In The
Court of Appeals of Virginia

RECORD NO. 2440-09-1

JAMES DARIO MACIEL, JR.,

***Appellant*,**

v.

COMMONWEALTH OF VIRGINIA,

***Appellee*.**

AMICUS CURIAE BRIEF IN OPPOSITION TO PETITION FOR APPEAL AND IN SUPPORT OF BRIEF IN OPPOSITION

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INTEREST OF THE VIRGINIA ASSOCIATION OF COLLEGE AND UNIVERSITY HOUSING OFFICERS AND SUMMARY OF ARGUMENT

The Virginia Association of College and University Housing Officers ("VACUHO") is a non-profit organization dedicated to the education and professional development of housing and residence life staff at institutions of higher education in Virginia. There are forty-three (43) residential colleges and universities in Virginia, all of which are members of VACUHO.[1] Twenty-seven (27) of these colleges and

[1] VACUHO's Members are as follows: **Southeastern Region:** Christopher Newport University, Norfolk State University, Virginia Wesleyan College, College of William & Mary, Old Dominion University, Hampton University, Regent University; **Capital Region:** Randolph Macon College, University of Richmond, Virginia State University, Saint Paul's College, University of Virginia, Richard Bland College, Virginia Union University, Virginia Commonwealth University; **Northern Region:** Bridgewater College, George Mason University, Marymount University, Christendom College, James Madison University, Shenandoah University, Eastern Mennonite University, Mary Baldwin College, University of Mary Washington; **Central Region:** Averett University, Longwood University, Southern Virginia University, Hampton-Sydney College, Lynchburg College, Sweet Briar College, Liberty University, Randolph Macon Women's College, Washington & Lee University; **Southwestern Region:** Bluefield College, Hollins University, University of Virginia's College at Wise, Emory & Henry College, Radford University, Virginia Intermont College, Ferrum College, Roanoke College, Jefferson College, Virginia Tech.

universities are “active members” of VACUHO, meaning that their housing officers are active participants of the Association.

VACUHO was formed to provide support to housing and residence life professionals in colleges and universities across the Commonwealth. Currently, VACUHO centers its attention on student housing in colleges and universities, offering techniques to enhance the development of student housing and offering education and support for housing and residence life professionals. To this end, VACUHO sponsors three annual conferences at which it offers programs on a broad spectrum of topics. Through these and other activities, VACUHO helps student housing officers focus their efforts and manage the host of issues surrounding student housing.

The appearance of VACUHO as *amicus curiae* is desirable to provide the Court with the history, tradition, and current state of student housing at colleges and universities in Virginia from the perspective of an organization comprised of individuals directly involved in the management of such housing from every college and university in Virginia. Importantly, it is not solely those who manage student housing across the Commonwealth who stand to be impacted by this Court’s ruling. Indeed, at present, there are approximately 80,000 residents at Virginia colleges and universities. Also, student housing takes on many forms, including dormitories, single-family homes, hotel or motel rooms, and apartment-style complexes.

This Court’s statutory interpretation and characterization of the relationship between a student resident and the school that provides the housing is of vital importance. It is no overstatement to say that the outcome of this case has the potential to impact both

the management of all types of student housing across the Commonwealth ***and*** all students at Virginia's colleges and universities.

VACUHO supports the Commonwealth in this case against James D. Maciel, Jr. ("Maciel"). Specifically, VACUHO supports the Circuit Court's recognition, through its ruling, that Regent University was ***not*** required to obtain a court order prior to removing a student from student housing. The Circuit Court's ruling confirms the current (and historical) practice of colleges and universities across the Commonwealth, and it should be affirmed for the reasons set forth below. As important as it is for this Court to understand the importance of affirming the ruling below, it is even more important for this Court to understand the consequences of granting this Petition and reversing the Circuit Court's ruling. This would not only change the way that student housing is administered throughout Virginia, it would create the potential for chaos any time a university needs to remove a student (or more importantly, numerous students) from student housing, whatever the reason.

VACUHO agrees with the Circuit Court's decision that Maciel was guilty of trespass after he refused to vacate student housing (after having broken into his former housing unit), notwithstanding warnings that he was no longer permitted on the premises by Regent University Police and a Regent University housing official. As noted above, through its ruling, the Circuit Court recognized that Regent University was ***not*** required to obtain a court order before it denied Maciel access to university student housing. Regent University, together with each of the forty-three (43) other colleges and universities in this Commonwealth, are not and should not be required to obtain a court order prior to denying any person, including a former student occupant, access to student

housing. In this way, the Circuit Court's ruling was consistent with the standard operating procedure at each of VACUHO's member colleges and universities.

Both historically and currently, VACUHO's members do not file Unlawful Detainer actions and obtain Writs of Possession before they remove students or former students who refuse to vacate their housing assignments at the end of the term or students who are dismissed from the college or university for disciplinary or other reasons. For this reason, reversal of the Circuit Court's ruling would severely disrupt management of student housing in every college and university in Virginia. For example, an adverse ruling could mean that colleges and universities would be required to file Unlawful Detainers and obtain Writs of Possession before removing students from any student housing, be it a dormitory room, hotel or motel room, or apartment-style complex. This would be absolutely unworkable for the administration of student housing. Under such a ruling, no matter what violation a student has committed (be it an alcohol, drug, weapon, noise, or other violation) and no matter how long a student decided to stay in student housing (after an academic semester, after graduation, after dismissal/withdrawal from the university), colleges and universities would be forced to file suit and obtain a Writ of Possession ***before*** the student could be removed.

While he acknowledges that educational institutions are explicitly exempt under the Virginia Residential Landlord Tenant Act ("VRLTA") from the requirement of filing an Unlawful Detainer and obtaining a Writ of Possession prior to removing a student, in his Petition Maciel attempts to circumvent this statutory exclusion (and the General Assembly's clear intent), by boot-strapping Virginia Code § 55-225.1 to apply not only to "landlords" and "tenants" in "residential dwellings," but also to colleges, universities, and

their student residents. Of course, student housing in colleges and universities is significantly and substantially different from the typical landlord/tenant relationship – not only because of the primary purpose of the housing (i.e., to provide housing in connection with provision of education) – but, more importantly, because of the degree of control exercised by the educational institution over the students and the student housing itself. The student housing context – which is the context for the instant case – is completely outside the scope of the typical residential landlord/tenant situation addressed by the Code of Virginia.

Ultimately, Regent University had the legal right to deny Maciel access to the premises, and Maciel's steadfast refusal to leave the premises constituted a trespass. Accordingly, VACUHO supports the Commonwealth of Virginia in opposing Maciel's Petition for Appeal in this Court and opposes Maciel in seeking reversal of the Circuit Court's decision finding him guilty of trespass.

QUESTIONS PRESENTED

I. Must a university obtain a court order before it has the right to remove students from on-campus student housing owned and operated by the university?

II. Must a university obtain a court order before it has the right to remove students from on-campus student housing owned and operated by the university where the student housing agreement does not provide that a court order is necessary for removal?

III. Does a student have a "claim of right" to return and re-enter on-campus student housing owned and operated by the university where the student has previously been removed?

STATEMENT OF THE FACTS

James Maciel, Jr. was a graduate student at Regent University and resided with his wife, Jeraline Maciel, at 5928 Jake Sears Circle, Unit 102, Virginia Beach, Virginia, in Regent Village (the "unit"). (Written Statement of Facts ("SOF"), ¶ 2) Regent Village is an on-campus university housing facility owned and operated by Regent University for graduate students and their families. (*Id.*) All residents of Regent Village are either students, their immediate families, or Regent University Staff**.** (*Id.*; Commonwealth's Ex. 2) Maciel entered into a student housing agreement with Regent University, which allowed Maciel, his wife, and child to reside in an apartment in Regent Village. (*Id.*)

The agreement outlined the rules and regulations that Regent University imposes upon the occupants of the units in Regent Village. Under the agreement, occupancy is directly linked to one's status as a student at Regent University. (*Id.*) Dismissal as a student from Regent University results in automatic termination of the student housing agreement, and upon graduation or withdrawal from the university the student is no longer eligible to reside at Regent Village. (*Id.*) Occupants are prohibited from using and/or possessing a variety of otherwise legal substances including tobacco, alcoholic beverages, firearms, or any item that is "unsafe, unhealthy, illegal or inconsistent with the image and objectives of Regent University." *(Id.*, ¶ 9*)* In addition, occupants agree to comply with twenty-five (25) rules relating to the use of the property at Regent Village. (*Id.*) Regent University holds a key to the premises at all times, and occupants agree to allow Regent University to enter the unit in order to inspect the premises or to make repairs. (*Id.*, ¶¶ 18, 19)

In May of 2009, Maciel and the Director of Student Housing for Regent University, Ryan Brown, had numerous e-mail communications regarding the date Maciel would vacate the unit. (SOF, ¶ 2) As of May 31, 2009, Maciel had completed his course work for the spring 2009 semester, and he had not registered for the summer or fall semester. (*Id.*) Maciel contacted Regent University School of Government Director of Enrollment Services and informed him that he was leaving Regent University and was not registering for summer 2009 or fall 2009 classes. (*Id.*) At his request, Maciel was permitted to extend his move-out date multiple times, ultimately to May 31, 2009. (*Id.*)

Nevertheless, Maciel did not vacate his housing unit by May 31, 2009. (*Id.*) On that date, in addition to his previous extensions, he requested two (2) more weeks to remove his belongings and vacate the premises. (*Id.*) Student Housing Director Brown informed Maciel in writing that the housing agreement term ended on May 31, 2009, and that he and his family were required to vacate the unit by that date. (*Id.*)

As of June 1, 2009, Maciel still had not vacated his apartment. (*Id.*) Brown caused the locks to be changed and posted a note for Maciel requesting him to contact Brown. (*Id.*) That same day, Brown was informed that Maciel had broken into the unit through a window. (*Id.*) Regent University police officers responded and ordered Maciel to leave the premises. (*Id.*) Maciel demanded additional time to remove his belongings. (*Id.*) Brown requested that Maciel relinquish the key to the unit and advised that Maciel had until 3:00 p.m. on that day to remove his belongings. (*Id.*)

At approximately 3:00 p.m., Brown and Regent University police officers found Maciel inside the unit**.** (*Id.*) Despite their demands for Maciel to leave, Maciel refused to

do so. (*Id.*) Maciel was shouting and making threatening remarks to the officers. (*Id.*) Thereafter, Regent University police officers arrested Maciel for trespass. (*Id.*)

Brown testified that Regent University did not obtain a court order prior to removing Maciel from the on-campus housing. (*Id.*) Brown further testified that he removed the locks to the apartment and ordered Maciel to leave the apartment under the authority in the housing agreement and his understanding that the VRLTA did not apply to educational institutions such as Regent University. (*Id.*)

After the Commonwealth presented evidence, Maciel moved to strike the Commonwealth's evidence arguing that a "tenant" is innocent of criminal trespass where there exists a written lease between a "tenant" and "landlord" and the "landlord" has taken no action to request possession of the premises by court order as required by Virginia Code § 55-225.1. (SOF, ¶ 5) Maciel also argued that subject to Virginia statute, Regent was prohibited from using self-help remedies to dispossess Maciel from his residence. (*Id.*) Maciel, however, stipulated that the VRLTA exempted educational institutions under Virginia Code § 55-248.5(A)(1). (*Id.*, ¶ 4) Maciel requested that the Court allow briefing concerning his arguments on his Motion to Strike. (*Id.*, ¶ 5, 7) Judge O'Brien granted the request, and both parties submitted briefs to the court. (*Id.*, ¶ 6)

After considering the parties briefs, the Court denied Maciel's Motion to Strike and the case was continued until October 8, 2009, when Maciel attempted to present his defense with a court reporter present. (*Id.*, ¶ 8) Over the Commonwealth's objection, the Court permitted Maciel to utilize a court reporter for the presentation of his case in chief

despite the fact that he had not arranged for a court reporter to be present during the Commonwealth's case. (Tr., 3-7)

At trial, Maciel testified on his own behalf. (Tr., 9) He testified that he was not registered for classes at the time that he was asked to vacate student housing. (Tr., 10) He further testified that that he felt entitled to stay in the unit; all of his personal belongings were still in the unit, and he "wasn't ready to leave on the 1st." (Tr., 15) Maciel stated that at approximately 12:00 p.m., Brown permitted him back in the unit until 3:00 p.m. for the specific purpose of moving all of his personal belongings. (Tr., 15) However, during the hours of 12:00 p.m. through 3:00 p.m., Maciel alleges that he contacted three (3) law firms and a magistrate judge. (Tr., 16) Maciel testified that after making these alleged calls he "didn't have any concerns" with whether he was permitted to enter the property. (Tr., 18) Maciel further testified that he received a five-day notice and a 60-day termination notice from Regent University, as well as an e-mail on May 12, 2009 stating that he was required to vacate by May 31, 2009. (Tr., 19, 22; Commonwealth's Ex. 1)

During argument, counsel for Maciel asserted that Regent University was required to obtain a court order in order to evict him because the student housing agreement specified that it was governed by Virginia law, under which a "landlord" is required to obtain a court order in order to evict a "tenant." (Tr., 29-32) The court disagreed, specifically finding that Maciel did not enter the premises in good faith. (Tr. 36-37) According to Judge O'Brien, "He was told several times, and you can't bootstrap that by saying he made these calls to somebody who gave him additional information. That's not in good faith." (Tr., 36-37) The Circuit Court found Maciel guilty of trespass

and fined him $250 with 30 days in jail, both of which were suspended on the condition that he is of good behavior for one year and that he pay court costs. (Tr., 37)

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

I. Regent University had the right to deny Maciel access to the premises without first obtaining a Court Order.

Regent University had the right to deny Maciel access to the premises prior to obtaining a court order because, under Virginia law, Regent University and Maciel did not enter into a "landlord/tenant" relationship. Moreover, because the agreement between the parties allowed for reentry, Virginia Code § 55-225.1 has no application even if Regent University and Maciel did enter into a "landlord/tenant relationship," because this statute's prohibitions do not apply where the parties provide by agreement for re-entry.

A. Virginia Code § 55-225.1 does not apply because Regent University and Maciel did not enter into a landlord/tenant relationship.

The relationship between Maciel and Regent University was not a landlord/tenant relationship as defined under Virginia law, even though the student housing agreement uses terms such as "lease," "lessor," and "lessee." Maciel stipulated at trial that Regent University was exempt from the VRLTA under Virginia Code § 55-248.5(A)(1). (SOF ¶ 4) Virginia Code § 55-225.1, on the other hand, ***only*** applies when a "landlord" and a "tenant" enter into a lease. Virginia Code § 55-225.1 provides, in pertinent part:

> A ***landlord*** may not recover or take possession of a ***residential dwelling*** unit by (i) willful diminution of services to the ***tenant*** by interrupting or causing the interruption of electric, gas, water or other essential service required to be supplied by the landlord under a rental agreement or (ii)

> refusal to permit the tenant access to the unit unless such refusal is pursuant to the execution of a writ of possession.

(emphasis supplied).

Rather than a landlord/tenant relationship, Regent University's legal relationship with Maciel was a licensor/licensee relationship. Regardless of how the parties refer to or label an agreement, the Court will determine whether the agreement is a lease or a license by ascertaining the parties' rights set forth in the agreement. *See Mgmt. Enters., Inc. v. Thorncroft Co.*, 243 Va. 469, 470, n.*, 416 S.E.2d 229, 230 n.* (1992). The distinction between a license and a lease is that a license does not convey a possessory interest in property. *See id.* "In order to ascertain whether an instrument must be construed as a lease or a license, it is only necessary to determine whether the grantee has acquired by it any estate in the land, in respect if which he might bring an action of ejectment." *Church v. Goshen Iron Co.*, 112 Va. 694, 697, 72 S.E. 685, 686 (1911).

The student housing agreement in this case operates as a license as opposed to a lease. Regent University gave Maciel permission to occupy the apartment contingent upon his status as a student for so long as he followed the rules outlined in the agreement. These rules, which reflect both the image and objectives that Regent University strives to maintain, demonstrate the significant amount of control Regent University maintains over the university owned and operated student housing that Maciel occupied. Of course, the significant amount of control that Regent University maintains over its resident students falls directly in line with the supervision and control that colleges and universities across the Commonwealth (i.e., VACUHO's members) maintain over student housing and resident students.

The student housing agreement in this case outlined the rules and regulations that Regent University imposes upon the occupants of the units in Regent Village related to activity within student housing. Besides the fact that only eligible students and members of the student's immediate family can reside in Regent Village, under the agreement, occupancy is directly linked to one's status as a student at Regent University. (Commonwealth's Ex. 2, ¶ 5) This means that dismissal as a student from Regent University results in automatic termination of the student housing agreement and graduation or withdrawal from the university means that the student can no longer reside at Regent Village. (*Id.*) Unlike occupancy of a traditional "residential dwelling," occupants are prohibited from using and/or possessing a variety of otherwise legal substances including tobacco, alcoholic beverages, firearms, or any item that is "unsafe, unhealthy, illegal or inconsistent with the image and objectives of Regent University." (*Id.*, ¶ 9)[2]

In this way, the agreement ***requires*** that an occupant be enrolled as a student at the university, ***mandates*** that a graduate student not use or possess otherwise legal substances (tobacco or alcoholic beverages), and ***permits*** Regent University to enter the unit and inspect the premises. Put simply, even in an apartment-style setting, on-campus student housing with this type of limited purpose and level of control and access

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[2] In addition, occupants agree to comply with twenty-five (25) rules relating to the use of the property at Regent Village. (*Id.*) Regent University holds a key to the premises at all times, and occupants agree to allow Regent University to enter the unit in order to inspect the premises or to make repairs. (*Id.* ¶¶ 18, 19)

maintained by the university is not indicative of a landlord/tenant relationship.[3] Instead, the agreement for student on-campus housing evidences a license – i.e., permission to occupy the premises but not an estate in land to the exclusion of others.

Furthermore, the occupants of student housing do not fall within the definition of a "tenant" reflected in Virginia statutory law. For purposes of Chapter 13 of Title 55 of the Code of Virginia (i.e., the Chapter that contains Virginia Code § 55-225.1), a "tenant" is defined as "a person entitled under a rental agreement to occupy a dwelling unit *to the exclusion of others*." Va. Code § 55-225.8 (emphasis supplied). Pursuant to the agreement executed by both parties, Maciel was not entitled to exclude the officers of Regent Housing from the property. This aspect of the relationship is consonant with student housing agreements between universities and students across the Commonwealth in VACUHO's member schools. As a practical matter, for the safety of their resident students, colleges and universities must maintain this type of access to student housing (whatever form it takes), which is necessarily inconsistent with the right of exclusion that a tenant in a typical landlord/tenant relationship would normally have.

[3] Student housing at colleges and universities in Virginia takes on many forms, including dormitories, single-family homes, hotel or motel rooms, and apartment-style complexes. Admittedly, some of these forms of student housing may appear (particularly to an outside observer) more similar to traditional residential dwellings. However, it is important to recognize that the primary purpose of student housing, in any form, is the same. That purpose is to provide housing in connection with the provision of education. Clearly, the General Assembly recognized this primary purpose when it created a specific exclusion to the VRLTA for, "Residence at a public or private institution, if incidental to . . . the provision of . . . educational" or similar services." Va. Code § 55-248.5(A)(1). It should be noted that this exclusion draws absolutely no distinction between student housing in a dormitory, apartment, or single-family home for that matter, so long as the housing is incidental to the provision of "educational" services. (*Id.*)

For these reasons, Maciel was not a "tenant" within the meaning of Virginia Code § 55-225.1. Thus, any requirements owing a tenant were not and are not applicable to Maciel.

Extensive research disclosed not a single case in Virginia in which students living in university-owned housing were found to be "tenants" under the VRLTA or any other statutory scheme. Other jurisdictions have similarly concluded that the relationship between a student housing occupant and a college or university is ***not*** a landlord/tenant relationship. For example, in *Houle v. Adams State College*, 547 P.2d 926 (Colo. 1976), the court determined whether a state college was a landlord within the meaning of the Security Deposit Act. The plaintiff was a former student of the college, and she filed the action in order to recover her student housing deposit, which she contended was required under the Security Deposit Act. *Id.* at 927. The statute did not contain a definition of the term "landlord" or "landlord/tenant relationship;" therefore, the court based its conclusion on the ordinarily accepted definition of such terms. *Id.* The college was under the control of a board of trustees, which the court held did not fall within the ordinary interpretation of a "landlord." *Id.* "A common sense assessment of the college-student concept militates against petitioner's contention that the relationship of the Trustees to the students is factually indistinguishable from that of a landlord-tenant." *Id.* The court further reasoned that "[d]ormitory living involves more than providing a physical place to inhabit. Acclimation to college and attendant social and educational benefits are ingredients of dormitory living." *Id.*

Similarly, in *Cook v. University Plaza*, 427 N.E.2d 405 (Ill. App. Ct. 1981), the court considered whether an agreement between a student and a university was a lease or

a license. The students argued that they were entitled to payment of interest on security deposits as tenants. *Id.* at 408. Echoing Virginia courts, the Illinois Court held that, "Whether a contract is a lease or a license is not determined from the language that the parties choose to call it but from the legal effect of its provisions." *Id.* at 407. An agreement that merely gives the occupant the right to use the premises and the owner retains the possession and control of the premises does not confer an interest in land and therefore is not a lease, but merely a license. *Id.* To constitute a lease, the agreement must transfer exclusive possession to the lessee. *Id.* The lessee's possession cannot be coextensive with the lessor; "it must be exclusive against the world and the lessor." *Id.* In focusing on the amount of control the lessor had over the premises and concluding that the agreement did not transfer a possessory interest in the property, the court held that the parties did not intend to enter into a landlord/tenant relationship. *Id.* Thus, the court affirmed the lower court's decision to dismiss the case based on the inapplicability of the statute to the case due to the lack of a landlord/tenant relationship. *Id.*

As noted above, while Virginia courts have not had occasion to address this precise question, Virginia courts have recognized that students and universities have a special relationship much different than that of a landlord and tenant. *See Peterson v. Commonwealth*, Nos. CL09-005525, CL09-05526, 2010 Va. Cir. LEXIS 7, *24 (Danville 2010); *Schieszler v. Ferrum College*, 236 F. Supp. 2d 602, 609 (W.D. Va. 2002). As one court noted:

> [A] student living in a college dormitory should reasonably expect a greater degree of protection from the University than would a tenant who leases residential property from a landlord in the open market. The same dormitory student may also reasonably expect certain limitations, i.e. curfew, restrictions upon visitors, etc., not found in non-college housing. *The relationship between a college or university and its resident dormitory*

> *student is not identical or perceived to be the same relationship between a landlord and tenant in the ordinary course of business.*

Wilson v. Commonwealth, 17 Va. Cir. 144, 145 (Chesterfield County 1989) (emphasis supplied).[4]

The relationship between a student and a university is simply not the same as the relationship between a landlord and a tenant. A university has obligations and responsibilities towards its students that do not exist in the typical landlord/tenant relationship. Like other colleges and universities across the Commonwealth, Regent University exercises a significant degree of control over its resident students, as it must to continue to provide educational services for all students at the university. Given this significant degree of control, students who reside in dormitories, apartments, hotel or motel rooms – whatever form the student housing takes – do not obtain an "estate" in land. Rather, they simply are granted permission to occupy the premises contingent upon enrollment and compliance with numerous rules and regulations. Accordingly, the agreement between a student housing resident and the university is not a lease that creates a landlord/tenant relationship, it is a mere license.

As a licensee, Maciel did not have a legal right to continue to remain on the property after he ceased to be a student and after Regent University Police and a Regent housing official instructed him to leave the premises. Thus, his act of breaking in and his subsequent refusal to leave the premises constitutes a trespass.

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[4] Although Maciel resided in an on-campus apartment owned and operated by Regent University, the limitations he could "reasonably expect" based upon the provisions of the student housing agreement should lead this Court to the same conclusion as the court in *Wilson*, regardless of the *form* the student housing takes (i.e., whether dormitory, apartment unit, hotel or motel room, or single family home).

B. Virginia Code § 55-225.1 does not apply because Regent University and Maciel provided for re-entry by agreement.

Even if this Court were to determine that Regent University and Maciel entered into a landlord/tenant relationship, the agreement provides that Regent University could immediately assume possession of the premises upon termination of the agreement. In light of this agreement, Regent University was not required under Virginia Code § 55-225.1 to obtain a court order prior to removing Maciel and assuming possession of the student housing unit.[5]

Importantly, under the VRLTA (Chapter 13.2 of Title 55), the landlord may not recover possession of the unit "by refusal to permit the tenant access to the unit unless such refusal is pursuant to a court order for possession." Va. Code § 55-248.36. The VRLTA also states that "[a] rental agreement shall not contain provisions that the tenant agrees to waive or forego rights or remedies under this chapter." Va. Code § 55-

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[5] Both historically and currently, VACUHO's members do not file Unlawful Detainer actions and obtain court orders (Writs of Possession) before they remove students or former students who refuse to vacate their housing assignments at the end of the term or students who are dismissed from the college or university for disciplinary or other reasons. The alternative is nearly unthinkable. If colleges and universities were required to file Unlawful Detainers and obtain Writs of Possession before removing students from any student housing (be it a dormitory room, hotel or motel room, or apartment-style complex), no matter the violation (be it an alcohol, drug, weapon, noise, or other violation) and no matter how long a student decided to stay in student housing (after an academic semester, after graduation, after dismissal/withdrawal from the university), colleges and universities would be forced to file suit and obtain a Writ of Possession ***before*** the student could be removed.

It does not take much imagination to envision a situation where numerous students decide, at semester's close, not to leave their student housing as the university prepares for the next semester's students to arrive and move in. If a university were forced to file an Unlawful Detainer, obtain a Writ of Possession, and stand in line for the Sheriff's Department to effect each and ever eviction in this situation, the disruption to the educational mission of the university would be profound. Clearly, this is precisely the type of potential harm the General Assembly had in mind when it explicitly exempted student housing from the VRLTA.

248.9(A)(1). Therefore, the provision relating to recovery of possession, as well as many other provisions of the VRLTA concerning rights and remedies of the parties, cannot be modified by the lease agreement.[6]

Chapter 13 contains a similar provision relating to recovery of possession of a residential dwelling unit. It provides that, a landlord may not recover or take possession a residential unit by "refusal to permit the tenant access to the unit unless such refusal is pursuant to the execution of a writ of possession." Va. Code § 55-225.1. In stark contrast to the VRLTA, Chapter 13 ***does not*** prohibit modifications of its provisions by agreement. Although no Virginia courts have directly addressed the parties' ability to dispense with the prohibitions in Virginia Code § 55-225.1, a court has held in considering another statute within Chapter 13 of Title 55 (Virginia Code § 55-224) that this statute is not applicable where the parties provide by contract for re-entry upon default. *TenBraak v. Waffle Shops, Inc.*, 542 F.2d 919, 925 n.8 (4th Cir. 1976). "It is well recognized, both at common law and under the law of Virginia, that parties to a contract of lease may modify their legal rights by provisions in the lease." *Id.*; *Jabbour Bros. v. Hartsook*, 131 Va. 176, 185, 108 S.E. 684, 687 (1921).

Another example from Chapter 13 of Title 55, in *Marina Shores, Ltd. v. Cohn-Phillips*, *Ltd.*, 246 Va. 222, 435 S.E.2d 136 (1993), the tenant argued that the lease had not terminated because the landlord failed to comply with the five-day notice provision contained in Virginia Code § 55-225. The court disagreed, reasoning that the parties' lease was the law of the case under which the parties agreed that the landlord could terminate the lease upon default with or without notice or demand. *Id.* at 225-26, 435

[6] As previously explained, college and university housing is explicitly exempted from the VRLTA.

S.E.2d at 138. In light of the stark difference between Chapter 13.2 (which does not allow for modification by agreement by the parties, from which student housing is explicitly exempted) and Chapter 13 (which contains no such prohibition, rather, several cases stand for the contrary proposition), the provisions of Virginia Code § 55-225.1 simply ***are not applicable*** in cases in which the parties have agreed otherwise. *Id.* at 226, 435 S.E.2d at 138.

Put simply, even if the relationship between Maciel and Regent University is a landlord/tenant relationship, the student housing agreement in this case supersedes the default provision in Virginia Code § 55-225.1. The agreement specifically states that if the occupant violates any provision of the agreement, Regent University has the right to terminate the agreement and immediately recover possession. (Commonwealth's Ex. 2, ¶¶ 5, 17) Under the agreement, Regent University had the right to terminate the agreement by giving Maciel written notice of such termination. (*Id.*, ¶ 2) As evidenced by the testimony at trial and the e-mail admitted into evidence, Regent University gave Maciel the required notice of termination. (*Id.*, ¶¶ 19, 22; Commonwealth's Ex. 1) Upon termination of the agreement, Maciel was required to "promptly vacate the premises." (Commonwealth's Ex. 2, ¶ 13) Instead, Maciel refused to vacate the premises. (SOF, ¶ 2) His refusal was a violation of the agreement and allowed Regent University to recover possession of the property pursuant to the terms of the agreement.

The agreement is the law of the case. Both parties agreed that Regent University could recover possession of the premises upon termination. This agreement was an effective modification of the parties' legal rights and obligations. *See TenBraak*, 542 F.2d at 925 n.8. Thus, Regent University was not subject to the default provision

contained in Virginia Code § 55-225.1, requiring Regent University to first obtain a court order before recovering possession of the property. Moreover, if this Court found that colleges and universities across the Commonwealth are bound by the terms of Virginia Code § 55-225.1 and must obtain a court order before recovering possession of student housing, such a ruling would create the potential for chaos and disruption any time a student (or more importantly, numerous students) need to be removed from student housing, whatever the reason.

II. The Circuit Court did not err in finding that Maciel did not have a bona fide, good faith belief that he was legally entitled to remain in the unit.

The Circuit Court found Maciel guilty of criminal trespass in violation of Virginia Code § 18.2-119, which prohibits unlawfully remaining on the land of another after being forbidden to do so. Criminal intent is an essential element of the offense of trespass. *Reed v. Commonwealth*, 6 Va. App. 65, 71, 366 S.E.2d 274, 278 (1988). Only a bona fide claim of right to be on the land has the ability to negate criminal intent. *Id.* This Court has stated that "a bona fide claim of right is a sincere, although perhaps mistaken, good faith belief that one has some legal right to be on the property. The claim need not be one of title or ownership, but it must rise to the level of authorization." *Id.*

Maciel's situation is similar to the facts presented in *Lassiter v. Commonwealth*, 46 Va. App. 604, 620 S.E.2d 563 (2005), in which this Court affirmed the defendant's trespass conviction, specifically holding that the defendant did not have a bona fide claim of right to be on the property. The landlord filed an unlawful detainer action against the defendant, who was the tenant of the property. *Id.* at 606, 620 S.E.2d at 564. The court entered judgment for the landlord and ordered the defendant to vacate the property by August 15, 2003. *Id.* On August 16, 2003, the landlord changed the locks on the

property and posted "No trespassing" signs. *Id.* at 607, 620 S.E.2d at 564. Subsequently, the defendant broke into the house and entered the property. *Id.* at 612, 620 S.E.2d at 567.

On appeal, the defendant asserted that at the time of the alleged trespass he believed he had a right to be in the house because the landlord was required to obtain a writ of possession in order to recover the property, and that such belief negated the criminal intent necessary to support a trespass conviction. *Id.* at 609-10, 620 S.E.2d at 566. This Court disagreed, stating that although a landlord who has successfully pursued an unlawful detainer action may seek a writ of possession, he is not required to do so. *Id.* at 612, 620 S.E.2d at 567. The court further reasoned that the defendant had no legal right to enter the property after the landlord had lawfully entered the property and changed the locks. *Id.* Consequently, when he entered the property, he committed the offense of criminal trespass. *Id.*

Likewise, in the instant case, Maciel did not possess a bona fide claim of right sufficient to negate the intent necessary to establish a criminal trespass. Maciel testified that he received a five-day notice to vacate and a 60-day termination notice from Regent University. (Tr., 19, 20) He was also notified by e-mail on May 12, 2009 that he was required to vacate the unit by May 31, 2009. (Tr., 22; Commonwealth's Ex. 1) On June 1, 2009, Brown changed the locks to the apartment and posted a note on the door requesting Maciel to contact him directly. (SOF, ¶ 2) Instead of calling the number posted on the door, Maciel broke into the unit through a window. (*Id.*; Tr., 14) Regent University Police and Brown found Maciel in the house, and upon Maciel's request, he was given until 3:00 p.m. that same to day to remove his belongings and vacate. (SOF,

¶ 2) Despite this directive, Maciel refused to leave the apartment at 3:00 p.m., stating that he had called three lawyers and a magistrate judge. (*Id.*; Tr., 16-18) Although no evidence (other than rank hearsay) was produced at trial as to what exactly the lawyers and the magistrate judge allegedly said to Maciel,[7] he testified that after making these calls he "didn't have any concerns" with whether he was permitted to enter the property. (Tr., 18)

The Circuit Court, which had the opportunity to hear Maciel's testimony and observe his demeanor first-hand, found that Maciel's professed belief did not amount to a bona fide claim of right, specifically stating that Maciel did not enter the premises in good faith. (Tr., 36) According to the Circuit Court, "He was told several times, and you can't bootstrap that by saying he made these calls to somebody who gave him additional information. That's not in good faith." (Tr., 36-37)

The Circuit Court's determination was proper in that the evidence presented did not prove that Maciel had a bona fide claim of right to be in the unit. Maciel was instructed to vacate on numerous occasions by Regent University police and the housing official, and as in *Lassiter*, 46 Va. App. at 607, 620 S.E.2d at 564, Regent University changed the locks to the unit, leaving Maciel without unforced access to the property.

To access the property, Maciel had to break in through a window. This alone should have been confirmation that he did not have a legal right to be on the property. Furthermore, there is no evidence in the record as to what the lawyers and the magistrate

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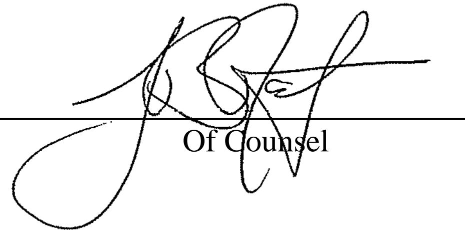
[7] Maciel attempted to testify concerning what the lawyers and the magistrate judge said during the phone calls; however, the Commonwealth objected to the testimony on hearsay grounds. (Tr., 16) The judge sustained the objection and informed Maciel that he was not permitted to testify as to what the lawyers and the magistrate judge told him. (Tr., 16-17).

judge allegedly said to Maciel or what information he gave to them. His subjective, unsupported contention of entitlement does not constitute a bona fide claim of right, which this court defines as "a sincere, although perhaps mistaken, good faith belief that one has some legal right to be on the property." *Id.* at 71, 366 S.E.2d at 278. Accordingly, Maciel possessed the criminal intent necessary to support a trespass conviction.

CONCLUSION

For the reasons stated in this brief, the Virginia Association of College and University Housing Officers respectfully requests that this Court deny the Petition for Appeal filed by James Maciel, Jr.

VIRGINIA ASSOCIATION OF COLLEGE AND UNIVERSITY HOUSING OFFICERS

By 
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CERTIFICATE

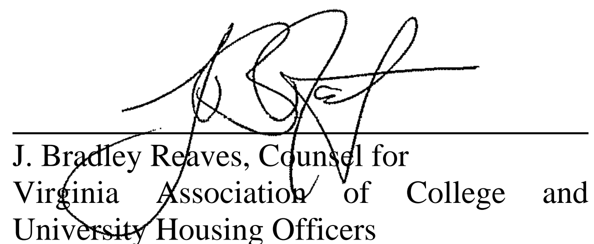
I, J. Bradley Reaves, counsel for Virginia Association of College and University Housing Officers, hereby certify:

1. The address and telephone number for Appellee, the Commonwealth of Virginia is: Shelly Pfeiffer and Sally-Ann Kass, Assistant Commonwealth's Attorneys, and Harvey Bryant, Commonwealth's Attorney, 2425 Nimmo Parkway, Judicial Center, Building 10, Virginia Beach, Virginia 23456, Phone: 757/385-4401.

2. The names, address and telephone number for counsel for Appellant, James Dario Maciel, Jr. is: Christopher Todd Hedrick, Esquire, Dickerson & Smith Law Group, P.C., 115 South Lynnhaven Road, Virginia Beach, Virginia 23452, Phone: 757/463-4900.

3. The address and telephone number for counsel on Amicus Brief are: J. Bradley, Reaves and R. Ellen Coley, Kaufman & Canoles, P.C., 150 West Main Street, Suite 2100, Norfolk, Virginia 23510, Phone: 757/624-3000.

4. Four copies of this Amicus Brief in Support of the Brief in Opposition to Petition for Appeal were hand-filed with the Clerk of this Court, and a copy of the same was sent by United States First-Class Mail, Postage Prepaid this 8th day of March 2010 to counsel the Appellant and counsel for the Appellee at the addresses listed above.



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