Record No. 06-7890

IN THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOSEPH M. GIARRATANO,

Plaintiff-Appellant,

v.

GENE JOHNSON, et al.,

Defendants-Appellees.

On Appeal From The United States District Court for the
Western District of Virginia, Big Stone Gap Division

APPELLANT'S OPENING BRIEF

Rebecca K. Glenberg
American Civil Liberties Union
of Virginia Foundation, Inc.
530 E. Main Street, Suite 310
Richmond, VA 23219
(804) 644-8080
(804) 649-2733 (fax)
rglenberg@acluva.org

R. Frazier Solsberry, VSB #31016
103 East Water Street, Suite 301
Charlottesville, VA 22902
(434) 296-2220

Steven D. Rosenfield
913 E. Jefferson Street
Charlottesville, VA 22902
(434) 984-0300
(434) 220-4852 (fax)
attyrosen@aol.com

Counsel for Appellant

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over the constitutional claims below pursuant to 28 U.S.C. §§1331 and 1343. This Court has jurisdiction over this appeal under 28 U.S.C. §1291 from the final judgment below, which was entered October 16, 2006 and disposed of all claims in the case. The notice of appeal in this case was filed November 8, 2006. J.A. 25.

STATEMENT OF THE ISSUES

1) Whether the District Court erred in dismissing plaintiff's claim that Virginia's statutory exclusion of prisoners from making requests under the Freedom of Information Act (FOIA) violates the equal protection clause, without giving plaintiff an opportunity to present evidence or conduct discovery.

2) Whether the District Court erred in ruling that a prisoner who is not allowed access to the protocols for treatment of his serious medical condition has not been denied access to the court.

STATEMENT OF THE CASE

On January 19, 2006, Joseph Giarratano, a state prisoner at the Red Onion State Prison located in Pound, Virginia, filed suit against the Director of the Virginia Department of Corrections and the warden of his facility. Pursuant to 42 U.S.C. 1983, he alleged that the provision in Virginia's

FOIA. which excluded him from accessing the protocols regarding the treatment of his Hepatitis C, violated his Fourteenth Amendment rights to equal protection of the law, both facially and as applied to him, as well as his right to access to the courts.

On March 27, 2006, the state filed a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6). A hearing was held on June 1, 2006, and the Court rendered an opinion and final judgment on October 16, 2006 granting the state's motion and dismissing the case.

STATEMENT OF THE FACTS

Giarratano is a Virginia state prisoner who has Hepatitis C (HCV), a blood borne, potentially fatal virus that infects and damages the liver. (J.A. 6.) Giarratano twice asked the Virginia Department of Corrections (VDOC) to provide him, at his own expense, a copy of the department's protocols for the treatment of Hepatitis C. (J.A. 7.) The first request was made informally through his institution's medical department, the second under the Virginia Freedom of Information Act (FOIA). Both times, he was denied access to the protocol for treating his condition because prisoners are excluded from requesting documents under FOIA. (J.A. 7.) The documents requested by Giarratano are public records available under FOIA to any non-

incarcerated citizen of Virginia, and would not in any way threaten the security or safe and orderly administration of any VDOC facility. (J.A. 7.)

Giarratano sought this information so that he may intelligently exercise his judgment in personal medical decisions, and make an informed decision as to whether litigation was warranted for the non-treatment of his serious medical need. (J.A. 7.) Giarratano has never filed a frivolous request for information, nor has he ever filed a request in order to vex or harass a government official. (J.A. 8.) He has at all times been willing to pay the costs of duplicating the requested records. *Id.*

SUMMARY OF ARGUMENT

The court below erred in dismissing Giarratano's claim that FOIA's prisoner exclusion violates the Equal Protection Clause of the Fourteenth Amendment. The district court concluded that the prisoner exclusion was rational because the legislature could rationally assume that prisoners are likely to misuse FOIA to harass prison officials, but did not afford Giarratano an opportunity to discover facts and present evidence that might disprove that assumption. Even when a piece of legislation need only be rationally related to a legitimate governmental interest, courts often carefully examine the facts to determine whether such a rational basis exists.

The district court also erred in holding that Giarratano's access to courts was denied. The court was wrong to conclude that Giarratano had access to the courts since he was allowed to physically file a lawsuit challenging the treatment he was receiving. In fact, Giarratano cannot file a non-frivolous Eighth Amendment claim without alleging a factual basis for his contention that prison officials are deliberately indifferent to his serious medical need. The policy he seeks is instrumental in making those allegations. The district court failed to account for the practical implication of denying Girratano access to the very policies that a non-frivolous lawsuit might challenge.

STANDARD OF REVIEW

A dismissal for failure to state a claim is reviewed de novo. *Glaser v. Enzo Biochem, Inc.*, 464 F.3d 474, 476 (2006). "A complaint should not be dismissed unless there is no set of facts on which relief can be granted, with all well-pled allegations of the complaint viewed as true and drawing all reasonable inferences in favor of the plaintiff." *Id*. (citing *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001); *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)).

ARGUMENT

The Virginia Freedom of Information Act, Va. Code § 2.2-3700 *et seq.* (FOIA), was enacted to ensure that citizens had an opportunity to understand their government, and that government would be accountable to the populace. The statute's statement of purpose declares that "[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government." Va. Code §2.2 3700. Under the statute, citizens must be allowed access to public records of the state and localities. Va. Code 2.2-3704.

From its inception in 1968 to nearly thirty years later, FOIA allowed all citizens, including those incarcerated, to receive public records. A 1997 amendment, however, provides that FOIA shall not "afford any rights to any person incarcerated in a state, local or federal correctional facility." Va. Code § 2.2-3703 (C) (hereinafter, the "prisoner exclusion"). Giarratano claims that this exclusion violates his rights under the Equal Protection Clause of the Fourteenth Amendment and his right to access to the courts.[1]

[1] While every state has an open records law, plaintiff is only aware of seven other states that exclude inmates from requesting records. *See* Mich. Comp. Laws Ann. § 15.231; La. Rev. Stat. Ann. § 44:31; Tex. Gov't. Code Ann. §552.028y; Wis. Stat. Ann. § 19.31-.37; N.J. Stat. Ann. § 47:1A-1; Conn. Gen. Stat. Ann. § 1-210 ; Ohio Rev. Code Ann. § 149.43. In contrast, every

I. THE DISTRICT COURT ERRED IN DISMISSING GIARRATANO'S EQUAL PROTECTION CLAIM.

A. The District Court Should Have Allowed Giarratano to Discover and Present Evidence to Disprove the Government's Asserted Rational Basis for the Prisoner Exclusion.

A statute violates the Equal Protection Clause if it draws a distinguishes among groups of people without a rational basis. The district court dismissed this case because it concluded that "the Virginia General Assembly could have believed that inmates are intrinsically prone to abuse the VFOIA request provisions and that such frivolous requests would unduly burden state resources." (J.A. 18.) But the question of whether this belief is

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other state and the federal government provide access to public records for all persons or all citizens. *See* 5 U.S.C. §§ 551, 552; Cal. Gov't Code § 6253; Colo. Rev. Stat. § 24-72-203; 29 Del. Code Ann. § 10003; D.C. Code Ann. § 2-531; Fla. Stat. Ann. § 119.01; Ga. Code Ann. § 50-18-70; Haw. Rev. Stat. Ann. § 92F-11; Idaho Code § 9-338; 5 Ill. Comp. Stat. Ann. 140/1; Ind. Code 5-14-3-1; Iowa Code Ann. § 22.2; Kan. Stat. Ann. § 45-218; Ky. Rev. Stat. Ann. § 61.872; La. Rev. Stat. Ann. § 44:31; Me. Rev. Stat. Ann. tit. 1, § 401; Md. Code Ann., State Gov't § 10-612; Mass. Gen. Laws Ann. ch. 66, § 10; Minn. Stat. Ann. § 13.02; Miss. Code Ann. § 25-61-5; Mo. Ann. Stat. § 109.180; Mont. Code Ann. § 2-6-102; Neb. Rev. Stat. Ann. § 84-712; Nev. Rev. Stat. § 239.010; N.C. Gen. Stat. § 132-1; N.D. Cent. Code § 44-04-18; N.H. Rev. Stat. Ann. § 91-A:4; N.M. Stat. Ann. § 14-2-1; N.Y. Pub. Off. Law § 87; Okla. Stat. Ann. tit. 51, § 24A.3; Or. Rev. Stat. § 192.420; 65 Pa. Cons. Stat. Ann. § 66.1; R.I. Gen. Laws § 38-2-2; S.C. Code Ann. § 30-4-30; S.D. Codified Laws Ann. § 1-27-1; Tenn. Code Ann. § 10-7-503; Utah Code Ann. § 63-2-102; Vt. Stat. Ann. tit. 1, § 315; Wash. Rev. Code Ann. § 42.17.260; W. Va. Code Ann. § 29B-1-2; Wyo. Stat. § 16-4-201.

rational depends of facts, and Giarratano ought to have been given an opportunity to disprove the asserted rational basis.

Giarratano recognizes that the rational basis standard is intended to be deferential to the legislature, and that "rational distinctions may be made with substantially less than mathematical exactitude." *New Orleans v. Dukes*, 427 U.S. 297 (1976). But that does not mean that the basis for a classification may be utterly divorced from the facts. Instead, even under a rational basis standard, legislation "must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993). Thus, "[w]here the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 (1938).

Accordingly, where the factual basis of a statute or a government action has been in doubt, neither this Court and the Supreme Court has hesitated to examine the factual record closely before determining whether a rational basis does or does not exist. For example, in *City of Cleburne v.*

Cleburne Living Center, 473 U.S. 432 (1985), the Supreme Court considered whether a city zoning code could require a group home for developmentally disabled adults to obtain a special use permit, where similar living arrangements, such as nursing homes, did not require a permit. The Court held that mental retardation was not a "suspect classification" that would justify heightened scrutiny of the statute, and that "legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose." 473 U.S. at 446.

In applying the rational basis standard, the Court considered whether each of the city's rationales for requiring a special use permit was legitimate, and whether it supported by the facts in the record. The Court first found that the negative attitudes of the neighbors was not a sufficient basis, because "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from" similar uses. *Id.* at 448. Similarly, the "vague undifferentiated fear[]" that students from a nearby school would harass residents of the home was not a rational basis for the distinction. The Court further found that concerns about the size of the home and the number of occupants was not rational, were there would be

no restrictions on the number of people who could live in a nursing home or other similar housing:

> It is true that they suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent. At least *this record* does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes. . . .[T] he City never *justifies* its apparent view that other people can live under such "crowded" conditions when mentally retarded persons cannot.

Id. at 449-450 (emphasis added) (quotation marks and internal citation omitted). The Court did not credit the city's proffered rational bases where the facts did not support them.

Similarly, in *Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Court, applying rational basis, struck down an amendment to the Food Stamp Act that prohibited any household containing unrelated persons from receiving food stamps. The government contended that the exclusion was rationally related to its interest in reducing fraud in the food stamp program, because Congress could rationally believe that households with unrelated members were more likely to abuse the program. The Court rejected this rationale:

> [E]ven if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning the differences between 'related' and 'unrelated' households we still could not agree with the Government's conclusion that the denial of essential federal food

> assistance to all otherwise eligible households containing unrelated members constitutes a rational effort to deal with those concerns.

413 U.S. at 535-36. The Court went on to explain that this distinction would not affect "hippies," at whom the amendment was apparently directed, but would instead affect low-income mothers and children who shared housing in order to raise their standard of living. *Id.* at 537-38. Thus, "*in practical effect,* the challenged classification simply does not operate so as rationally to further the prevention of fraud." *Id.* at 537 (emphasis added).

In *Morrison v. Garraghty,* 239 F.3d 648 (4th Cir. 2001), this Court engaged in the same kind of fact-based rational basis analysis in the prison context. In *Morrison*, a Caucasian prison inmate who practiced what he called "Native American spirituality" challenged a rule that restricted certain religious objects to inmates who were of Native American ancestry. Applying a rational basis test,[2] the Court held that the rule violated the Equal Protection Clause. The Court rejected the prison's explanation that the rule was intended to limit the religious items to prisoners who had a sincere belief in Native American religions. The Court noted that "defendants had failed to present any convincing *evidence* for the broad proposition that race is a prerequisite for a sincere belief in Native American theology." 239 F.3d

[2] *Morrison* was decided before *Johnson v. California*, 543 U.S. 499 (2005), made clear that strict scrutiny governs inmates' claims of race discrimination.

at 659 (emphasis added). The Court further rejected the notion that the rule was related to the prison's interests in safety and security. The Court noted that "defendants have failed to demonstrate that the requested spiritual items are any less dangerous in the hands of a Native American inmate, as opposed to a non-Native American inmate who sincerely wishes to practice Native American spirituality." *Id.* at 660. "Nor was there any *evidence* that one group, but not the other, has abused or misused such items in the past." *Id.* at 660-61 (emphasis added).

The common thread that runs through *Cleburne*, *Moreno*, and *Morrison* is that in each instance, the court refused simply to accept the government's assumptions about a particular group of people. It was not enough that the government might have believed that developmentally disabled people were incapable of living near a school, that unrelated household members were prone to food stamp fraud, or that Caucasian inmates could not be trusted with Native American spiritual items. Instead, the courts evaluated whether those beliefs were reasonable in light of the *facts*. In this case, the district court should not have simply accepted the government's claim that prison inmates are prone to abuse FOIA, without allowing Giarratano to show, using evidence, that this belief is baseless.

Of course, in order to conduct such an evaluation, there must be an opportunity to discover evidence, as this Court made clear in *Willis v. Town of Marshall*, 426 F.3d 251 (4th Cir. 2005). In that case, the plaintiff was banned from weekly, town-sponsored concerts at which dancing took place. Ostensibly, she was banned because of her "lewd" dancing style. While the Court affirmed the dismissal of her First Amendment and due process claims, it held that she had stated a claim under the Equal Protection Clause. The plaintiff claimed that others had danced similarly, but she was singled out for punishment. The town responded that it had received complaints about her, and not any other dancer. The Court held that this assertion could not suffice where the plaintiff had not had an opportunity for discovery:

> Although the Town asserts in its argument that it received no complaints about any other Depot dancer, there is no *evidence* in the record demonstrating the absence of complaints. Whether complaints were or were not received is a matter wholly within the knowledge of the Town. Because the district court granted summary judgment before allowing any discovery, Willis had no opportunity to demonstrate others situated similarly in this regard were not treated similarly.

426 F.3d at 263. (emphasis in original).

In the present case, as well, the evidence that could support or undermine the VDOC's claimed rational basis is wholly in the possession of VDOC. Only VDOC and its employees know whether, prior to 1997,

inmates were actually prone to frivolous FOIA requests. Giarratano should have a chance to discover that evidence.

Whether something is rational or irrational depends on the underlying facts. The district court should have allowed Giarratano to adduce the facts that might have proved VDOC's rationale to be irrational.[3]

B. The Court Erred In Dismissing Giarratano's As-Applied Equal Protection Claim.

In addition to his facial challenge under the Equal Protection Clause, Giarratano alleged that FOIA's prisoner exclusion was unconstitutional as applied to his request for the Hepatitis C protocols. "the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition." *Carolene Products*, 304 U.S. at 153-54.

[3] In addition to VDOC's claim that prisoners are likely to abuse FOIA, the district court suggested another "rational basis" for the prisoner exclusion: that "inmates have less of a need to access public records because their confinement greatly limits the amount of contact they have with state government." (J.A. 19.) The appellant disputes that this is a rational basis. In fact, inmates are completely under the control of the state in almost every aspect of their lives. This is especially true with respect to health care. *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976) ("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.")

In this case, even if it were true that prisoners were generally prone to frivolous FOIA requests, this is not true of Giarratano, who has never filed a FOIA request frivolously. Moreover, it is patently *not* frivolous for an inmate who suffers from Hepatitis C to seek the documents that explain his treatment, or lack thereof.

II. THE DISTRICT COURT ERRED IN DISMISSING GIARRATANO'S CLAIM OF DENIAL OF ACCESS TO THE COURTS.

For the better part of Giarratano's 28 years in the VDOC, he has not received treatment or monitoring for his HCV. His risk of suffering from cirrhosis of the liver or death increases as time goes on.[4] He may appear symptom free, but lurking is a possible time bomb which, if detected early on, can be treated and monitored. Delay in his treatment can result in dire consequences. Simple testing can save him from untold misery down the road. [5] But these facts are not sufficient to state a claim under the Eighth

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[4] "While infection can spontaneously clear during [the early] stage, 55–85 percent of HCV-infected persons proceed to the chronic HCV stage. . . Five to 20 percent of HCV-infected persons develop cirrhosis of the liver, which represents a significant risk for developing end-stage liver disease." *Comment: Hepatitis C In Prisons: Evolving Toward Decency Through Adequate Medical Care And Public Health Reform*, Andrew Brunsden, 54 U.C.L.A. L. Rev. 46554 U.C.L.A. L. Rev. 465, 473-74 (2006) (hereinafter, "*Hepatitis C In Prisons*").

[5] "The purpose of HCV treatment is 'to prevent complications of HCV treatment 'is to prevent complications of HCV infection[;] this is principally achieved by eradication of infection.' HCV-infected persons left untreated

Amendment unless he can allege that prison officials have been deliberately indifferent to his need for treatment. To make this allegation, he requires access to VDOC's HCV treatment protocol.

The Constitution[6] "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolf v. McDonnell*, 418 U.S. 539, 579 (1974). Mr. Giarratano thinks that prison officials may be deliberately indifferent to his need for treatment for HCV, in violation of the Eighth but he cannot file a well-pleaded complaint to that effect without seeing VDOC's HCV treatment policy. Without viewing the policy, Giarratano cannot allege that the policy is constitutionally inadequate, or that prison officials are failing to treat him in accord with the policy. Equally important, he does not know whether the non-treatment of his HCV is the

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are at risk for liver cirrhosis, end-stage liver disease, and death. While HCV is currently not curable, treatment can eradicate infection by reducing HCV to undetectable levels, avoiding death and other HCV complications." *Hepatitis C In Prisons*, 54 U.C.L.A. L. Rev. at 475 (internal footnote omitted).

[6] It is not completely clear whether this right exists under the First or the Fourteenth Amendment. *Cf. In re Primus,* 436 U.S. 412 (1978) (finding litigation protected by the First Amendment) *with Wolf v. McDonnell*, 418 U.S. 539 (1974) (finding right to access to courts in the Fourteenth Amendment), *with Lewis v. Casey*, 518 U.S. 343 (1996) (discussing the right to access to courts without identifying its origin).

result of prison officials legitimately following a constitutionally sound HCV policy.

The district court held that Giarratano's right to access to the court had not been violated because "[t]here is no indication that prison officials have in any way obstructed the ability of the plaintiff to file a suit alleging the treatment he has received for hepatitis C falls short of what is required under the Eighth Amendment." (J.A. 23.) But this ignores the fact that "*[m]eaningful* access to the courts is the touchstone." *Bounds v. Smith*, 430 U.S. 817, 823 (1977) (emphasis added; internal quotation marks and citation omitted). Giarratano certainly could certainly *physically* file a complaint that alleges that prison officials have violated the Eighth Amendment. But such a complaint would most likely be dismissed because he will be unable to allege facts supporting his mere conclusion that his rights are being violated. The Prison Litigation Reform Act, 28 U.S.C. 1915A(b)(1), provides that the court shall dismiss a complaint as soon as practicable if the court determines that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, and courts do not hesitate to do so. *See Lewis v. Casey*, 518 U.S. 343, 351 (1996) (suggesting that a prisoner could demonstrate a denial of access to the courts where "a complaint he prepared was dismissed for failure to satisfy some technical requirement which,

because of deficiencies in the prison's legal assistance facilities, he could not have known.")

De'lonta v. Angelone, 330 F.3d 630 (4th Cir. 2003), demonstrates how a prison policy relating to the treatment of particular conditions may be central to an inmate's Eighth Amendment claim. There, the plaintiff alleged that a VDOC policy barring medical treatment for gender identity disorder violated her rights under the Eighth Amendment. The district court dismissed the case, finding "that the suit was nothing more than a challenge to the medical judgment of VDOC doctors." 330 F.3d at 634. This Court reversed, noting that parts of the record indicated that VDOC's "refusal to provide hormone treatment to De'lonta was based solely on the Policy rather than on a medical judgment concerning De'lonta's specific circumstances." The policy's *per se* exclusion of De'lonta from treatment would violate the Eighth Amendment. *Id.* at 635. In *De'lonta*, the treatment policy was not simply a piece of evidence in the case, it was the very basis of the claim of deliberate indifference. *De'lonta* could not have asserted deliberate indifference had she not known of the policy. *See also Johnson v. Wright*, 412 F.3d 398, 406 (2d Cir. 2005) (reversing grant of summary judgment to defendants, in part because "a jury could find that the defendants acted with deliberate indifference by reflexively relying on the medical soundness of

the Guideline's substance abuse policy when they had been put on notice that the medically appropriate decision could be, instead, to depart from the Guideline. . . .")

The district court concluded that there is no constitutional requirement that "the plaintiff [be given] unfettered access to the public documents which he seeks simply because he wishes to evaluate whether he has a viable claim." (J.A. 23.) But Giarratano seeks only the ability to get into court with a well-pleaded complaint. His situation is akin to one who "suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint." *Lewis v. Casey*, 518 U.S. at 351. The only difference is that instead of failing to provide law books, the government has here refused to provide a public record, readily available and easily produced, that the plaintiff requires to file his complaint.

CONCLUSION

For the foregoing reasons, appellant respectfully requests the Court to reverse the judgment of the district court and remand for further proceedings.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument.

Dated: January 22, 2007

Respectfully submitted,

JOSEPH M. GIARRATANO

By counsel:

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Rebecca K. Glenberg
American Civil Liberties Union
of Virginia Foundation, Inc.
530 E. Main Street, Suite 310
Richmond, VA 23219
(804) 644-8080
(804) 649-2733 (fax)
rglenberg@acluva.org

Steven D. Rosenfield
913 E. Jefferson Street
Charlottesville, VA 22902
(434) 984-0300
(434) 220-4852 (fax)
attyrosen@aol.com

R. Frazier Solsberry, VSB #31016
103 East Water Street, Suite 301
Charlottesville, VA 22902
(434) 296-2220

CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct documents of the foregoing brief, and one copy of the Joint Appendix, by U.S. Mail, postage prepaid, addressed as follows:

William E. Thro
Mark. R. Davis
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
(804) 786-5631

_____
Rebecca K. Glenberg