreme Court has recognized that in passing FOIA, Congress intended to change the status quo from the routine withholding of government records to broad disclosure. Specifically, as the Court has stated, "Congress enacted FOIA to overhaul the public-disclosure section of the Administrative Procedure Act (APA), 5 U.S.C. § 1002 (1964 ed.)," a provision "'plagued with vague phrases'" that had "gradually [become] more 'a withholding statute than a disclosure statute.'" *Milner*, 562 U.S. at 565 (quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973)). It is in light of this history that the Supreme Court has observed that FOIA's exemptions are "explicitly made exclusive" and must be "narrowly construed." *Mink*, 410 U.S. at 79.

Building upon the original goals motivating FOIA's passage, in 1974 Congress strengthened its disclosure provisions. Congress reasoned:

> Extensive hearings in both the House and Senate have brought out clearly the need to broaden and strengthen the 1966 Freedom of Information Act. Court construction of some loosely drafted provisions in the law have opened gaping loopholes which have engulfed entire buildings of Government files. Even where the law clearly and unambiguously requires disclosure of certain documents, bureaucratic sleights of hand continue to keep them out of reach of the public and the press.

120 Cong. Rec. S19806–23 (daily ed. Nov. 21, 1974) (statement of Sen. Kennedy). Simply put, Congress, in amending FOIA in 1974, was wary of agencies taking

advantage of "loosely drafted provisions" to circumvent FOIA's mandate of broad disclosure mandate. *Id*. And, as was the case in 1974, FOIA requesters today, including many of amici, operate in a landscape wherein federal agencies seek to withhold records "even where the law clearly and unambiguously requires disclosure." *Id*.

The legislative history makes clear that even if the statutory language could be read to allow for the existence of the consultant corollary theory, which it does not, FOIA's Exemption 5 must be applied "as narrowly as consistent with efficient Government operation," to keep in line with FOIA's purpose. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (quoting S. Rep. No. 89-813, at 9 (1965) (rejecting argument that disclosure of requested memoranda would harm "efficient Government operation"—the agency's proffered concern—and ordering their release)). *Milner* made clear that concerns that "certain sensitive information *should* be exempt from disclosure" cannot be basis for expanding FOIA beyond its text. *Milner*, 562 U.S. at 580 (emphasis in original) (holding that an expansion of Exemption 2 did not comport with FOIA's purpose).

Congress strengthened FOIA's mandate of disclosure in its most recent amendment to FOIA, which codified the "foreseeable harm standard." The foreseeable harm standard provides that records may be withheld "*only if* . . . the agency reasonably foresees that disclosure would harm an interest protected by an

exemption," or the disclosure is prohibited by law. 5 U.S.C. § 552(a)(8) (emphasis added). Through this requirement, Congress sought to "reduce the perfunctory withholding of documents through the overuse of FOIA's exemptions." *See* 162 Cong. Rec. S1496 (daily ed. Mar. 15, 2016) (statement of Sen. Leahy). Indeed, the foreseeable harm standard means that *even if* a record falls within one of FOIA's exemptions—such as Exemption 5—agencies must make an additional showing of harm to an interest protected by an exemption before the record can be withheld. In light of Congress's demand for disclosure, the Court should reconsider *Hunton*'s expansive approach to FOIA's exemptions.

IV. The Federal Advisory Committee Act further demonstrates Congress's intent that records generated in the scope of a government agency's relationship with outside consultants be accessible to the public.

FOIA is not the only instance of Congress ensuring public access to information about the government's relationship with third-party consultants. Though not at issue here, the Federal Advisory Committee Act ("FACA"), Pub. L. No. 92-463, 86 Stat. 770 (1972), is further evidence of Congress's intent to ensure public scrutiny of the government's relationship with third-party consultants; FACA mandates broad public access to records used or prepared by federal advisory committees, which necessarily include communications between government agencies and consultants. Section 10(b) of FACA requires that, subject to the parameters of FOIA, all "records, reports, transcripts, minutes,

appendixes, working papers, drafts, studies, agenda, or other documents" used or prepared by federal advisory committees must be made available to the public. 5 U.S.C.App. 2 § 10. The purpose of section 10(b) of FACA is to provide for the "contemporaneous availability of advisory committee records that . . . provide[s] a meaningful opportunity to fully comprehend the work undertaken by the committee." James L. Dean, *Memorandum for Committee Management Officers*, General Services Administration (March 14, 2000), https://perma.cc/HL3D-YJXF.

The individuals and entities who serve on federal advisory committees serve in a role that is, by definition, consultative. *See* General Services Administration, *Appointment of Consultants to FACA* (Feb. 26, 2019), https://perma.cc/8UR6-NSVF (defining "consultant" as "a person who can provide valuable and pertinent advice generally drawn from a high degree of broad administrative, professional, or technical knowledge or experience"). Today, an average of 1,000 advisory committees with more than 60,000 members advise the executive branch on issues ranging from the disposal of nuclear waste and the depletion of atmospheric ozone to the fight against AIDS—and countless other issue areas demanding attention, research, funding, and policy reform. General Services Administration, *The Federal Advisory Committee Act Brochure* (Feb. 26, 2019), https://perma.cc/FBR9-K7LR. That Congress *explicitly* makes the records of these advisory committees accessible to the public demonstrates a strong public policy in

favor of public access to records born of the government's relationship with outside consultants.

V. The consultant corollary theory denies the public access to valuable records that illuminate government conduct.

Rejecting the consultant corollary theory will ensure that the press and public has access to records concerning government conduct. Such access promotes the basic purpose underlying FOIA: to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Hunton*, 590 F.3d at 276 (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

For example, the records at issue in this case, which concern deficiencies in the concrete turnout ties used in construction of the Silver Line Metro Expansion Project, *see* JA-145, will provide valuable information to the public. For years, the public and press have closely followed the construction of the Silver Line and its budget, delays, and setbacks. *See, e.g.*, Lori Aratani, *Silver Line is Over Budget and Behind Schedule*, Wash. Post (Apr. 27, 2015), https://wapo.st/3cZhyGy; Lia DeGroot, *Silver Line Extension Falls Two More Months Behind Schedule*, GW Hatchet (June 19, 2019, 7:25 PM), https://perma.cc/TA24-SQ8A; Jenny Gathright, *The Silver Line Extension Has an (Approximate) Opening Date*, DCist (June 14, 2019, 10:32 AM), https://perma.cc/5Y3C-PNM3. News organizations have previously reported on deficiencies with the concrete ties used in the construction.

See, e.g., Lori Aratani, *Contractor Identifies New Problems with Phase 2 of the Silver Line*, Wash. Post (Apr. 12, 2019, 6:00 AM), https://wapo.st/2SkSuBN (reporting a contractor involved in the construction of the Silver Line "is still trying to find an acceptable fix for a problem that surfaced in September when a review found that more than 400 concrete rail ties failed to meet project standards"); Lori Aratani, *New Problems for the Silver Line Phase 2: Officials Say Rail Ties are Flawed*, Wash. Post (Dec. 12, 2018, 6:58 PM), https://perma.cc/YNP9-NSLB (reporting that officials say that "[h]undreds of concrete rail ties installed at track crossovers along the second phase of the Silver Line are flawed"). According to news reports, WMATA, Metropolitan Washington Airports Authority, and the contractor responsible for the ties do not agree on "how to deal with" the deficient concrete ties or even the number of flawed ties. *See* Aratani, *Contractor Identifies New Problems*, *supra*.

The public's interest in the records at issue is particularly acute because the condition of the concrete ties used in construction of the Silver Line could impact public safety. *The Washington Post* has reported that issues with the ties "may cause the tracks to tilt outward," resulting in "a train going over those sections of track could lean slightly toward the outside." Aratani, *New Problems for the Silver Line Phase 2, supra*. According to the *Post*, in a letter sent in December 2019 by Metro General Manager Paul J. Wiedefeld to the Washington Metrorail Safety

Commission, Mr. Wiedefeld identified the defective rail ties as "chief among" the problems with the Silver Line construction, writing that the rail ties and other deficiencies "'are at risk of being safety issues.'" Lori Aratani, *Metro Asks Safety Oversight Agency to do More Extensive Review of Silver Line*, Wash. Post (Dec. 28, 2019, 5:29 PM), https://perma.cc/NKK9-UPPM. The records underlying this case are critical to the public's full understanding of how public dollars are being spent.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to reverse the district court's order granting summary judgment in favor of WMATA.

Respectfully submitted,

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Dated: May 12, 2020

APPENDIX A

ALM Media, LLC publishes over 30 national and regional magazines and newspapers, including The American Lawyer, The National Law Journal, New York Law Journal and Corporate Counsel, as well as the website Law.com. Many of ALM's publications have long histories reporting on legal issues and serving their local legal communities. ALM's The Recorder, for example, has been published in northern California since 1877; New York Law Journal was begun a few years later, in 1888. ALM's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later picked up by other national media.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Atlantic Media, Inc. is a privately held, integrated media company that publishes The Atlantic, National Journal, and Government Executive. These award-winning titles address topics in national and international affairs, business, culture, technology and related areas, as well as cover political and public policy

issues at federal, state and local levels. The Atlantic was founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others.

BuzzFeed is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

Dow Jones & Company is the world's leading provider of news and business information. Through *The Wall Street Journal*, *Barron's*, MarketWatch, Dow Jones Newswires, and its other publications, Dow Jones has produced journalism of unrivaled quality for more than 130 years and today has one of the world's largest newsgathering operations. Dow Jones's professional information services, including the Factiva news database and Dow Jones Risk & Compliance, ensure that businesses worldwide have the data and facts they need to make intelligent decisions. Dow Jones is a News Corp company.

The E.W. Scripps Company serves audiences and businesses through local television, with 60 television stations in 42 markets. Scripps also owns Newsy, the next-generation national news network; podcast industry leader Stitcher; national broadcast networks Bounce, Grit, Escape, Laff and Court TV; and Triton, the global leader in digital audio technology and measurement services. Scripps

serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states and Guam — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, based at the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

Los Angeles Times Communications LLC is one of the largest daily newspapers in the United States. Its popular news and information website, www.latimes.com, attracts audiences throughout California and across the nation.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to

foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MPA – The Association of Magazine Media, ("MPA") is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA's membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

National Newspaper Association is a 2,000 member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Pensacola, FL.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously

promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to nearly 300 reporters, editors and producers. It distributes 30,000 copies of its Washington

newspaper on each publishing day and attracts an influential global audience of more than 35 million monthly unique visitors across its various platforms.

Reveal from The Center for Investigative Reporting, founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website https://www.revealnews.org/, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

The Washington Post (formally, WP Company LLC d/b/a The Washington Post) is a news organization based in Washington, D.C. It publishes The Washington Post newspaper and the website www.washingtonpost.com, and produces a variety of digital and mobile news applications. The Post has won 47 Pulitzer Prizes for journalism, including awards in 2018 for national and investigative reporting.

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Bruce D. Brown, Esq.
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THE REPORTERS COMMITTEE FOR
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Dated: May 12, 2020
Washington, DC

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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