IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ENERGY & ENVIRONMENT LEGAL INSTITUTE, Petitioner/Appellant, vs. **ARIZONA BOARD OF REGENTS**, an educational, non-profit corporation, and **TERI MOORE**, in her official capacity as Custodian of Public Records for the University of Arizona, Respondents/Appellees.	Court of Appeals Division Two 2CACV-2015-0086 Pima County Superior Court Cause No. C2013-4963

BRIEF FOR *AMICUS CURIAE* CLIMATE SCIENCE LEGAL DEFENSE FUND IN SUPPORT OF APPELLEES

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INTEREST OF THE *AMICUS CURIAE*

The Climate Science Legal Defense Fund ("CSLDF"), a 501(c)(3) non-profit organization, was founded in 2011 in response to the increasing incidence of legal attacks against climate scientists, which prominently include abusive public-record requests targeting climate scientists affiliated with public universities and other public entities. Its mission is to protect the scientific endeavor in general, and climate science and climate scientists in particular, from assaults being launched through use and abuse of the legal system, many of which come in the form of invasive public-record requests.

CSLDF's initial project was to generate funding and publicity for the defense of Dr. Michael Mann, a climate scientist whose confidential communications while at the University of Virginia were the subject of a request made by the petitioner-appellant in this case, the Energy & Environment Legal Institute ("E&E Legal") (then operating under its former name, the American Tradition Institute ("ATI")), under Virginia's public-records law. The request was made at a time when Dr. Mann was no longer employed by the University of Virginia, and the University initially agreed, without Dr. Mann's approval, to permit E&E Legal to review his communications under a protective order. CSLDF helped obtain funding for Dr. Mann to intervene in the proceeding, and also helped generate support for his position in the scientific community and more broadly.

The University eventually reversed course, in part because it came to realize that E&E Legal could not be trusted to abide by the protective order, and the Virginia courts upheld the refusal to produce Dr. Mann's communications.

Following that case, CSLDF has continued to advise scientists on their legal rights and obligations under public-record laws, and CSLDF has provided legal resources and counseling to many climate scientists facing invasive public-records requests.

CSLDF has an interest in protecting climate scientists like Drs. Hughes and Overpeck of the University of Arizona from the kind of abusive and invasive public-records request at issue here. A decision in favor of E&E Legal could encourage additional such requests in Arizona and elsewhere. CSLDF believes that the Court can benefit from its perspective in light of its extensive experience with this kind of request, involving this particular area of research, and even involving E&E Legal specifically.

INTRODUCTION

E&E Legal claims that its overbroad, intrusive, and burdensome public-record requests are part of a "transparency project." Having helped climate scientists fight E&E Legal's requests for several years and in various venues, CSLDF knows E&E Legal's real motivation: to interfere with the work of climate scientists in an attempt to discourage the pursuit of climate science and impugn the

integrity of climate science as a whole. E&E Legal's actions are just one part of a systematic campaign, funded by certain individuals and entities whose economic interests are threatened by any meaningful efforts to combat climate change, to create doubt about the reality, causes, and potential consequences of climate change where there should be none.

The scientific consensus has been clear for years: global warming is real, and it is caused in major part by human activity. Yet certain opponents of progress on climate change like E&E Legal continue to do what they can to foster a public perception that the science is inconclusive. Whatever one might think of this broader "debate," this Court should have little difficulty determining that the exceedingly broad and highly intrusive public-record requests at issue here cross the line, trampling on traditionally confidential prepublication communications among scientists, jeopardizing the ability of great institutions such as the University of Arizona to maintain preeminence in scientific endeavors by impairing their attractiveness as places for scientists to work and teach, wasting time that scientists like Drs. Hughes and Overpeck could have spent furthering their important research, and having other detrimental impacts described by Respondents and their other amicus.

Consequently, we urge the Court not only to reject this appeal but to adopt rules for handling these sorts of requests that afford clear protection to traditionally

confidential scientific communications and thus allow for the speedy and non-burdensome dispatch of overly intrusive requests. Such rules would prevent E&E Legal and its allies from being able to "win while losing" by virtue of the intolerable burdens they have been able to impose on climate scientists in cases like this simply by filing non-meritorious demands.

ARGUMENT

I. THE STATE OF CLIMATE-CHANGE SCIENCE AND THE ONGOING "CONTROVERSY"

In 1995, the Intergovernmental Panel on Climate Change (IPCC) reviewed the state of climate-change science and, referring to global warming, concluded that "[t]he balance of evidence suggests a discernible human influence on global climate."[1] By 2001, the IPCC came to more specific conclusions: "Human activities . . . are modifying the concentration of atmospheric constituents or properties of the surface that absorb or scatter radiant energy," and "[m]ost of the observed warming over the last 50 years is likely to have been due to the increase

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[1] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IPCC SECOND ASSESSMENT: CLIMATE CHANGE 1995, at 22 (1995) [hereinafter IPCC Second Assessment], *available at* http://www.ipcc.ch/pdf/climate-changes-1995/ipcc-2nd-assessment/2nd-assessment-en.pdf; *see also* WORKING GRP. 1 TO THE SECOND ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 1995: THE SCIENCE OF CLIMATE CHANGE 412 (1995) [hereinafter IPCC Second Assessment, Working Grp. 1 Contribution], *available at* http://www.ipcc.ch/ipccreports/sar/wg_I/ipcc_sar_wg_I_full_report.pdf ("[T]h[e] results point towards a human influence on global climate.").

in greenhouse gas concentrations."[2] That same year, the National Research Council of the National Academy of Sciences similarly concluded that "[g]reenhouse gases are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise."[3] These statements, from international and national scientific bodies, represent what has now for many years been the scientific consensus on climate change.

And it is a true and longstanding consensus; there are no scientifically credible dissenting views. In 2004, Naomi Oreskes, now Professor of the History of Science at Harvard, undertook a comprehensive study of papers published in refereed scientific journals within the ten previous years, attempting to determine whether there was significant disagreement among scientists regarding "the reality

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[2] WORKING GRP. II OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, TECHNICAL SUMMARY: CLIMATE CHANGE 2001: IMPACTS, ADAPTATION, AND VULNERABILITY 21 (2001), *available at* http://www.grida.no/climate/ipcc_tar/wg2/pdf/wg2TARtechsum.pdf; INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: SYNTHESIS REPORT 51 (2001), *available at* http://www.grida.no/climate/ipcc_tar/vol4/english/pdf/q1to9.pdf.

[3] COMM. ON THE SCI. OF CLIMATE CHANGE, DIV. ON EARTH & LIFE STUDIES, NAT'L RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS 1 (2001), *available at* http://www.nap.edu/read/10139/chapter/2.

of anthropogenic climate change."[4] The results of her study were clear. Of the 928 papers reviewed, 75% were categorized as either explicitly or implicitly accepting the consensus view, 25% took no position on current anthropogenic climate change, and *not a single paper* rejected the hypothesis of human-caused climate change.[5]

The complete absence of dissent surprised Oreskes at the time,[6] and it may be just as surprising to many Americans now, more than a decade later. The reason the surprise persists is not that the consensus has weakened; in 2014, the IPCC concluded that "anthropogenic greenhouse gas emissions . . . , together with . . . other anthropogenic drivers, have been detected throughout the climate system and are *extremely likely* to have been the dominant cause of the observed warming since the mid-20th century."[7] Rather, it persists because the claims that

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4 *See* Naomi Oreskes, Essay, *The Scientific Consensus on Climate Change*, SCIENCE, Vol. 306, Issue 5702, at 1686 (Dec. 3, 2004), *available at* http://www.sciencemag.org/content/306/5702/1686.full.pdf.

5 *Id.*

6 *See* Justin Gillis, *The Lightning Rod*, N.Y. Times, June 16, 2015, at D1, *available at* http://www.nytimes.com/2015/06/16/science/naomi-oreskes-a-lightning-rod-in-a-changing-climate.html?_r=0 (online version published June 15, 2015, and titled *Naomi Oreskes, a Lightning Rod in a Changing Climate*).

7 INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS 4 (2014) [hereinafter 2014 IPCC POLICY SUMMARY], *available at* http://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf.

the Earth is warming and that we are to blame remain contested in non-scientific venues. As climate scientist Michael Mann wrote of the opposition to the scientific consensus in 2014:

> This virulent strain of anti-science infects the halls of Congress, the pages of leading newspapers, and what we see on TV, leading to the appearance of a debate where none should exist. In fact, there is broad agreement among climate scientists not only that climate change is real . . . , but that we must respond to the dangers of a warming planet. If one is looking for real differences among mainstream scientists, they can be found on two fronts: the precise implications of those higher temperatures, and which technologies and policies offer the best solution to reducing, on a global scale, the emission of greenhouse gases.[8]

If anything, we now have more evidence than ever that climate change is real and it is caused by human activities; and the mechanism for human causation—the "greenhouse effect" described above—is well understood and readily observed.[9] Given the scientific consensus and the ever-growing body of

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[8] *See* Michael E. Mann, *If You See Something, Say Something*, N.Y. TIMES, Jan. 19, 2014, at SR8, *available at* http://www.nytimes.com/2014/01/19/opinion/sunday/if-you-see-something-say-something.html (online version published January 17, 2014).

[9] *See Climate change: How do we know?*, NASA, http://climate.nasa.gov/evidence/ (last visited Oct. 26, 2015) (discussing the evidence of global warming and human causation); 2014 IPCC POLICY SUMMARY 2-5 (discussing the evidence of global warming and human causation, and concluding that "[w]arming of the climate system is unequivocal" and that "[h]uman influence on the climate system is clear"); *A blanket around the Earth*, NASA, http://climate.nasa.gov/causes/ (last visited Oct. 26, 2015) (discussing

evidence on which it rests, the question is why we see the "appearance of a debate," in Dr. Mann's words, in non-scientific forums. The answer, in broad terms, is clear: As in other cases where scientific developments present the potential for significant economic challenges, business interests and their political allies have done what they can to manufacture doubt about the validity of the science.[10]

For instance, according to a 2007 report published by the Union of Concerned Scientists, one company in the fossil-fuel industry has "funneled about $16 million between 1998 and 2005 to a network of ideological and advocacy organizations that manufacture uncertainty on [global warming]," with "[m]any of these organizations hav[ing] an overlapping—sometimes identical—collection of spokespeople serving as staff, board members, and scientific advisors."[11] "By publishing and republishing the non-peer-reviewed works of a small group of

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measured increases in greenhouse gases in the Earth's atmosphere, and explaining how the greenhouse effect operates).

[10] *See generally* NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING (2010).

[11] UNION OF CONCERNED SCIENTISTS, SMOKE, MIRRORS & HOT AIR: HOW EXXONMOBIL USES BIG TOBACCO'S TACTICS TO MANUFACTURE UNCERTAINTY ON CLIMATE SCIENCE 1 (Jan. 2007), *available at* http://www.ucsusa.org/sites/default/files/legacy/assets/documents/global_warming/exxon_report.pdf.

scientific spokespeople, [these] organizations have propped up and amplified work that has been discredited by reputable climate scientists."[12]

As Dr. Mann wrote, the "anti-science" funded by interests related to the fossil-fuel industry and others who stand to suffer economically if serious action is taken to prevent further climate change has "infect[ed] the halls of Congress."[13] Politicians have stymied a variety of measures designed to cut carbon emissions, often suggesting that the economic impacts in the present are not worth any "speculative" future benefit.[14]

Whatever one may generally think about efforts by companies and politicians to protect their own interests in the face of the findings of climate scientists, and whatever one may think about the "controversy" they have created, there is no question that some opponents of efforts to combat climate change have gone beyond public debate to engage in clearly dishonest, and arguably criminal, tactics to further the campaign against the findings of climate science.

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[12] *Id.*

[13] Mann, *supra* note 8.

[14] *See, e.g.*, Eric Pooley, *Why the Climate Bill Failed*, TIME, June 9, 2008, *available at* http://content.time.com/time/nation/article/0,8599,1812836,00.html (discussing the Senate's rejection of the 2009 Lieberman-Warner Climate Security Act, and quoting Senator James Inhofe as saying that "[a]ny action should not raise the cost of gasoline or energy to American families").

Perhaps the best example of this is the so-called "Climategate scandal." In 2009, a hacker stole thousands of emails from the University of East Anglia's Climate Research Unit.[15] Opponents of climate science then lifted snippets of the emails out of their context, assembled them in a highly misleading fashion, and aggressively touted them as "proof" that climate scientists had manipulated data to achieve desired results and otherwise acted unethically.[16] Repeated investigations—including investigations conducted by the National Oceanic and Atmospheric Administration Inspector General, the National Science Foundation Inspector General, and the Environmental Protection Agency—completely debunked these claims.[17] Yet opponents of climate science, including E&E Legal,

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[15] CTR. FOR SCI. & DEMOCRACY AT THE UNION OF CONCERNED SCIENTISTS, FREEDOM TO BULLY: HOW LAWS INTENDED TO FREE INFORMATION ARE USED TO HARASS RESEARCHERS 7 (Feb. 2015) [hereinafter CSD Rept.], *available at* http://www.ucsusa.org/sites/default/files/attach/2015/09/freedom-to-bully-ucs-2015-final.pdf.

[16] *See* Phil Platt, *The global warming emails non-event*, DISCOVER, Nov. 30, 2009, http://blogs.discovermagazine.com/badastronomy/2009/11/30/the-global-warming-emails-non-event/.

[17] *See Debunking Misinformation About Stolen Climate Emails in the "Climategate" Manufactured Controversy*, UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/global_warming/solutions/fight-misinformation/debunking-misinformation-stolen-emails-climategate.html (last visited Oct. 26, 2015); *Myths vs. Facts: Denial of Petitions for Reconsideration of the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, U.S. ENVTL. PROTECTION AGENCY, http://www3.epa.gov/climatechange/endangerment/myths-facts.html (last visited Oct. 26, 2015).

continue to cite this "scandal" as a basis for further harassment of climate scientists.[18]

As we next discuss, the abusive invocation of public-records statutes as a method of harassing climate scientists is another form of conduct that has no proper place in honest debate about the topic of global warming.

II. THERE IS A GROWING TREND OF ABUSE OF PUBLIC-RECORD LAWS TO HARASS SCIENTISTS, INCLUDING CLIMATE SCIENTISTS

Over the past decade or so, there has been a growing trend on the part of opponents of climate science and others of similar ilk to use public-record laws to harass scientists and other academics whose findings or methods the harassers do not like or who work in fields the harassers do not wish to see progress.[19] The requests made by these interested parties, served on scientists who are subject to public-record laws because they are connected to public universities or other governmental entities, are expansive and intrusive: They seek not only data or research methods underlying published studies, which are generally made public

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[18] *See, e.g.*, Pet. Opening Brief at 4 (June 26, 2014) ("E&E Legal Trial Ct. Br.").

[19] *See* CSD Rept. at 2 ("[I]ndividuals and well-heeled special interests across the political spectrum are increasingly using broad open records requests to attack and harass scientists and other researchers and shut down conversation at public universities. These companies, organizations, and activists may disagree with researchers' findings or even dislike an entire field of study.").

anyway, but also personal documents and correspondence, as well as other traditionally confidential prepublication materials that are crucial to the collaborative scientific endeavor, such as preliminary drafts, handwritten notes, and private critiques from other scientists.[20] Requests even sometimes go so far as to seek the names of human subjects, even where those subjects have been promised confidentiality.[21]

The increase in this sort of harassment corresponds to the growing use of email and other forms of electronic communications by scientists.[22] Of course, the common mingling of the personal and the professional in electronic

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[20] *See id.* at 2, 5; *see also* Michael Halpern & Michael Mann, Editorial, *Transparency versus harassment*, SCIENCE, Vol. 348, Issue 6234, at 479 (May 1, 2015), *available at* http://www.sciencemag.org/content/348/6234/479.full.

[21] *See* CSD Rept. at 12 (discussing a request made by an industry group for a university to provide "all materials associated with [a] study including, incredibly, the identities of . . . participants whose confidentiality [the academic conducting the study] had assured").

We wish to make clear that it is not our contention that all public-record requests served on academics or other researchers constitute harassment. For instance, we believe that information regarding the funding of published research and the potential influence of that funding on the conclusions reached should ordinarily be a proper subject of public-record requests. *See, e.g.*, *id.* at 16 ("The public should . . . have access to information on who is funding an academic's work, and any influence the funder has on the content of that work."). Our concern is with the kinds of material that the trial court concluded were properly withheld in this case.

[22] *See id.* at 2; Halpern & Mann, *supra* note 20.

communications can make dealing with this sort of harassment even more complicated than it would otherwise be.[23]

This sort of harassment is frequently part of a broader strategy of attacking individual scientists as a way to try to discredit theories or even entire fields of study.[24] Dr. Mann has explained that "[b]y singling out a sole scientist, it is possible for the forces of 'anti-science' to bring many more resources to bear on one individual, exerting enormous pressure from multiple directions at once, making defense difficult."[25] For this reason, Dr. Mann has labeled this strategy the "Serengeti strategy," comparing such attacks to "a group of lions on the Serengeti seek[ing] out a vulnerable individual zebra at the edge of the herd."[26]

When a single scientist is targeted, that scientist often cannot entirely control the response to the attack. Public-record requests are typically served on the public universities or agencies associated with the scientist. Universities can provide useful support in these situations, as the University of Arizona has done in this case, but their involvement can also create complications. In spite of the

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[23] *See* CSD Rept. at 17.

[24] *See generally* Michael Mann, *The Serengeti strategy: How special interests try to intimidate scientists, and how best to fight back*, BULLETIN OF THE ATOMIC SCIENTISTS, Vol. 71, Issue 1, at 33-45 (2015).

[25] *Id.* at 34.

[26] *Id.*

increasing prevalence of this kind of harassment, universities are not always prepared to respond appropriately, and even if they have appropriate policies and procedures in place, they do not always communicate those policies and procedures to scientists.[27]

Even more significantly, the interests of scientists and their associated universities (or other public entities) are not always aligned.[28] In Dr. Mann's case, for example, the University of Virginia at first agreed to give the harassing party—E&E Legal's predecessor, ATI—special access to the requested materials under a protective order.[29] Dr. Mann had to intervene "to protect privacy interests he d[id] not think w[ould] be adequately protected by the other parties," including the University.[30] In another case, a university administrator at the University of North Carolina told a professor that he could face criminal charges if he did not turn over

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[27] *See* CSD Rept. at 15-16.

[28] *Id.* at 17.

[29] *Id.* at 6; *see also* Kate Sheppard, *Lawyer in Climate Science Case May Have Broken Ethics Rules*, MOTHER JONES, Oct. 9, 2012, http://www.motherjones.com/environment/2012/10/virginia-foia-michael-mann-epa-lawyer (also noting that UVA initially entered into a protective order with ATI).

[30] Sue Sturgis, *SPECIAL INVESTIGATION: Who's behind the 'information attacks' on climate scientists?*, THE INST. FOR SOUTHERN STUDIES, Oct. 31, 2011, http://www.southernstudies.org/2011/10/special-investigation-whos-behind-the-information-attacks-on-climate-scientists.html.

documents as directed by the University's attorney in response to an industry-group document request.[31] The professor had to hire his own attorney to negotiate with the University's attorney, ultimately limiting the scope of the University's voluntary production.[32]

Although the focus of this brief is the use of this sort of attack against climate scientists, the phenomenon is much broader than that. Examples run the gamut, spanning a wide array of fields:

- *History and Politics.* In 2011, the Republican Party of Wisconsin used public-record laws to seek the emails of University of Wisconsin history professor William Cronon, who had written "critically about the state's caustic conversation around collective bargaining rights" and about Governor Scott Walker, most notably in an op-ed for the New York Times and a subsequent blog post.[33] Cronon wrote that the "request seem[ed] designed to give [the Republican Party] what [it] hopes will be ammunition [it] can use to embarrass, undermine, and ultimately silence me."[34] The University ultimately released some emails, but not those related to Cronon's research process.[35]

- *Biology and Medicine*. Academics in various fields related to biology who use animal subjects in their research have been on the receiving end

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31 CSD Rept. at 12.

32 *Id.*

33 *See id.* at 9; William Cronon, *A Tactic I Hope Republicans Will Rethink: Using the Open Records Laws to Intimidate Critics*, Scholar as Citizen, Mar. 24, 2011, http://scholarcitizen.williamcronon.net/2011/03/24/open-records-attack-on-academic-freedom/.

34 Cronon, *supra* note 33.

35 CSD Rept. at 10.

of harassment from animal-rights supporters. For instance, activists pursued the correspondence of a UCLA professor who used primate subjects for 10 years.[36] UCLA ultimately found the burden of responding to these and other public-record requests so great that it felt compelled to establish a task force "to develop guidelines to protect faculty records while allowing an appropriate level of accountability."[37] In a declaration submitted to the trial court in this case, Professor Carole Goldberg, who co-chaired that task force, summarized the key principles underlying its conclusions, noting that the task force concluded that public-records requests are specifically damaging when "used for political purposes or to intimidate faculty working on controversial issues."[38] The University of Wisconsin similarly encountered this issue in the context of research using primates.[39] In general, the use of public-records requests to seek email and other personal information from researchers who use animal subjects has become so prevalent that the Federation of American Societies for Experimental Biology, the National Association for Biomedical Research, and the Society for Neuroscience have developed a guide to help researchers respond.[40]

- *Health Sciences*. Beginning in 2012, the Highland Mining Company made a series of public-record requests to the University of West Virginia seeking, among other things, draft documents and peer review comments related to the work of Michael Hendryx, who had studied the relationship between a certain kind of mining and adverse health effects.[41] The University refused to provide much of the requested information, and the company took it to court. Ruling in favor of the University, a state court explained that requiring excessive disclosure could cause scientists "to temper their approaches to research questions

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[36] *Id.* at 12-13.

[37] *Id.* at 13.

[38] Declaration of Carole Goldberg at 2-7 (July 29, 2014).

[39] CSD Rept. at 13.

[40] *Id.* at 14.

[41] *Id.* at 11.

> and problem-solving and be more hesitant to think outside the box, fearing public reception of the extreme or unconventional."[42]

As these examples demonstrate, the broad issue here is certainly not the exclusive domain of liberals or conservatives; these tactics are used by "activists across the political spectrum."[43] Whether this sort of harassment should be countenanced is a fundamental question about the boundaries of academic freedom, it is not about politics or any particular special-interest groups. Of course, in any particular case, the resort to intrusive public-records demands is fueled by the ideological or commercial interests of the requesters, as is certainly true when climate science is the issue.

III. E&E LEGAL AND THE HARASSMENT OF CLIMATE SCIENTISTS

A. E&E Legal

E&E Legal is a 501(c)(3) organization that was originally founded in 2009 as the Western Tradition Institute, rechristened as the American Tradition Institute (ATI) in 2010, and ultimately took on its current name in October of 2013.[44] It is a spinoff of the American Tradition Partnership (ATP), a 501(c)(4) organization that bills itself as "a no-compromise grassroots organization dedicated to fighting the

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[42] *Id.* at 11-12

[43] Halpern & Mann, *supra* note 20.

[44] *See* Sturgis, *supra* note 30; Press Release, Energy & Env't. Legal Inst., Introducing The Energy & Environment Legal Institute (Oct. 3, 2013), http://www.eelegal.org/?p=2015.

radical environmentalist agenda."[45] When ATP originally launched E&E Legal (then ATI), it said it would be a "think tank" that would be "battling radical environmentalist junk science head on."[46] E&E Legal itself touts its mission as achieving "free-market environmentalism through strategic litigation."[47] E&E Legal has referred to climate science as "the biggest taxpayer-financed gravy train for science and academia in decades."[48]

Although the specifics of their funding are somewhat obscure, both E&E Legal and ATP have received substantial funding from fossil-fuel interests and others with apparent economic incentives to prevent serious action on climate change.[49] Chris Horner, E&E Legal Senior Legal Fellow, has received funding

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[45] Sturgis, *supra* note 30; American Tradition Partnership, http://www.americantradition.org (last visited Oct. 26, 2015).

[46] Sturgis, *supra* note 30.

[47] Energy & Environment Legal Institute, http://www.eelegal.org (last visited Oct. 26, 2015).

[48] Press Release, Am. Tradition Inst., 'Hockey Stick' Creator Michael Mann Seeks Court's Help to Ensure No Enquiry, No 'Exoneration' (Sept. 6, 2011), http://eelegal.org/wp-content/uploads/2013/09/atinstitute.org-Hockey_Stick_Creator_Michael_Mann_Seeks_Courts_Help_to_Ensure_No_Inquiry_No_Exoneration.pdf.

[49] *See* Sue Sturgis, *Climate science attack group turns sights on Texas professors*, THE INST. FOR SOUTHERN STUDIES, July 19, 2012, http://www.southernstudies.org/2012/07/climate-science-attack-group-turns-sights-on-texas-professors.html; Shawn Lawrence Otto, *Climate Scientist Wins A Round for America*, HUFFINGTON POST, Nov. 1, 2011,

directly from the coal industry, as has the Free Market Environmental Law Clinic, which represents E&E Legal in this and other litigation.[50] In June of this year, a coal-industry trade organization sent the following message to its email list: "As the 'war on coal' continues, I trust that the commitment we have made to support Chris Horner's work will eventually create great awareness of the illegal tactics being employed to pass laws that are intended to destroy our industry."[51]

B. The Harassment of Climate Scientists

An early and loud warning shot of what was to come for climate scientists was fired in 1995, long before E&E Legal existed, in the aftermath of the IPCC's conclusion that "[t]he balance of evidence suggests a discernible human influence on global climate."[52] Dr. Benjamin Santer was the lead author of the chapter that yielded this conclusion.[53] Dr. Santer was attacked by a group led by two scientists tied to the George C. Marshall Institute, a think tank in Washington, D.C. backed

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http://www.huffingtonpost.com/shawn-lawrence-otto/climate-scientist-wins-a-_b_1070426.html; Sturgis, *supra* note 30; Mann, *supra* note 24, at 39.

[50] Lee Fang, *Attorney Hounding Climate Scientists is Covertly Funded by Coal Industry*, THE INTERCEPT, Aug. 25, 2015, https://theintercept.com/2015/08/25/chris-horner-coal/.

[51] *Id.*

[52] IPCC Second Assessment at 22.

[53] *See* IPCC Second Assessment, Working Grp. 1 Contribution at 407.

by fossil-fuel interests.[54] The group accused Dr. Santer of inappropriately altering the IPCC report to make the conclusions seem firmer than they were; and they accused him of "'scientific cleansing'—expunging the views of those who did not agree."[55] They circulated their accusations widely, publishing pieces in trade publications and heavily circulated newspapers, and writing letters to members of Congress, other government officials, and editors of scientific journals.[56] In op-eds in the *Wall Street Journal*, the group accused Dr. Santer of making changes to the IPCC report to "deceive policy makers and the public,"[57] and of "tamper[ing] with [the report] for political purposes."[58] The group even pressured contacts in the Energy Department to get Dr. Santer fired from his job.[59]

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54 *See* Erik M. Conway & Naomi Oreskes, *The Relentless Attack on Climate Scientist Ben Santer*, MOYERS & COMPANY, May 16, 2014, http://billmoyers.com/2014/05/16/the-relentless-attack-of-climate-scientist-ben-santer/; Seth Shulman, *Climate Fingerprinter: Profile: Benjamin Santer, Lawrence Livermore Laboratory*, UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/global_warming/science_and_impacts/science/climate-scientist-benjamin-santer.html (describing Santer's attackers as "fossil-fuel interests").

55 Conway & Oreskes, *supra* note 54.

56 *Id.*

57 Frederick Seitz, *A major deception on 'global warming'*, WALL STREET J., June 12, 1996, at A16, *available at* http://stephenschneider.stanford.edu/Publications/PDF_Papers/WSJ_June12.pdf.

58 S. Fred Singer, *Letter to the Editor: Coverup in the Greenhouse?*, WALL STREET J., July 11, 1996, at A15, *available at*

The attacks were "widely echoed by industry groups, business-oriented newspapers and magazines and think tanks," and Dr. Santer "spent enormous amounts of time and energy defending his scientific reputation and integrity."[60] Even today, Dr. Santer is still a regular target of opponents of climate science, often receiving hate mail.[61]

The harassment of Dr. Mann began in much the same way as the harassment of Dr. Santer: with scientific achievement met with a smear campaign. Dr. Mann was one of the authors (along with Dr. Hughes and Dr. Raymond Bradley) of a seminal paper in the field of climate science, depicting the so-called "hockey stick" curve that showed the spike in global temperature in recent decades.[62] The hockey stick was featured prominently in the IPCC's 2001 report, and it drew significant attention to Dr. Mann. Dr. Santer even said that "[t]here [we]re people who believe[d] that if they [could] bring down Mike Mann, they c[ould] bring down the

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http://stephenschneider.stanford.edu/Publications/PDF_Papers/WSJ_July11_96.pdf.

59 Conway & Oreskes, *supra* note 54.

60 *Id.*

61 Shulman, *supra* note 54.

62 *See* Mann, *supra* note 24, at 37-38.

IPCC,"[63] and people indeed tried to bring Dr. Mann down, attacking him in editorials published in national publications, just as Dr. Santer had been attacked.[64]

Before E&E Legal became involved in Dr. Mann's harassment, several government figures made attempts to access his personal records. First, Texas Republican Joe Barton, then the chair of the House Energy and Commerce Committee, sought to subpoena records from Dr. Mann and his "hockey stick" co-authors.[65] Representative Barton also sought records from the National Science Foundation—which had underwritten some of the research—including checks and bank statements.[66] In its editorial pages, the *New York Times* chided Barton for "harassing reputable scientists who helped alert the world to the problem" of global warming.[67] Barton, who was a "leading beneficiary of campaign funds from the oil, gas and utility industries," described his efforts through a spokesperson as a "common exercise" of committee responsibility.[68] But even some of his fellow

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[63] *Id.* at 38.

[64] *Id.* at 38-39.

[65] *Id.* at 39.

[66] Editorial, *Houses Divided on Warming*, N.Y. TIMES, July 23, 2005, *available at* http://www.nytimes.com/2005/07/23/opinion/houses-divided-on-warming.html?_r=0.

[67] *Id.*

[68] *Id.*

Republicans in the House saw through the pretext. New York Republican Sherwood Boehlert, for instance, described Barton's actions as "an effort to intimidate scientists rather than learn from them, and to substitute Congressional political review for scientific peer review."[69]

After Barton came Ken Cuccinelli, then Attorney General of Virginia, who had received money from contributors with an interest in the fossil-fuel industry.[70] In 2010, Cuccinelli used civil subpoenas under Virginia's Fraud Against Taxpayers Act—ostensibly designed to pursue state Medicare fraud—to seek all of Dr. Mann's personal emails with more than 30 other scientists during his 1999-2005 tenure at the University of Virginia.[71] This effort was ultimately rebuffed by the courts, with the Virginia Supreme Court rejecting the subpoenas as beyond Cuccinelli's powers under the statute.[72]

When it became apparent that Cuccinelli's efforts were in peril, E&E Legal stepped in, seeking, via the Virginia Freedom of Information Act, the same documents Cuccinelli had sought.[73] At first, the University agreed to give E&E

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[69] *Id.*

[70] Mann, *supra* note 24, at 39.

[71] *See id.*; CSD Rept. at 6.

[72] *Cuccinelli v. Rector & Visitors of Univ. of Va.*, 283 Va. 420 (2012).

[73] CSD Rept. at 6.

Legal special access to the documents under a protective order.[74] With the help of CSLDF, Dr. Mann objected, and the University also came to realize that it could not trust E&E Legal to abide by the protective order.[75] Ultimately, a Virginia court nullified the protective order, and the University and Dr. Mann then joined together to challenge E&E Legal in court, defending the withholding of certain information requested by E&E Legal.[76] Just as Cuccinelli had been rebuffed, E&E Legal was likewise rebuffed. In siding with Dr. Mann and the University, the Virginia Supreme Court cited the State's interest in "protect[ing] public universities and colleges from being placed at a competitive disadvantage in relation to private universities and colleges," explaining that this interest "implicates . . . harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and

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[74] *Id.*

[75] *Id.*; *see also* Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va., No. CL-11-3236, Mem. in Support of Mot. to Revise Order and for a Continued Stay, at 2 (Va. Circ. Ct. Oct. 18, 2011) (stating that "University counsel have received information in the last weeks that has shattered their confidence in the honesty and accuracy of the representations made to them by [E&E Legal]," and suggesting that E&E Legal "ha[s] not demonstrated [it] can be trusted to keep the records [at issue] safe"), *available at* http://www.ucsusa.org/sites/default/files/legacy/assets/documents/scientific_integrity/ATI-UVA-support-memorandum.pdf.

[76] CSD Rept. at 6.

confidentiality, and impairment of free thought and expression."[77] The Court noted that, as in this case, "many noted scholars and academic administrators submitted affidavits attesting to the harmful impact disclosure would have."[78]

Unfortunately, defeat in Virginia has not slowed E&E Legal down; E&E Legal surely understands the damage it can cause even when it is ultimately "unsuccessful." Beyond Arizona and Virginia, E&E Legal has also filed abusive public-record requests in, at least, Alabama, Delaware, Illinois, Texas, and Washington, D.C.[79] In Texas, for instance, E&E Legal sent requests to Texas A&M University under the Texas Public Information Act after Texas A&M

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77 *Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, 287 Va. 330, 342 (2014).

78 *Id.* at 343. The events described above are not a complete chronicle of the tribulations Dr. Mann has had to endure as a result of his role in the progress of climate science. In the aftermath of "Climategate" (*see supra* pp.10-11), for instance, Dr. Mann's employer, Pennsylvania State University, received "numerous communications . . . accusing Dr. Mann of having engaged in" misconduct "based on perceptions of the content of the [stolen] emails." Respondents' Opening Mem. at 34 (July 31, 2014) ("Resp. Trial Ct. Br."). These accusations spurred the University to appoint an Inquiry Committee to consider whether Dr. Mann had "engaged in manipulating data, destroying records and colluding to hamper the progress of scientific discourse around the issue of anthropogenic global warming." *Id.* at 33. Dr. Mann was completely vindicated by the resulting investigation. *See id.* at 33-34.

79 *See* CSD Rept. at 6; Michael Halpern, *Digging into big coal's climate connections*, THE GUARDIAN, Aug. 28, 2015, http://www.theguardian.com/science/political-science/2015/aug/28/digging-into-big-coals-climate-connections; E&E Legal v. Nasa/Hansen, ENERGY & ENV'T LEGAL INST., http://eelegal.org/?page_id=2220 (last visited Oct. 26, 2015).

Professor Andrew Dessler was quoted in the *New York Times* as having made a statement critical of attempts to minimize the problem of global warming.[80] E&E Legal's requests covered, among other things, communications between Dessler and the *New York Times* reporter who wrote the article at issue, and communications between Dessler and the Union of Concerned Scientists, a non-profit organization that protects scientific independence.[81]

IV. E&E LEGAL'S GOAL IS INTERFERENCE WITH CLIMATE SCIENCE, NOT TRANSPARENCY

E&E Legal's opening brief in the trial court claimed that it is "engaged in a transparency project . . . related to the important public policy issue of alleged catastrophic man-made global warming."[82] Its opening brief in this Court similarly claimed that it "is engaged in a transparency project to make government (public) information more accessible to the public and to guard against government employees and elected officials withholding from the public information to which they are entitled by law and which bears on important questions of public policy," and that as part of this project, "it has requested and obtained information held by many agencies, including universities, related to the important public policy issue

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80 *See* Sturgis, *supra* note 49.

81 *Id.*

82 E&E Legal Trial Ct. Br. at 4.

of catastrophic man-made global warming."[83] In the trial court, E&E Legal claimed that the events inappropriately labeled as Climategate demonstrated "apparent unethical behavior of faculty" and suggested that this behavior is widespread among climate scientists.[84] It claimed that this behavior was "likely to be further documented in the records sought."[85]

But the reality, as others have recognized, is that E&E Legal is not engaged in any sort of "transparency" project; it is simply "filing nuisance lawsuits to disrupt important academic research"[86] and because it "wants the public to believe human-caused global warming is a scientific fraud."[87] E&E Legal "abuse[s] open records laws to harass climate scientists across the United States," and "while they [have] los[t] repeatedly, in one way they are successful: they confuse the public debate, and force universities and scientists to spend hundreds of thousands of

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83 Pet.-App. Opening Brief at 4-5 (July 24, 2015).

84 E&E Legal Trial Ct. Br. at 4, 13.

85 *Id.* at 13.

86 Suzanne Goldenberg, *American Tradition Institute's fight against 'environmental junk science'*, THE GUARDIAN, May 9, 2012, http://www.theguardian.com/environment/2012/may/09/climate-change-american-tradition-insitute.

87 Sturgis, *supra* note 30.

dollars defending themselves[,] . . . tak[ing] time away from research and dissuad[ing] scientists from public engagement."[88]

The declarations submitted by the Appellees in the trial court demonstrate the burden of E&E Legal's attacks, even where E&E Legal is defeated in court.

Dr. Hughes explained that "[r]esponding to the E&E public records request was and continues to be a very burdensome and dispiriting task that diverted [his] energies and attention from productive work to a notable degree."[89] He added that "reviewing [his] emails for information responsive to Petitioner's broad demands took at least ten weeks" and "deprive[d] [him] of one of a small handful of summers remaining in [his] career," a difficult professional burden given that "[f]or an active science professor, summer is . . . a time for intensive scientific activity."[90]

Dr. Overpeck similarly stated that "[p]reparing the response to E&E's public records request in this case was . . . a significant burden."[91] He had to review over 90,000 pages of potentially responsive emails, a task that took "all afternoon and

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[88] Halpern, *supra* note 79.

[89] Declaration of Dr. Malcolm Hughes at 4 (July 28, 2014) ("Hughes Decl.").

[90] *Id.* at 4-5.

[91] Declaration of Dr. Jonathan Overpeck at 3 (July 28, 2014).

into the evening" every day for a period of approximately six weeks.[92] Based on E&E Legal's misuse of emails that were turned over, Dr. Overpeck concluded that "it would seem the real reason for E&E's request [wa]s to seek [his] email records merely in hopes of misstating, misquoting, taking [his] statements or those of others out of context, or otherwise twisting their meaning to attempt to burden, embarrass, or harass climate researchers such as [him]self."[93]

Declarations from academics who have not personally been subject to E&E Legal's attacks demonstrate the obvious burden on any academic that even the possibility of such an attack creates. For instance, biologist and former *Science* Editor-in-Chief Dr. Bruce Michael Alberts explained: "Were I as a young man required to keep every paper data tape from the scintillation counter measuring the incorporation of radioactive nucleotides into DNA (tens of thousands of biochemical reactions), because that data might need to be turned over routinely in response to 'public records' or FOIA-type requests, I might have quit science instead."[94]

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[92] *Id.* at 4.

[93] *Id.*

[94] Declaration of Dr. Bruce Michael Alberts at 5 (July 29, 2014) ("Alberts Decl.").

Respondents and their other amicus have accurately outlined the other serious repercussions of this sort of abusive request.[95] Requiring any additional documents to be disclosed would exacerbate these negative impacts, and would encourage E&E Legal and its allies to file more of these abusive requests.

V. EFFECTIVE RELIEF IS REQUIRED

It should be clear from the foregoing that it is not sufficient for this Court merely to affirm the ruling of the trial court and thereby leave open the need in case after case for document-by-document review of scientists' work papers and confidential pre-publication communications with other scientists. The repetition in case after case of such expensive and burdensome procedures allows entities like E&E Legal to accomplish a large part of their objectives in bringing abusive public-records litigation—to wit, to impose huge burdens on the time and resources of scientists and the institutions that employ them.

Accordingly, CSLDF urges the Court to make clear that, in the absence of a showing of exceptional circumstances, certain types of documents related to research are exempt from disclosure under the Arizona Public Records Law because, with regard to such disclosure, it is presumptively the case that "the interests of privacy, confidentiality, or the best interests of the state in carrying out

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[95] *See, e.g.*, Appellees' Answering Brief (Sept. 15, 2015) at 27-39; Brief of Amicus Curiae Am. Assoc. of Univ. Professors in Support of Respondents/Appellees. .

its legitimate activities outweigh the general policy of open access."[96] Similar to Appellees' suggestion to the trial court,[97] CSLDF believes that at least the following types of documents should be covered by this exemption: prepublication drafts, editorial comments, peer reviews, email (between and among researchers, co-authors, reviewers and other collaborators), unfinished or inactive research, and unused data, in each case even if the materials relate to an eventual publication. Documents not covered by such an exemption would include those that reveal potential conflicts of interest, such as corporate or other funding sources, and those sought in connection with extreme circumstances, such as where a prima facie showing of crime or fraud has been made.

In addition to being consistent with Arizona's statutory public-records exemption for universities,[98] this listing is well justified by traditional, established

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[96] *Carlson v. Pima County*, 141 Ariz. 487, 491 (1984).

[97] *See* Resp. Trial Ct. Br. at 40.

[98] *See* A.R.S. § 15-1640(A)(1)(b), (d) (exempting from disclosure "[i]nformation or intellectual property . . . [d]eveloped by persons employed by a university, independent contractors working with a university or third parties that are collaborating with a university, if the disclosure of this data or material would be contrary to the best interests of this state," and more specifically exempting "[i]nformation or intellectual property . . . [c]omposed of unpublished research data, manuscripts, preliminary analyses, drafts of scientific papers, plans for future research and prepublication peer reviews"); *see also* Resp. Trial Ct. Br. at 39-40.

principles of confidentiality deemed necessary for the protection of uninhibited scientific inquiry. As Dr. Alberts explained in his declaration:

> Science is a search for truth. Scientists must feel free to speak their minds in private emails—spontaneously and without fear of each informal thought being officially reviewed. They must be able to share their thoughts on the fly, to question the abilities or care of other scientists, and to be highly critical (and even scathingly rude) about the data or approaches of others in emails and other private correspondence. Any discouragement of such spontaneous and blunt honesty on the part of a scientist in private correspondence would seriously hinder the free flow of thought that is critical to scientific invention.[99]

Dr. Alberts' words echo sentiments Dr. Hughes expressed to a University of Virginia Professor in a 2011 letter about E&E Legal's pursuit of Dr. Mann's confidential communications. Dr. Hughes wrote that "[m]any of the most pressing issues in modern science demand study by collaborative groups of scholars drawn from several fields and often multiple locations," and that members of such groups "must be free to float ideas, express opinions, and, importantly, change opinions in the course of the collaborative work," without work that is ultimately published being judged based on "ongoing discussions in coffee rooms or telephone calls or email messages."[100] Dr. Hughes went on: "Nothing is more likely to quash the creativity of America's scientists than the ever-present ear of a hostile listener

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[99] Alberts Decl. at 5.

[100] Hughes Decl. at 9.

intent on finding, at all costs, the appearance of malfeasance. Nothing is more calculated to discourage research into topics that may challenge powerful interests than the telephone tap, or its modern cousin the carefully cherry-picked phrase in one out of thousands of emails. . . . It is indeed the modern 'hostile ear.'"[101]

Confidentiality must of course be balanced against the societal goods that traditionally justify public-record laws; CSLDF does not believe the presumptive exemptions it asks the Court to adopt will impede any appropriate use of the Arizona Public Records Law.[102] And such an approach may be the only effective means of curbing the threats to scientific inquiry at public institutions posed by abusive litigation of the sort this case represents.

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101 *Id.*; *see also, e.g.*, Declaration of Molly Corbett Broad at 5 (July 10, 1014) ("The publication of research findings and the raw and methodological data upon which they are based is a normal part of scientific work, and should be sufficient to enable findings to be checked, methodologies to be examined and underlying data to be interpreted and understood. On the other hand, there is no compelling necessity for intrusion into other aspects of the collaborative, analytical and critical processes involved in getting work published.").

102 *See supra* note 21 (discussing public-record requests served on academics or other researchers that may be appropriate)

CONCLUSION

The judgment of the trial court should be affirmed, and the Court should adopt rules to limit the need for and burden imposed by document review in connection with this type of public-record litigation, as discussed above.

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CERTIFICATE OF COMPLIANCE

This certificate of compliance concerns an amicus curiae brief, and is submitted under Rule 16(b)(4) of the Arizona Rules of Civil Appellate Procedure. The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains **7,350** words. The brief to which this Certificate is attached does not exceed the applicable word limit.

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2015, Counsel for *Amicus Curiae* Climate Science Legal Defense Fund's Brief for Amicus Curiae Climate Science Legal Defense Fund in Support of Appellees and Certificate of Compliance was electronically filed with the Clerk's Office and copies were sent via email to:

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