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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

ENERGY & ENVIRONMENT LEGAL INSTITUTE

Petitioner,

vs.

ARIZONA BOARD OF REGENTS and TERI MOORE, in her official capacity as Custodian of Public Records for the University of Arizona,

Respondents.

Case No. C2013-4963

Brief for *Amicus Curiae* Climate Science Legal Defense Fund In Support of Respondents

[Hon. James E. Marner]

INTRODUCTION

The Climate Science Legal Defense Fund ("CSLDF") submits this Brief because of its concern that a decision for Petitioner Energy & Environment Legal Institute ("E&E") would encourage burdensome and abusive public-record requests in Arizona and elsewhere and impair research in politically controversial fields such as climate change.

E&E claims that its overbroad, intrusive, and burdensome public-record requests are part of a "transparency project." Having helped climate scientists fight E&E's requests for years, CSLDF knows E&E's real motivation: to interfere with climate scientists' work in an attempt to discourage the pursuit of climate science and impugn the integrity of climate science as a whole. E&E's actions are part of a systematic campaign to create doubt about the reality, causes, and potential consequences of climate change where there should be none.

In spite of the scientific consensus that global warming is real and caused in major part by human activity, E&E and other opponents of effective measures to combat climate change continue, in conduct reminiscent of that of the tobacco companies in the latter half of the 20th century, a systematic effort to foster public perception that the science is inconclusive. Whatever one might think of this broader "debate," this Court should have little difficulty, even under a *de novo* standard of review, concluding that the broad and intrusive public-record requests at issue here cross the line. Ruling otherwise would trample on the traditional confidentiality of pre-publication communications among scientists, jeopardize the ability of public institutions like the University of Arizona to maintain scientific preeminence by impairing their attractiveness as places for scientists to work and teach, waste time that scientists could spend furthering their research, and have other detrimental impacts described by Respondents and the AAUP.

We urge the Court not only to again reject further disclosure, but also to adopt rules for handling these sorts of requests that afford clear protection to traditionally confidential scientific communications and thus allow for the non-burdensome rejection of overly intrusive requests. Such rules would prevent E&E and its allies from "winning while losing" by imposing intolerable burdens on scientists simply by filing non-meritorious demands. The adoption of such rules is particularly important given the Court of Appeals' ruling in this case that public officials' decisions regarding public-record requests are subject to *de novo* judicial review.

ARGUMENT

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

Over the past decade, public-record laws have increasingly been used to harass researchers whose findings or methods opponents do not like or who work in fields opponents wish to impede.[1] Harassing requests, served on scientists affiliated with public universities or other governmental entities, seek not only data or research methods underlying published studies, which are generally made public anyway, but also traditionally confidential pre-publication materials—including preliminary drafts, handwritten notes, private critiques from other scientists, and even personal documents and correspondence—that are crucial to collaboration.[2]

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[1] *See* CTR. FOR SCI. & DEMOCRACY AT THE UNION OF CONCERNED SCIENTISTS, FREEDOM TO BULLY: HOW LAWS INTENDED TO FREE INFORMATION ARE USED TO HARASS RESEARCHERS 2 (Feb. 2015) [hereinafter "CSD Rpt."], *available at* http://www.ucsusa.org/sites/default/files/attach/2015/09/freedom-to-bully-ucs-2015-final.pdf.

[2] *See id.* at 2, 5; *see also* Michael Halpern and 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. We do not contend that all public-record requests served on scientists constitute harassment. For instance, information regarding the funding of published research and the potential influence of that funding on the conclusions reached are ordinarily a proper subject of public-record requests. *See, e.g.*, CSD Rpt. at 16 ("The public should . . . have access to information on who is funding an academic's work, and any

The rise in such harassment tracks scientists' growing use of email and other electronic communications.[3] The requests are frequently part of a broader strategy of attacking individuals as a way to discredit theories or even entire fields.[4] "By 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."[5]

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 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.[6]

Even more significantly, the interests of scientists and their institutions are not always aligned.[7] In the case of former University of Virginia professor Michael Mann, for example, the

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influence the funder has on the content of that work."). Our concern is with the kinds of material still at issue in this case.

3 *See id.* at 2; Halpern & Mann, *supra* note 2; *see also* Resp. Final Mem. at 2-3 (describing the importance of email for modern scientists, including Drs. Hughes and Overpeck).

4 *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).

5 *Id.* at 34.

6 *See* CSD Rpt. at 15-16.

7 *Id.* at 17.

University at first agreed to give the harassing party—E&E's predecessor, ATI[8]—access to the requested materials under a protective order.[9] Dr. Mann had to intervene (helped by CSLDF) "to protect privacy interests he d[id] not think w[ould] be adequately protected by the other parties," including the University.[10] In another case, a University of North Carolina administrator told a professor he could face criminal charges if he did not turn over documents as directed by the University's attorney in response to an industry-group document request.[11] The professor had to hire his own attorney to convince the University to limit its voluntary production.[12]

Although our focus is climate scientists, examples span 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.[13] Cronon wrote that the

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[8] E&E 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. *See* 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; Press Release, Energy & Env't. Legal Inst., Introducing The Energy & Environment Legal Institute (Oct. 3, 2013), http://www.eelegal.org/?p=2015. It is a spinoff of the American Tradition Partnership, a 501(c)(4) organization that bills itself as "a no-compromise grassroots organization dedicated to fighting the radical environmentalist agenda." Sturgis, *supra*; American Tradition Partnership, http://www.americantradition.org (last visited Mar. 25, 2016).

[9] CSD Rpt. 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.

[10] Sue Sturgis, *supra*, note 8.

[11] CSD Rpt. at 12.

[12] *Id.*

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

"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."[14]

- *Biology and Medicine*. Researchers using animal subjects have been harassed by animal-rights groups. For instance, activists spent a decade pursuing correspondence of a UCLA professor studying primates.[15] UCLA found responding to these and other public-record requests so burdensome that it established a task force "to develop guidelines to protect faculty records while allowing an appropriate level of accountability."[16] Public-record requests have been used so regularly to seek email and other personal information from researchers using animal subjects that groups serving researchers in relevant fields published a guide to help researchers respond.[17]

- *Health Sciences*. Starting in 2012, Highland Mining Company made public-record requests to the University of West Virginia seeking, *inter alia*, draft documents and peer-review comments related to the work of Michael Hendryx, who studied adverse health effects of certain mining techniques.[18] The University refused to provide much of the requested information and the company sued. Ruling for the university, a state court explained that excessive disclosure could cause scientists "to temper their approaches to research questions and problem-solving and be more hesitant to think outside the box, fearing public reception of the extreme or unconventional."[19]

As these examples demonstrate, the broad issue here is not the exclusive domain of liberals or conservatives; these tactics are used by "activists across the political spectrum."[20] This sort of harassment raises a fundamental question about academic freedom; it is not about politics or particular special-interest groups. Of course, in any particular case intrusive public-record demands are likely fueled by the requesters' ideological or commercial interests.

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14 Cronon, *supra* note 13.

15 CSD Rpt. at 12-13.

16 *Id.* at 13.

17 *Id.* at 14.

18 *Id.* at 11.

19 *Id.* at 11-12

20 Halpern & Mann, *supra* note 2.

In Dr. Mann's case, government figures made politically-motivated attempts to access his personal records even before E&E was involved.[21] When those efforts began to fail, E&E stepped in, also with political motivations. E&E touts its mission as "free-market environmentalism through strategic litigation,"[22] and it has called climate science "the biggest taxpayer-financed gravy train for science and academia in decades."[23] E&E has received substantial funding from fossil-fuel interests and others against action on climate change.[24] E&E and E&E Senior Legal Fellow Chris Horner have been funded by coal companies, as has the Free Market Environmental Law Clinic, which represents E&E in this and other litigation.[25]

In Virginia, E&E sought the same documents the State's Attorney General had unsuccessfully sought.[26] *See* note 21, *supra*. With CSLDF's help, the University and Dr. Mann

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[21] *See* Mann, *supra* note 4, at 39 (discussing politically-motivated attempts by U.S. Rep. Barton and Virginia Attorney General Cuccinelli); CSD Rpt. at 6; *see also Cuccinelli v. Rector & Visitors of Univ. of Va.*, 283 Va. 420 (2012) (rejecting Cuccinelli's attempt).

[22] E&E Legal, http://www.eelegal.org (last visited Mar. 25, 2016).

[23] 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.

[24] *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, http://www.huffingtonpost.com/shawn-lawrence-otto/climate-scientist-wins-a-_b_1070426.html; Sturgis, *supra* note 8; Mann, *supra* note 4, at 39.

[25] Nick Surgey, *Lawyer Tormenting Scientists Revealed Working For Coal Company*, PR WATCH, Mar. 18. 2016, http://www.prwatch.org/news/2016/03/13062/chris-horner-revealed-counsel-coal-company-alpha-natural-resources; 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/.

[26] CSD Rpt. at 6.

succeeded in protecting certain information requested by E&E.[27] In siding with Dr. Mann and the University, the Virginia Supreme Court noted that requiring disclosure of the requested documents would cause "harm to university wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression."[28]

Unfortunately, defeat in Virginia has not slowed E&E; E&E surely understands the damage it can cause even when it is "unsuccessful." Beyond Arizona and Virginia, E&E has filed similar requests in, at least, Alabama, Delaware, Illinois, Texas, and Washington, D.C.[29] In Texas, for instance, E&E sent requests to Texas A&M University after Professor Andrew Dessler was quoted in the *New York Times* criticizing attempts to minimize the problem of global warming.[30] E&E's requests covered, among other things, communications between Dessler and the *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.[31]

Although E&E's original opening brief in this Court claimed (at 4) it is "engaged in a transparency project . . . related to the important public policy issue of alleged catastrophic man-made global warming," the reality is that E&E is not conducting any "transparency"

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27 *Id*.

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

29 *See* CSD Rpt. 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 Mar. 25, 2016).

30 *See* Sturgis, *supra* note 24.

31 *Id.*

project; it is simply "filing nuisance lawsuits to disrupt important academic research"[32] and it "wants the public to believe human-caused global warming is a scientific fraud."[33] E&E "abuse[s] open records laws to harass climate scientists across the United States," and "while they lose repeatedly, in one way they are successful: they confuse the public debate, and force universities and scientists to spend hundreds of thousands of dollars defending themselves[,] . . . tak[ing] time away from research and dissuad[ing] scientists from public engagement."[34]

Respondents and the AAUP have outlined well the other serious repercussions of this sort of abusive request.[35] Requiring disclosure of additional documents would exacerbate these negative impacts, and would encourage E&E and its allies to file more abusive requests. Nondisclosure fits comfortably within the statutory exception.

II. EFFECTIVE RELIEF IS REQUIRED

It should be clear from the foregoing that it is not sufficient for this Court merely to refuse to order disclosure in this case, while leaving 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 of such burdensome procedures allows entities like E&E to accomplish a large part of their objectives—to wit, to impose huge burdens on scientists and institutions that employ them, not to mention the judges who must adjudicate

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[32] 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.

[33] Sturgis, *supra* note 8.

[34] Halpern, *supra* note 29; *see also* Resp. Final Mem. at 10 (discussing the burden of responding to requests).

[35] *See, e.g.*, Resp. Final Mem. at 4-10; Brief of Amicus AAUP at 9-15 (Oct. 28, 2014).

these cases. The *de novo* standard held applicable by the Court of Appeals only makes matters worse: Scientists and institutions targeted by entities like E&E face the added burden of explaining actions taken in response to abusive public-record requests even more fully in court than previously thought necessary.

Accordingly, CSLDF urges the Court to make clear that, absent a showing of exceptional circumstances, certain types of research documents 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 its legitimate activities outweigh the general policy of open access."[36] Similar to Respondents' prior suggestion to this Court,[37] CSLDF believes that at least the following types of documents should be exempted: pre-publication drafts, editorial comments, peer reviews, email (between and among researchers, co-authors, reviewers and other collaborators), abandoned 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-record exemption for universities,[38] this listing is well justified by traditional, established principles of confidentiality necessary for the protection of uninhibited scientific inquiry, as detailed by Respondents.[39]

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[36] *Carlson v. Pima County*, 141 Ariz. 487, 491 (1984); *see also ABOR v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 258 (1991).

[37] *See* Resp. Opening Br. at 40 (July 31, 2014).

[38] *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

Confidentiality must of course be balanced against the societal good that traditionally justifies public-record laws. CSLDF submits, however, that the presumptive exemptions it asks the Court to adopt will not undermine any appropriate use of the Arizona Public Records Law.[40] 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.

CONCLUSION

The Court should find in favor of Respondents, even under the *de novo* standard of review, and the Court should adopt categorical rules to limit the need for and burden imposed by document review in connection with this type of public-record litigation, as discussed above.

Respectfully submitted,

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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").

39 *See* Resp. Final Mem. at 4-10.

40 *See supra* note 2 (discussing appropriate public-record requests)

The FOREGOING filed with the
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