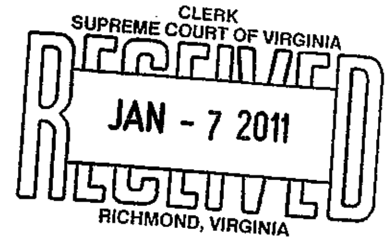
COPY



IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 102359

KENNETH T. CUCCINELLI, II, ATTORNEY GENERAL OF VIRGINIA,

Petitioner-Appellant,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA,

Respondent-Appellee.

BRIEF IN OPPOSITION AND ASSIGNMENT OF CROSS-ERROR

OF COUNSEL:

Stephanie J. Gold, Esq.
Catherine E. Stetson, Esq.
HOGAN LOVELLS US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
Telephone: (202) 637-5600
Facsimile: (202) 637-5910
stephanie.gold@hoganlovells.com
cate.stetson@hoganlovells.com

Chuck Rosenberg (VSB No. 44727)
Jessica L. Ellsworth (VSB No. 46832)
HOGAN LOVELLS US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
Telephone: (202) 637-5600
Facsimile: (202) 637-5910
chuck.rosenberg@hoganlovells.com
jessica.ellsworth@hoganlovells.com

N. Thomas Connally (VSB No. 36318)
Jon M. Talotta (VSB No. 44590)
HOGAN LOVELLS US LLP
Park Place II
7930 Jones Branch Drive
McLean, VA 22102
Telephone: (703) 610-6100
Facsimile: (703) 610-6200
tom.connally@hoganlovells.com
jon.talotta@hoganlovells.com

Counsel for the Rector and Visitors of the University of Virginia

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW 3

QUESTIONS PRESENTED 5

ASSIGNMENT OF CROSS-ERROR 5

STATEMENT OF FACTS 5

STANDARD OF REVIEW 13

ARGUMENT 14

The Circuit Court Was Within Its Discretion To Set Aside The CIDs 14

A. The CIDs did not "state the nature of the conduct constituting an alleged violation of [FATA] that is under investigation." 15

B. The AG failed to provide an objective "reason to believe" that the requested information was relevant to investigating a potential FATA violation by Dr. Mann. 17

C. The circuit court correctly concluded that FATA does not authorize the AG to investigate federal grant funding decisions. 20

D. The circuit court's suggestions of what the AG could investigate under FATA is dicta that does not warrant review 21

ARGUMENT IN SUPPORT OF CROSS-ERROR 22

The General Assembly Did Not Authorize CIDs To Be Served On Commonwealth Entities Like The University 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES:

Al Fayed v. C.I.A., 229 F.3d 272 (D.C. Cir. 2000) 25

America Online, Inc. v. Anonymous Publicly Traded Co., 261 Va. 350 (2001) 13

Andrews v. Com., 280 Va. 231 (2010) 24

Bottoms v. Bottoms, 249 Va. 410 (1995) 13, 14, 20

Check'n Go of Fla., Inc. v. State, 790 So. 2d 454 (Fla. App. Ct. 2001) 18

Com. v. AMEC Civil, LLC, 280 Va. 396 (2010) 24

Com. ex rel. Pross v. Board of Sup'rs of Spotsylvania Cnty., 225 Va. 492 (1983) 23, 24

COMSAT Corp. v. National Sci. Found., 190 F.3d 269 (4th Cir. 1999) 25

Evans v. State, 963 P.2d 177 (Utah 1998) 18

Hawthorne v. VanMarter, 279 Va. 566 (2010) 14

In re Civil Investigative Demand, 1981 WL 291003 (Va. Cir. Ct. June 3, 1981) 13

In re Subpoena Duces Tecum, 228 F.3d 341 (4th Cir. 2000) 14, 19

James v. Jane, 221 Va. 43 (1980) 25

Jones v. Com., 267 Va. 218 (2004) 23

Major League Baseball v. Crist, 331 F.3d 1177 (11th Cir. 2003) 18

Paramount Builders, Inc. v. Com., 260 Va. 22 (2000) 17

Richard L. Deal & Assocs. v. Com., 224 Va. 618 (1983) 23

Simonian v. Univ. & Cmty. Coll. Sys. of Nev., 128 P.3d 1057 (Nev. 2006) 24-25

TABLE OF AUTHORITIES – Continued

Page

U.S. ex rel. Milam v. Regents of Univ. of Cal., 912 F. Supp. 868 (D. Md. 1995) 16

U.S. ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co., 612 F.3d 724 (4th Cir. 2010) 16

United States v. Morton Salt Co., 338 U.S. 632 (1950) 19

United States v. R. Enters. Inc., 498 U.S. 292 (1991) 14

Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992) 16

Waterman v. Halverson, 261 Va. 203 (2001) 24

Weathers v. Com., 262 Va. 803 (2001) 24

STATUTES:

31 U.S.C. § 3733(*l*)(4) 23

Va. Code § 1-230 24

Va. Code § 5.1-1 24

Va. Code § 59.1-9.10 7

Va. Code § 59.1-201.1 6-7

Va. Code § 8.01-216.2 .... 7, 19, 21, 23

Va. Code § 8.01-216.3 19

Va. Code § 8.01-216.3(A)(1) 7

Va. Code § 8.01-216.3(A)(2) 7

Va. Code § 8.01-216.3(A)(3) 7

Va. Code § 8.01-216.4 .... 3, 19

TABLE OF AUTHORITIES – Continued

Page

Va. Code § 8.01-216.10 23

Va. Code § 8.01-216.10(A) 2, 3, 7

Va. Code § 8.01-216.11 .... 1, 3, 7, 15, 16

Va. Code § 8.01-216.12 13

Va. Code § 8.01-216.18(B) 3, 4

Va. Code § 8.01-412.9 24

REGULATIONS:

2 C.F.R. Parts 215 & 220 21

74 Fed. Reg. 66,496 (Dec. 15, 2009) 8

LEGISLATIVE MATERIAL:

Virginia Acts 2002, c. 842 7

OTHER MATERIALS:

Experts Claim 2006 Report Plagarized, USA Today (Nov. 22, 2010), http://www.usatoday.com/weather/climate/globalwarming/2010-11-21-climate-report-questioned_N.htm 6

GMU investigating climate change skeptic cited by Cuccinelli, The Washington Post, Virginia Politics (Oct. 8, 2010), http://voices.washingtonpost.com/virginiapolitics/2010/10/gmu_investigating_climate_chan.html 6

INTRODUCTION

The Office of the Attorney General ("AG") petitions for appeal from an order setting aside two Civil Investigative Demands ("CIDs") that it issued without complying with the statutory requirements bounding its investigative authority. The CIDs, issued pursuant to the Virginia Fraud Against Taxpayers Act ("FATA"), sought extensive information from the University of Virginia about research conducted by a former professor, Dr. Michael Mann. Dr. Mann's research has addressed, among other things, climate change, and he is a party to the ongoing debate among credentialed research scientists and academics about how to study this topic. The AG issued the CIDs here in a unique and unprecedented attempt to police that academic debate and to investigate whether Dr. Mann's research, data, methodologies, and conclusions are "misleading."

The circuit court exercised its discretion to set aside the CIDs because they did not, as the statute requires, "state the nature of the conduct constituting the alleged violation of [FATA] that is under investigation." Va. Code § 8.01-216.11. In addition, as the circuit court explained, neither the CIDs themselves nor the AG's presentation in support of the CIDs showed that the AG satisfied the statutorily-required "reason to believe" the University has information relevant to investigating

conduct constituting an alleged violation of FATA. *Id.* § 8.01-216.10(A). The circuit court thus was well within its discretion in setting aside the CIDs.

The CIDs themselves, the briefing below, and the AG's Petition for Appeal all make clear that the AG did not issue the CIDs because of allegations that Dr. Mann defrauded Commonwealth taxpayers—which is, after all, the purpose of the AG's investigative authority under FATA. The AG sought instead to use the CIDs for a fishing expedition into the work of Dr. Mann and numerous other scientists merely by invoking the scientific debate about global warming and identifying five grants on which Dr. Mann worked while teaching and researching at the University. Faced with these uniquely overreaching CIDs, the circuit court properly set them aside.

The Petition declines even to recognize that the applicable standard of review is abuse of discretion. It also engages in serious hyperbole by proclaiming that the decision below will "significantly limit" investigations of fraud "in every other context" and will "undermine the very purposes for which FATA was enacted." Pet. 5. In fact, the decision below stands for a rather unremarkable proposition: to exercise its investigative authority under FATA, the AG must meet the statutory requirements for CIDs. Those requirements include, as expressly stated in FATA, that a CID "state the nature of the conduct constituting the alleged violation of [FATA]

that is under investigation" and that the AG have a "reason to believe" that the CID recipient has information relevant to investigating the conduct that allegedly violates FATA. Va. Code §§ 8.01-216.4, 8.01-216.10(A), 8.01-216.11. The circuit court decision does not sound some sort of death knell for FATA investigations; far from it. The court merely identified and applied statutory limitations that ensure the AG is investigating conduct because the conduct allegedly violates FATA—and not for any other reasons. The Petition should be denied.

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On April 23, 2010, the AG served two identical CIDs on the University pursuant to FATA seeking extensive information relating to Dr. Mann, who was a University professor from 1999-2005. The University petitioned to set aside the CIDs pursuant to Va. Code § 8.01-216.18(B). Its petition and related brief explained that the CIDs were not enforceable because they did not comply with FATA's statutory requirements, including that (1) the CIDs did not describe the nature of any conduct that the AG could be investigating as a potential violation of FATA; (2) the AG lacked an objective "reason to believe" that the University had information relevant to investigating any such FATA violations; and (3) FATA does not authorize the issuance of CIDs to the University, which is a Commonwealth entity.

The University also emphasized that enforcing these particular CIDs—which were issued because of a disagreement with an academic's research—would chill academic inquiry and interfere with academic debate.

In the circuit court, the AG maintained that it was not required to state what conduct it was investigating as an alleged FATA violation. And contrary to the position the AG regularly takes when representing Commonwealth entities, the AG argued that Commonwealth entities were subject to the CID provision even though FATA is a statute of general application and does not expressly state that it applies to Commonwealth entities.

Following a hearing, the circuit court set aside the CIDs in their entirety. It held that the University is subject to a FATA CID, but found that the CIDs failed to meet FATA's requirements. It explained that the CIDs did not state the nature of any conduct by Dr. Mann that the AG suspected might have violated FATA. The court rejected the AG's assertion of unreviewable "unbridled discretion" to issue CIDs and found that the AG had not established a reason to believe that the University had material relevant to investigating FATA violations by Dr. Mann in his work on the five grants. Letter Op. 3. The court subsequently entered an order of judgment setting aside the CIDs. The AG now seeks this Court's review.

QUESTIONS PRESENTED

1. Whether the circuit court was within its discretion to set aside the CIDs because they failed to identify any conduct of Dr. Mann's that allegedly violated FATA and because the AG lacked an objective reason to believe the University had material relevant to investigating unspecified potential FATA violations by Dr. Mann. (AG Assignments of Error 1-3.)

2. Whether the circuit court correctly held that FATA authorizes the AG to investigate false claims related to grants funded by the Commonwealth, and not grants funded by the federal government or a federal agency. (AG Assignments of Error 4-5.)

ASSIGNMENT OF CROSS-ERROR

Whether the circuit court erred in holding the University is a "person" subject to FATA's CID provision, where the General Assembly specifically defined the term "person" in FATA *not* to include Commonwealth entities. (Preserved at University Br. to Set Aside 14-15; Reply Br. 7-8; Order 2.)

STATEMENT OF FACTS

The statement of facts in the AG's Petition underscores why the CIDs ran afoul of FATA and reinforces why the circuit court was exactly right to set them aside. The "facts" offered to show the circuit court's error consist of a lengthy discourse about two papers Dr. Mann co-authored in 1998 and 1999 as an assistant professor at the University of Massachusetts. The

AG's recitation of "facts" muses about whether a "hockey stick" graph that came out of those research papers adequately reflected a "Little Ice Age" and "Medieval Warm Period"; whether the graph should instead have made reference to the Bristlecone Pine tree ring chronologies published in 1993; and whether and how the philosophy of "Post Normal Science" is reflected in climate change research. Pet. 6-15.[1]

These are the same facts that the AG presented to the circuit court. They may express the AG's view on a scientific, academic debate. But what they do *not* do is describe conduct constituting an alleged violation of FATA by Dr. Mann that the AG is investigating; nor do they provide reason to believe the University has materials relevant to investigating any such violation. The following facts are further support for denying the petition.

CIDs. A CID is essentially a subpoena issued by the AG. Like other statutes conveying such investigative authority, FATA tethers the AG's authority to issue CIDs to investigations of specific misconduct. *E.g.,* Va.

---

[1] The AG also relies on a document known as the "Wegman Report," Pet. 9, even though plagiarism experts have concluded that portions of the report were copied from Wikipedia and other sources by its author, a George Mason University professor. *See Experts Claim 2006 Report Plagarized*, USA Today (Nov. 22, 2010), http://www.usa today.com/ weather/climate/globalwarming/2010-11-21-climate-report-questioned_N. htm; *GMU investigating climate change skeptic cited by Cuccinelli*, The Washington Post, Virginia Politics (Oct. 8, 2010), http://voices.washington post.com/virginiapolitics/2010/10/gmu_investigating_climate_chan.html. The AG nevertheless has continued to cite this document.

Code §§ 59.1-201.1, 59.1-9.10 (authorizing CIDs to investigate violations of, respectively, the Consumer Protection Act and the Virginia Antitrust Act).

FATA. FATA provides liability for submitting false or fraudulent claims for Commonwealth funds or causing such claims to be submitted. Va. Code § 8.01-216.3(A)(1), (2), (3). A claim includes a request for money "if the Commonwealth provides any portion of the money or property that is requested or demanded." *Id.* § 8.01-216.2. The AG can investigate FATA violations by issuing a CID that "state[s] the nature of the conduct constituting the alleged violation of a false claims law that is under investigation, and the applicable provision of law alleged to be violated." *Id.* § 8.01-216.11. To issue a CID, the AG must have "reason to believe that [the CID recipient] may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation." *Id.* § 8.01-216.10(A). FATA went into effect on January 1, 2003. *See* Virginia Acts 2002, c. 842.

"Climategate" Emails. In November 2009, thousands of emails and related documents were stolen from a computer system at the University of East Anglia in Great Britain and posted on the internet. After some individuals claimed that the stolen "climategate" emails showed that members of the climate science community had manipulated research

data, numerous academic and government bodies investigated those allegations. None found any fraud or manipulation or falsification of data in the conduct of any research. To the contrary, "[t]he internal consistency from multiple lines of evidence strongly supports the work of the scientific community, including those individuals singled out in [the "climategate"] email exchanges." Ex. 8, Statement by Working Group I of the Intergovernmental Panel on Climate Change (Dec. 4, 2009).[2]

The Commonwealth's EPA Litigation. In December 2009, EPA issued what is called an "Endangerment and Cause or Contribute Finding" for greenhouse gases under Section 202(a) of the Clean Air Act. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009). "[B]ased on careful consideration of the full weight of scientific evidence," EPA concluded that "six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations." *Id.* at 66,496. The AG promptly sued to challenge EPA's finding. Ex. 9, AG Pet. for Review, *Com. v. EPA*, D.C. Cir. Case No. 10-1036; Ex. 10, AG Press Release (Feb. 17, 2010).

---

2 All exhibits are referred to by their exhibit number in the circuit court record. Additional reports include: Ex. 3, Univ. of East Anglia Int'l Panel Report (Apr. 12, 2010); Ex. 4, United Kingdom House of Commons Science and Tech. Comm. Report (Mar. 31, 2010); Ex. 5, Hearing Transcript, U.S. House of Reps. Select Energy Independence and Global Warming Comm. (Dec. 2, 2009); Ex. 6, Select Comm. on Energy Independence and Global Warming Report; Ex. 35, The Pennsylvania State Univ. Final Report (June 4, 2010); Ex. 36, Independent Climate Change E-mails Review (July 2010).

Citing the so-called "climategate" emails, the AG sought to compel EPA to reconsider its finding that climate change poses a threat to public health and welfare. Ex. 11, AG Press Release (Apr. 16, 2010). Because the AG could not submit additional evidence to the D.C. Circuit, the AG tried to force the case back to EPA to add evidence to the record, including the "climategate" emails. Ex. 12, Mot. to Remand to Adduce Additional Evidence (Apr. 15, 2010). With that additional-evidence request pending, the AG issued the CIDs at issue here.

The CIDs. The CIDs purportedly relate to an investigation of "possible [FATA] violations by Dr. Mann." Ex. 1, CID No. 1-MM at 1; Ex. 2, CID No. 2-MM at 1. They reference "data and other materials that Dr. Mann presented in seeking awards/grants funded, in whole or in part, by the Commonwealth of Virginia or any of its agencies as well as data, materials and communications that Dr. Mann created, presented or made in connection with or related to [five specific, named] awards/grants." *Id.*

None of these grants have any connection to, nor were they discussed in, the "climategate" emails. The AG has repeatedly admitted below and in its Petition here that the CIDs list these five grants just because each was on Dr. Mann's curriculum vitae ("CV") and referenced the University. *See* AG Answer ¶¶ 3, 13; AG Opp. to Univ. Br. 16, 28-29,

Pet. 2. Those grants are listed in an Appendix hereto as they appear on the CIDs and Dr. Mann's CV. Four of the grant descriptions plainly state that they were awards from federal agencies—not the Commonwealth—involving the disbursement of federal funds—not Commonwealth funds. Specifically, the first and fourth grants were for federal funds from the National Oceanic and Atmospheric Administration ("NOAA")-Climate Change Data & Detection ("CCDD") Program, part of the United States Department of Commerce's Oceanic and Atmospheric Research Office, Climate Program Office.[3] The second one was for federal funding from the National Science Foundation.[4] And the third one was for federal funding under a cooperative agreement between NOAA and the University of Alaska to form the Cooperative Institute for Arctic Research ("CIFAR").[5] Only the fifth grant involved University funds; it was an internal grant from the University's Fund for Excellence in Science and Technology awarded in 2001 (two years *before* FATA's effective date). *See* Appendix hereto.

Not only did four of the grants involve federal funding, but the information requested in the CIDs was in no way linked to work on these

[3] Publicly available information further confirms the federal nature of these grants. They are listed in a federal grants database on NOAA's website, https://grantsonline.rdc.noaa.gov/flows/publicSearch/begin.do. *See* Exs. 13 & 14 (search results).

[4] *See* Ex. 15 (National Science Foundation award abstract).

[5] *See* Ex. 16 at 4-5 (excerpt of publicly available federal report).

grants. The CIDs sought, for example, "*all* computer algorithms, programs, source code or the like created or edited by Dr. Michael Mann . . . *from January 1, 1999, to the present*," as well as all documents that Dr. Mann used in his "day to day research or to produce *any* work product or result"—regardless of when created, used or produced and regardless of any nexus to the five grants. Ex. 1 at 11 (emphases added). They also requested all "correspondence, messages or e-mails" to or from Dr. Mann and 38 named scientists, as well as everything related to correspondence, messages or e-mails to or from Dr. Mann and these individuals and all documents that "reference" these individuals. *Id.* at 3, 7-9. There is no identified link between these individuals and the five grants; nor did the AG offer one even after the University specifically pointed to this lack of nexus.[6]

Proceedings Below. The University petitioned to set the CIDs aside as unlawful under FATA and an impermissible intrusion on academic speech and research. The University explained that the CIDs were not

---

[6] The AG's attempt to use a CID to police academic debate caused a forceful and immediate outcry. *See* Ex. 17, Position Statement of Univ. of Va. Faculty Senate Exec. Council (May 5, 2010); Ex. 18, Letter from Law Professors (May 18, 2010); Ex. 19, E-mail from Chair, Env'tl Sciences (May 17, 2010); Ex. 20, Letter from Virginia Conference of American Ass'n of Univ. Professors (May 6, 2010); Ex. 23, Declaration of President of American Council on Educ. (June 2, 2010); Ex. 21, Letter from Foundation for Individual Rights in Educ. (May 12, 2010); Ex. 22, T. Fuller, Global Warming: Open Letter to Virginia AG (May 2, 2010).

enforceable because they did not comply with FATA: They did not state the nature of any conduct the AG was investigating as a potential violation of FATA; the AG did not satisfy the "reason to believe" requirement; and FATA does not permit the issuance of CIDs to Commonwealth agencies.

After full briefing and a hearing, the circuit court set aside the CIDs. In addressing the "reason to believe" provision of FATA, the court rejected the AG's argument that FATA gave the office "unbridled discretion" that a court could not review. Letter Op. 3. It held that the AG must "have some objective basis to issue a [CID], which the Court has power to review." *Id.* As to the "nature of the conduct" requirement, it found that while the CIDs referenced provisions of FATA and listed five grants, "[w]hat the Attorney General suspects that Dr. Mann did that was false or fraudulent in obtaining funds from the Commonwealth is simply not stated." *Id.* at 3-4. And it explained that loosely alluding to a debate over climate change research—which is all the AG did in its brief and at the hearing—gave no indication of how the AG suspected Dr. Mann may have violated FATA in his work on the five grants. *Id.* The circuit court also rejected the argument that FATA provided the AG with authority to investigate how *federal* grant funds were obtained or paid. *Id.* at 5.

The circuit court addressed the University's argument that it was not

a "person" subject to a CID because the General Assembly did not define "person" in FATA to include Commonwealth entities—unlike in other statutes where that distinction is expressly drawn. It concluded that because the University is a corporation, in addition to being a Commonwealth agency, the University can be served with a CID. *Id.* at 4.

The circuit court entered judgment for the University. *See* Order.

STANDARD OF REVIEW

The AG maintains that a *de novo* standard of review applies and asserts—without citation—an entitlement to "reasonable inferences" in its favor. Wrong and wrong. The abuse of discretion standard applies, and as the prevailing party below, *the University* is the one entitled to reasonable inferences in its favor. *Bottoms v. Bottoms*, 249 Va. 410, 414 (1995).

Whether to set aside a CID is a discretionary decision for a circuit court. *E.g., In re Civil Investigative Demand*, 1981 WL 291003, at *13 (Va. Cir. Ct. June 3, 1981). That decision is reviewed for an abuse of discretion—just like appellate review of a quashed subpoena or a discovery protective order. *E.g., America Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350, 359 (2001). FATA itself directs that the standard applicable to subpoenas applies to FATA CIDs. Va. Code § 8.01-216.12.

The abuse-of-discretion standard is highly deferential. As the Court

recently explained:

> The essence of any discretionary determination is the exercise of judgment. Only when the record does not fairly support the circuit court's exercise of its judgment will we say that an abuse of discretion has occurred.

Hawthorne v. VanMarter, 279 Va. 566, 577 (2010). While legal questions underlying the discretionary determination are reviewed *de novo*, "the judgment of a trial court comes to an appellate court with a presumption that the law was correctly applied to the facts." *Bottoms*, 249 Va. at 414. "And, the appellate court should view the facts *in the light most favorable to the party prevailing before the trial court.*" *Id.* (emphasis added).

ARGUMENT

The Circuit Court Was Within Its Discretion To Set Aside The CIDs.

A CID is enforceable only if it was issued in compliance with applicable statutory requirements. The court's role in enforcing those limitations is critical: "The requirement that subpoenas be used only for a legitimate and authorized governmental purpose prohibits the government from 'engag[ing] in arbitrary fishing expeditions' and from 'select[ing] targets of investigation out of malice or an intent to harass.' " *In re Subpoena Duces Tecum*, 228 F.3d 341, 349 (4th Cir. 2000) (quoting *United States v. R. Enters. Inc.*, 498 U.S. 292, 299 (1991)).

A. The CIDs did not "state the nature of the conduct constituting an alleged violation of [FATA] that is under investigation."

FATA requires that a CID state "*the nature of the conduct constituting the alleged violation of [FATA] that is under investigation.*" Va. Code § 8.01-216.11. The circuit court correctly found that the CIDs here did not meet this statutory requirement; from reading the CIDs, "no reasonable person could glean what Dr. Mann did to violate the statute." Letter Op. 3.

The AG contended below, and contends again in its Petition here, that the circuit court should have found that the CIDs met this statutory requirement because the AG believes that the University "understands what is being investigated." Pet. 24; *see also* AG Opp. to Univ. Br. 23. The University makes no such concession. But in any event, the FATA requirement is not that a CID recipient "understand" what the AG is seeking; it is that the AG state the alleged violation of FATA that it is investigating, as a check on the AG's authority to use (and potentially abuse) a powerful investigative tool like a CID. The circuit court reasonably concluded that reciting three FATA subsections, some academic criticism of climate change research, and five grants on which Dr. Mann worked does not identify any conduct constituting an alleged violation of FATA—particularly when four of the grants are federal and *none* of them is

mentioned in the critiques forming the basis of the AG's attack.[7]

The AG contends that the circuit court required it to specifically state that Dr. Mann "committed fraud," which the AG cannot do in a pre-suit investigation. Pet. 23-24. The court did not require the AG to do any such thing. It found that the CIDs did not indicate "[w]hat the Attorney General suspects that Dr. Mann did that was false or fraudulent in obtaining funds from the Commonwealth." Letter Op. at 4. The circuit court emphasized that when it asked the AG's counsel at oral argument what conduct by Dr. Mann the AG was investigating as a FATA violation, counsel merely referred the court to the statement of facts in its brief below (which is an expanded version of the statement of facts in the AG's Petition). *Id.* To the extent the AG believes a FATA CID should not have to "state the nature of the conduct constituting the alleged violation of [FATA] that is under investigation," the AG's appeal is misdirected. That language comes directly from the statute, Va. Code § 8.01-216.11.

---

[7] To state conduct constituting an alleged FATA violation, the AG must do more than identify a scientific dispute. *See U.S. ex rel. Milam v. Regents of Univ. of Cal.*, 912 F. Supp. 868, 886 (D. Md. 1995) (a "legitimate scientific dispute" is "not a fraud case"); *see also U.S. ex rel. Owens v. First Kuwaiti General Trading & Contracting Co.*, 612 F.3d 724, 734 (4th Cir. 2010) (" 'the common failings of engineers and other scientists are not culpable under the [False Claims Act]' ") (citation omitted); *Wang v. FMC Corp.*, 975 F.2d 1412, 1420-21 (9th Cir. 1992) (the False Claims Act "is concerned with ferreting out 'wrongdoing,' not scientific errors" and "would not put either Ptolemy or Copernicus on trial") (citation omitted).

The Court's decision in *Paramount Builders, Inc. v. Commonwealth*, 260 Va. 22 (2000) reinforces that review is not warranted here. That case addressed whether a Consumer Protection Act CID met a similar statutory requirement to state the nature of the conduct alleged to be a violation. The Court found that the AG met that requirement *by alleging conduct that if true would amount to violations*—such as that Paramount "failed to leave copies of the contracts and signed 'right to cancel' waivers at consumers' homes or failed to give such copies to consumers upon request in a timely manner in violation of §§ 59.1-21.4(2) and 59.1-200(19)" and "misrepresented that Paramount was the 'sole distributor' or only 'locally authorized dealer of various building supplies' in violation of § 59.1-200(3)." *Id.* at 26-27. The CIDs issued to the University contained nothing remotely akin to such specific statements.

B. The AG failed to provide an objective "reason to believe" that the requested information was relevant to investigating a potential FATA violation by Dr. Mann.

The AG next argues that the circuit court decision should be reviewed because the court rejected the AG's argument that FATA's "reason to believe" standard grants the AG unbridled discretion to issue CIDs so long as the AG subjectively believes that the documents requested are relevant to a FATA investigation. The circuit court held—consistent with the view of

every other court to address the issue—that the "reason to believe" analysis is an objective, not subjective, one. Letter Op. 3; *Check'n Go of Fla., Inc. v. State*, 790 So. 2d 454, 456-57 (Fla. App. Ct. 2001) (interpreting "reason to believe" under Florida statute); *Evans v. State*, 963 P.2d 177, 183 (Utah 1998) (requiring objective evidence to satisfy "reasonable cause" standard under Utah law). Requiring an objectively reasonable belief ensures that an investigation is more than just a "fishing expedition." *Check 'n Go*, 790 So. 2d at 456-57, 460; *see also Major League Baseball v. Crist*, 331 F.3d 1177, 1186-88 (11th Cir. 2003) (in issuing a CID, an AG "must have more than a mere intuition that illegal activity is afoot").

The AG relatedly argues that the circuit court required it to have "an actual belief" rather than a "reason to believe." Pet. 18. Again, the AG is misstating the circuit court's decision. The circuit court found that the AG did not have an objective basis for believing that the University had materials relevant to a FATA investigation, where the AG could not even state what conduct of Dr. Mann's related to the five grants it was investigating. Letter Op. 3, 6.

The AG in response continues to offer the perfectly circular rationale it offered below: it can issue CIDs for information relevant to an investigation so long as the AG says that it is conducting an investigation to

which the information is relevant. This *ipso facto* contention misses the obvious and central limitation on the AG's authority under FATA: the AG is only authorized to investigate *FATA violations*. Va. Code § 8.01-216.2 (definition of "investigation"); *id.* § 8.01-216.4 (AG "shall investigate any violation of § 8.01-216.3"). In that regard, the AG's repeated citation to and reliance on *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), is misplaced. Among other things, that case did not involve an administrative subpoena, nor a "reason to believe" statutory requirement.[8]

The AG complains that circuit court looked for the AG's "reason to believe" on the face of the CID. Pet. 20. But since the only "facts" the AG offered related to a discourse on things like the Little Ice Age and Post-Normal Science, it was reasonable for the court to try to discern whether the AG had satisfied the "reason to believe" requirement by looking at the conduct the AG was investigating as articulated in the CIDs and the statutory provisions purportedly at issue. Absent any objective showing by the AG, this attempt by the court to shed light on whether the AG satisfied the "reason to believe" standard was far from an abuse of discretion.

---

[8] *Morton Salt* in no way eliminated the "requirement that subpoenas be used only for a legitimate and authorized governmental purpose." *In re Subpoena Duces Tecum*, 228 F.3d at 349 (discussing *Morton Salt* and holding that "[t]he value of constraining governmental power . . . is nevertheless recognized in the judicial supervision of subpoenas").

It was not enough for the AG to assert a "reason to believe" some scientists may have manipulated data in some climate science research (despite the contrary conclusions of every other scientific and governmental body that has investigated such claims). Rather, the AG must have "reason to believe" that a *FATA violation was committed with respect to the five grants it purports to be investigating*. The AG listed these five grants in the CIDs because they happened to be on Dr. Mann's CV and reference the University. (And the CIDs were issued just eight days after the AG filed a motion in its EPA lawsuit seeking to add new evidence there, *see* Ex. 12). The unique facts of this case—viewed as they must be "in the light most favorable to the party prevailing before the trial court," *Bottoms*, 249 Va. at 414—fully support the circuit court's judgment.

C. The circuit court correctly concluded that FATA does not authorize the AG to investigate federal grant funding decisions.

Once more mistakenly asserting that it is entitled to "all inferences" in its favor, the AG also asks the Court to review the circuit court's conclusion that the AG's CID authority does not extend to investigating grants that are sought from and paid by the federal government. Pet. 27. Again, it is the University—not the AG—that is the party entitled to inferences in its favor. *Bottoms*, 249 Va. at 414. In addition, the AG offers no support for its unprecedented contention that it can investigate the contents of *federal*

grant applications seeking funding from *federal agencies* and claims submitted for those *federal grant dollars*. *See* Va. Code § 8.01-216.2 (definition of "claim" requires Commonwealth funds). The circuit court correctly held that the CIDs exceed FATA's limited investigatory authorization in seeking information about federal grants.

The federal government maintains and enforces extensive regulations for the application and receipt of federal grant funding as well as detailed post-grant requirements. *See generally* 2 C.F.R. Parts 215 & 220. Despite the AG's apparent concern that the *federal grantors* on the four federal grants listed in the CIDs may not have understood scientific "jargon" in the applications, Pet. 14, the AG's FATA investigatory authority does not extend to policing federal grantors' comprehension of scientific terms in federal grant applications. Because the AG provides no support for the argument that a researcher's efforts to apply for or conduct research under a *federal* grant can somehow result in a violation of *Virginia's* false claims statute, there is no basis to grant review.

D. The circuit court's suggestions of what the AG could investigate under FATA is dicta that does not warrant review.

The Petition closes with a catch-all fifth assignment of error regarding what right of inquiry the AG can undertake in a future FATA-compliant CID. Pet. 31-32. The circuit court suggested that the AG could investigate as a

FATA violation Dr. Mann's conduct under the University-funded FEST grant after FATA's effective date, and that the AG could seek materials contained in that grant application or provided by or to Dr. Mann related to approval or payment of funds under that grant. Letter Op. 5-6. It also suggested that although FATA applies only prospectively after January 1, 2003, a CID could seek information pre-dating FATA as reasonable discovery to evaluate later conduct. *Id.* at 6. The AG seeks this Court's review of these forward-looking, and at this point hypothetical, opinions.

The circuit court's advice as to what might be permissible under FATA was both advisory and dicta; the AG has not issued a CID on those terms. The AG's reason for seeking review is based on speculative hypotheticals about what the AG *might* later seek in another CID that *might* fall outside the scope of materials discussed by the circuit court. This Court lacks the power to issue advisory opinions, *see, e.g., Martin v. Ziherl,* 269 Va. 35, 40 (2005), and should not use its limited resources to review dicta. There is no basis to review this issue, and especially not to resolve a theoretical conflict with a CID that has not yet issued.

ARGUMENT IN SUPPORT OF CROSS-ERROR

The General Assembly Did Not Authorize CIDs To Be Served On Commonwealth Entities Like The University.

FATA authorizes CIDs to be issued to a "person" who may possess

documentary material or information relevant to investigating FATA violations. Va. Code § 8.01-216.10. FATA defines "person" as including corporations, but not Commonwealth entities. *Id.* § 8.01-216.2. In contrast, FATA defines "Commonwealth" as encompassing "agenc[ies]" of the Commonwealth, like the University. *Id.* The circuit court held that because the University is both a corporation and a state agency, it should be considered a "person" subject to a CID. Letter Op. 4. That was legal error.

The AG concedes that FATA is a statute of general application. Pet. 25. It is a well-established principle that Commonwealth entities are not bound by statutes of general application "unless named expressly or included by necessary implication." *Com. ex rel. Pross v. Board of Sup'rs of Spotsylvania Cnty.*, 225 Va. 492, 494 (1983); *see also Richard L. Deal & Assocs. v. Com.*, 224 Va. 618, 620 (1983); *Jones v. Com.*, 267 Va. 218, 224-25 (2004). Here, instead of including the Commonwealth and her agencies within the definition of "person," the General Assembly expressly placed the University within the definition of "Commonwealth."

That is important. FATA's definitions deviate from the federal civil False Claims Act ("FCA"), to which FATA otherwise generally follows form. The FCA defines "person" for purposes of CIDs to "includ[e] any State or political subdivision of a State." 31 U.S.C. § 3733(*l*)(4). The General

Assembly's omission of similar phrasing in FATA demonstrates that it did not intend for state entities like the University to have to respond to CIDs.

In enacting laws, the General Assembly is presumed to be fully aware of the state of the law—and to accept that state of the law unless it states to the contrary. *See, e.g., Andrews v. Com.*, 280 Va. 231, 286 (2010); *Weathers v. Com.*, 262 Va. 803, 805 (2001); *Waterman v. Halverson*, 261 Va. 203, 207 (2001). The relevant state of the law has long been that Commonwealth entities are not bound by statutes of general application—like FATA's CID provision—"unless named expressly or included by necessary implication." *Com. ex rel. Pross*, 225 Va. at 494; *see also Com. v. AMEC Civil, LLC*, 280 Va. 396, 426 (2010) (Commonwealth agency not liable for pre-judgment interest where no statute specifically provides for payment of pre-judgment interest by Commonwealth agencies). The General Assembly plainly did not intend for Commonwealth agencies to be subjected to the costs and burdens of responding to CIDs.

Moreover, the General Assembly's choice of definitions can only be a purposeful one, since it has defined "person" to include state entities in other statutes. *See, e.g.*, Va. Code §§ 1-230, 5.1-1, 8.01-412.9. The only other case that the University has found addressing a state legislature's choice to deviate from the federal definition of person for purposes of CID

authority recognized the significance of this divergence. *See Simonian v. Univ. & Cmty. Coll. Sys. of Nev.*, 128 P.3d 1057, 1061 (Nev. 2006). If not reviewed, the circuit court's decision would permit plaintiffs in a wide variety of contexts to seek to foist on the University, and all public corporations in the Commonwealth, all of the legal obligations that flow from corporate status. But this Court has made clear that the corporate structure of the University does not negate its status as an agency of the Commonwealth. *See James v. Jane*, 221 Va. 43, 51 (1980) ("The University of Virginia is controlled by 'the Rector and Visitors of the University of Virginia,' a public corporation created for that purpose. . . . [N]o one questions the fact that this agency of the Commonwealth of Virginia is entitled to the protection of the immunity of the state.") (citation omitted).[9] Review is needed to protect public corporations in the Commonwealth from shouldering costs, burdens, and liabilities that the General Assembly did not intend them to bear.

CONCLUSION

For the foregoing reasons, the University respectfully requests that the AG's Petition for Appeal be denied and that the University's assignment of cross-error be reviewed.

[9] In similar situations, other courts have recognized that attempts to enforce a subpoena against a sovereign entity raise the same sort of immunity issues that arise in other contexts. *See, e.g., Al Fayed v. C.I.A.*, 229 F.3d 272, 274 (D.C. Cir. 2000); *COMSAT Corp. v. National Sci. Found.*, 190 F.3d 269, 277 (4th Cir. 1999).

Date: January 6, 2011

Respectfully submitted,

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA

By Counsel:

Chuck Rosenberg /per

Chuck Rosenberg (VSB No. 44727)
Jessica L. Ellsworth (VSB No. 46832)
HOGAN LOVELLS US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
Telephone: (202) 637-5600
Facsimile: (202) 637-5910
chuck.rosenberg@hoganlovells.com
jessica.ellsworth@hoganlovells.com

N. Thomas Connally (VSB No. 36318)
Jon M. Talotta (VSB No. 44590)
HOGAN LOVELLS US LLP
Park Place II
7930 Jones Branch Drive
McLean, VA 22102
Telephone: (703) 610-6100
Facsimile: (703) 610-6200
tom.connally@hoganlovells.com
jon.talotta@hoganlovells.com

Counsel for the Rector and Visitors of the University of Virginia

OF COUNSEL:

Stephanie J. Gold, Esq.
Catherine E. Stetson, Esq.
HOGAN LOVELLS US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
Telephone: (202) 637-5600
Facsimile: (202) 637-5910
stephanie.gold@hoganlovells.com
cate.stetson@hoganlovells.com

APPENDIX

The five grants listed in the CIDs, copied verbatim from Dr. Mann's publicly available CV, are:

2003-2006 *Decadal Variability in the Tropical Indo-Pacific: Integrating Paleo & Coupled Model Results*, **<u>NOAA-Climate Change Data & Detection (CCDD) Program</u>** [Principal Investigators: M.E. Mann (U. Va), J. Cole (U. Arizona), V. Mehta (CRCES)] U. Va award (M.E. Mann): $102,000

2002-2005 *Remote Observations of Ice Sheet Surface Temperature: Toward Multi-Proxy Reconstruction of Antarctic Climate Variability*, **<u>NSF-Office of Polar Programs, Antarctic Oceans and Climate System</u>** [Principal Investigators: M.E. Mann (U. Va), E. Steig (U. Wash.), D. Weinbrenner (U. Wash)] U. Va award (M.E. Mann): $133,000

2002-2003 *Paleoclimatic Reconstructions of the Arctic Oscillation*, **<u>NOAA-Cooperative Institute for Arctic Research (CIFAR) Program</u>** [Principal Investigators: Rosanne D'Arrigo, Ed Cook (Lamont/Columbia); Co-Investigator: M.E. Mann] U. Va subcontract (M.E. Mann): $14,400

2002-2003 *Global Multidecadal-to-Century-Scale Oscillations During the Last 1000 years*, **<u>NOAA-Climate Change Data & Detection (CCDD) Program</u>** [Principal Investigator: Malcolm Hughes (Univ. of Arizona); Co-Investigators: M.E. Mann; J. Park (Yale University)] U. Va subcontract (M.E. Mann): $20,775

2001-2003 *Resolving the Scale-wise Sensitivities in the Dynamical Coupling Between Climate and the Biosphere*, **<u>University of Virginia-Fund for Excellence in Science and Technology (FEST)</u>** [Principal Investigator: J.D. Albertson; Co-Investigators: H. Epstein, M.E. Mann] U. Va internal award: $214,700

See AG Answer, Ex. B, Curriculum Vitae of Dr. Mann, *available at* http://www.meteo.psu.edu/~mann/Mann/cv/cv.html. The grantor is underlined and bolded for ease of reference.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January 2011, a true and correct copy of the foregoing was served by U.S. Certified Mail, postage prepaid, as follows:

Kenneth T. Cuccinelli, II
Attorney General
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2071
Facsimile: (804) 786-1991

Wesley G. Russell, Jr.
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2071
Facsimile: (804) 786-1991

Mr. Russell represents the sole appellant in this matter, Kenneth T. Cuccinelli, II, in his capacity as Attorney General of Virginia.

I represent the Rector and Visitors of the University of Virginia, the sole appellee in this matter. My contact information is as follows:

Chuck Rosenberg (VSB No. 44727)
HOGAN LOVELLS US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
Telephone: (202) 637-5600
Facsimile: (202) 637-5910

I further certify that I have filed 7 printed copies of the Brief in Opposition with the Clerk of this Court, that the Brief in Opposition does not exceed 25 pages, and that I have otherwise complied with the requirements of Rule 5:18 of the Rules of the Supreme Court of Virginia.

I request notice of any oral argument before a panel of this Court regarding the Petition for Appeal or the University's cross-assignment of error.

Chuck Rosenberg

Chuck Rosenberg
Counsel for Rector and Visitors of the University of Virginia

Dated: January 6, 2011