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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES – CENTRAL DISTRICT

GOVERNMENT ACCOUNTABILITY & OVERSIGHT, P.C.,

Petitioner,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondent.

Case No. 20STCP01226

[PROPOSED] BRIEF OF *AMICUS CURIAE* THE CLIMATE SCIENCE LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Hearing Date: December 14, 2021
Time: 9:30 AM
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Petitioner Government Accountability & Oversight, P.C.'s ("GAO") public-records request is part of a growing effort by special interest groups to weaponize public-records laws against academic research and inquiry that those groups wish to discourage. In particular, groups funded by fossil fuel interests—here, the coal industry—have repeatedly targeted academics who focus on the threat posed by climate change. These requests harm the public interest by stifling academic freedom, discouraging collaboration among scholars, and undermining the competitive standing and educational mission of California's world-class public universities. At the same time, the requests would do little to inform California citizens on how their State government functions, as university faculty do not carry out traditional governmental functions. In short, public-records requests like those at issue here do not meaningfully educate the public "concerning the conduct of the people's business." Cal. Gov't Code § 6250. They do the opposite, chilling the pursuit of knowledge in the service of a special interest group's agenda. *Amicus curiae* the Climate Science Legal Defense Fund therefore respectfully requests that this Court deny GAO's petition.

INTEREST OF *AMICUS CURIAE*

The Climate Science Legal Defense Fund ("CSLDF"), a 501(c)(3) non-profit organization, was founded in 2011 in response to an increasing volume of legal attacks on climate scientists, including abusive public-records requests targeting academics affiliated with public universities. CSLDF's mission is to protect the scientific endeavor in general, and climate science in particular, by providing pro bono legal services and educational resources to researchers focused on investigating the causes and consequences of—and developing solutions for—climate change. Through its advocacy, CSLDF helps ensure that scholars can conduct, publish, and discuss their work without fear of harassment, censorship, or intimidation.

CSLDF's initial project was to assist in the defense of Dr. Michael Mann, a climate scientist whose confidential communications while a member of the University of Virginia faculty were the subject of a 2011 public-records request made by an organization with a mission similar to, and staffed by some of the same personnel as, GAO. Subsequent to Dr. Mann's case, CSLDF has developed expertise regarding public-records requests targeting climate science and related research that will be of assistance to the Court in resolving the Petition before it.

CSLDF exists in large part to protect scientists, academics, and researchers from invasive public-records requests like those at issue here. A decision in GAO's favor will encourage additional requests targeting climate science and related issues in California and elsewhere, while failing to meaningfully inform California citizens as to how their State government functions. The resulting chilling effect on scientific and academic inquiry is antithetical to CSLDF's mission to protect the scientific endeavor.

ARGUMENT

The records request at issue in this case is part of a trend where special interest groups use public-records laws to discourage academic or scientific research that they oppose. Such requests have repeatedly targeted scientists and others who work to address climate change, although climate science is far from the only discipline that special interest groups have sought to impede through public-records requests. When aimed at public university faculty, these records requests seriously harm the public interest while providing little benefit to California citizens. GAO's request is no exception.

I. THERE IS A GROWING TREND OF ABUSE OF PUBLIC-RECORDS LAWS TO CHILL ACADEMIC DISCOURSE AND RESEARCH IN CLIMATE SCIENCE AND OTHER FIELDS

Over the past decade, special interest groups opposed to climate-science research have used overbroad public records requests to discourage that research. Other special interest groups across the political spectrum have followed suit with respect to a wide array of different scientific and academic disciplines. This weaponization of public-records laws achieves little beyond chilling inquiry and innovation.

In 2009, a hacker stole thousands of emails from the University of East Anglia's Climate Research Unit in an incident that became known as "Climategate." *Hackers Target Leading Climate Research Unit*, BBC, Nov. 20, 2009, https://tinyurl.com/uscbkh75; Michael Halpern, Ctr. for Sci. & Democracy, Union of Concerned Scientists, *Freedom To Bully: How Laws Intended to Free Information Are Used To Harass Researchers* 7 (Feb. 2015), https://tinyurl.com/sxvryfuu (hereinafter "CSD Report"). Opponents of scientific research into the connection between human activity—primarily the burning of fossil fuels—and climate change then attempted to capitalize on the hack, presenting the stolen emails out of context to claim that climate scientists had manipulated data and acted unethically. *See* Douglas Fischer, *Climategate Scientist Cleared in Inquiry, Again*, Scientific American, July 1, 2010,

https://tinyurl.com/33wxbxc6; Phil Platt, *The Global Warming Emails Non-Event*, Discover, Nov. 30, 2009, https://tinyurl.com/y8m82e8r. Repeated investigations ultimately debunked these claims. *E.g.*, Union of Concerned Scientists, *Debunking Misinformation About Stolen Climate Emails in the "Climategate" Manufactured Controversy* (updated Aug. 25, 2011), https://tinyurl.com/xthtz7rw; *U.S. Scientists Cleared in 'Climategate,'* Canadian Broadcasting Channel, Feb. 25, 2011, https://tinyurl.com/tpp55u7x (noting the "latest of several U.S. and U.K. probes" that "cleared the scientists of wrongdoing"). Nevertheless, Climategate underscored to opponents of climate-science research that scientists' private communications could be weaponized to manufacture controversy and generally raise the costs of engaging in such research.

In the wake of Climategate, opponents of climate-science research have increasingly turned to public-records laws to obtain the research materials, pre-publication deliberative documents, and private communications of scientists and other researchers subject to those laws by virtue of their connections to public universities or government agencies. *See* CSLDF, *Research Protections in State Open Records Laws: An Analysis and Ranking* 1-3, 31-32, 180-82 (Oct. 2021), https://tinyurl.com/3667xfs8 (hereinafter "CSLDF Report"). In 2011, an organization called the American Tradition Institute ("ATI")[1] sought the communications of Michael Mann—a prominent climate scientist and the main target of Climategate polemics—for a six-year period during which he was a member of the University of Virginia faculty. CSD Report at 6.[2] ATI (and its successor organization, the Energy & Environmental Legal Institute ("E&E")) made similar records requests elsewhere targeting university faculty as well as scientists employed by federal agencies. *Id.*; *see Competitive Enter. Inst. v. Nat'l Sec. Agency*, 78 F. Supp. 3d 45, 49 (D.D.C. 2015) (describing efforts to obtain "telephone calls, e-mails, and text messages" of EPA

[1] Chris Horner, counsel for GAO and a member of its board of directors, was the Director of Litigation for ATI. CSD Report at 6; *see* pp. 13-14, *infra*.

[2] Litigation arising from that records request ultimately reached the Virginia Supreme Court, which broadly ruled in favor of the University and Professor Mann, holding that disclosure of Mann's correspondence would "harm . . . university-wide research efforts, damage . . . faculty recruiting and retention, undermin[e] faculty expectations of privacy and confidentiality, . . . impair[ ] free thought and expression," and disadvantage Virginia's "public universities in comparison to private" institutions. *Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, 756 S.E.2d 435, 442 (Va. 2014).

officials)[3]; Complaint, *Am. Tradition Inst. v. NASA*, No. 11-cv-1144, Dkt. 1 (D.D.C. June 21, 2011); *Past Legal Work*, Energy & Env't Legal Inst., https://eelegal.org/lawsuits-2/ (last visited Nov. 18, 2021).

In 2012, for example, after Texas Tech University professor Katherine Hayhoe became a target of talk-radio host Rush Limbaugh for her climate research, ATI submitted a public-records request for her email correspondence. CSLDF, *Perspectives of Scientists Who Become Targets: Katherine Hayhoe* (Aug. 10, 2017), https://tinyurl.com/s6vedrh2. The request purportedly sought evidence that Professor Hayhoe had somehow misused public funds in writing—*pro bono*—a chapter for a book to be published by an academic press. *Id.* When the university produced her communications, ATI found nothing it could use to further its agenda. *Id.* Professor Hayhoe understood, however, the intended impact of the records requests: "The goal," she said, "is to shut you up, to make you feel afraid, to make you feel like 'I shouldn't be saying anything because if I do, these are the consequences.'" *Id.*

To take another example, the same year, ATI (later E&E after its renaming in 2013) sought the communications of a scientist at Texas A&M University, Andrew Dessler, the day after he was quoted challenging the theory of a climate-change skeptic in the *New York Times*. CSLDF, *Perspectives of Scientists Who Become Targets: Andrew Dessler* (June 27, 2017), https://tinyurl.com/bu8wnnjc. The university produced the documents, but ATI apparently did not find any of them useful to its agenda. *Id.* E&E went on to seek Professor Dessler's communications ***twice*** more—both fishing expeditions in which E&E came up empty-handed. *Id.* In light of his experience as a three-time target of public-records requests, Professor Dessler now advises scientists to "'self-censor[ ] their emails.'" *Id.*

Use of public-records laws to chill academic discourse and research is not unique to the field of climate science. Nor is weaponizing those laws in furtherance of a particular political agenda. *See, e.g.*, CSLDF Report at 4-6, 38-42, 59-60, 63-64; *see also* Michael Halpern & Michael Mann, *Transparency Versus Harassment*, Science, May 1, 2015, https://tinyurl.com/573uvvuc (public-records requests are used

[3] E&E went so far as to seek EPA officials' communications from the National Security Agency on the theory that, as the judge overseeing that case put it, "[a]fter all, doesn't the NSA have everyone's phone, e-mail, and text-message records?" *Competitive Enter. Inst.*, 78 F. Supp. 3d at 49. That request was denied. *Id.*

by "activists across the political spectrum" to chill academic speech and inquiry). Examples abound, including:

- *Biology and Medicine.* Researchers who use animal subjects are frequently on the receiving end of overbroad records requests. *See* CSLDF Report at 5-6, 39-40, 59, 79, 87, 110, 124, 135, 142, 144, 149-50, 163, 178, 184, 190. Those requests have become so prevalent that the Federation of American Societies for Experimental Biology, the National Association for Biomedical Research, and the Society for Neuroscience developed a guide to help researchers respond in the event they are the target of a public-records request. CSD Report at 13-14.
- *History and Politics.* In 2011, a State political party used public-records laws to seek the emails of a professor who had criticized the State's approach to collective bargaining rights. CSD Report at 9. The professor observed that the request was calculated to "embarrass" him in order to "silence [him] as a critic." Bill Cronon, *Abusing Open Records To Attack Academic Freedom*, Scholar Citizen, Mar. 24, 2011, https://tinyurl.com/45wt2zsn.
- *Health Sciences.* Beginning in 2012, the Highland Mining Company made a series of public-records requests to the University of West Virginia seeking, among other items, draft documents and peer review comments related to the work of a professor on the relationship between a certain type of mining and adverse health effects. CSD Report at 11; *see, e.g.*, CSLDF Report at 92, 123, 136 (describing other public-records requests targeting health-science researchers).
- *Law and Religion.* Douglas Laycock, one of the nation's foremost religious-liberty experts, was the target of a public-records request for his email and phone records by two students professing support for LGBT equality after Professor Laycock argued in favor of certain religious exemptions from the Affordable Care Act. CSD Report at 15; *see* Jonathan H. Adler, *You Don't Start a Dialogue with FOIA Requests*, Wash. Post, May 27, 2014, https://tinyurl.com/j58dz6t4; *see also Sussex Commons Assocs., LLC v. Rutgers*, 46 A.3d 536, 538 (N.J. 2012) (holding that "records related to cases at public law school clinics are not subject to [state public records law]" where real estate developer requested records from environmental law clinic).
- *Agricultural Research.* The Humane Society targeted researchers at the University of California, Davis studying the effects of confinement on the productivity of egg-laying hens. CSD Report

at 6. When the Humane Society filed a petition similar to the one at issue in this case, the California Court of Appeals denied it, concluding that "the public interests in nondisclosure outweigh the public interests in disclosure." *Humane Soc'y of U.S. v. Superior Court*, 214 Cal. App. 4th 1233, 1275 (2013).

II. DISCLOSURE IN THIS CASE IS CONTRARY TO THE PUBLIC INTEREST

The public interest in the communications and research deliberations of university professors is minimal. Professors do not set public policy, nor do they carry out a particular statutory or regulatory mandate. There is little to gain from the disclosure of their communications with respect to California citizens' understanding of how their government functions. At the same time, the costs of compelled disclosure are high. Disclosure of professors' private communications, deliberations, and unpublished research materials chills academic freedom, hampers important research efforts, and puts California's public universities at a competitive disadvantage in comparison to private institutions. Accordingly, in this case, the public interest in nondisclosure clearly outweighs any public interest served by disclosure. *See* Cal. Gov't Code § 6255(a) (providing that a public agency may withhold records where "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record"); *Humane Soc'y*, 214 Cal. App. 4th at 1255 (applying the § 6255 "catch-all exemption").[4] Disclosure is therefore unwarranted.

[4] Significantly, the California Public Records Act explicitly exempts disclosure of "preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business." Cal. Gov't Code § 6254(a). The California Supreme Court has also recognized a "deliberative process" exemption, or "privilege," which protects "the freedom to think out loud" and "test ideas" "uninhibited by the danger" that one's "thoughts will become subjects of public discussion." *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1341 (1991) (en banc) (quoting Archibald Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1410 (1974)). And here, GAO's overbroad request is calculated to reveal not only communications of a personal nature, but also academic discussions, preliminary drafts, research memoranda, and informal deliberation. That said, because the "preliminary drafts" exemption and the "deliberative process privilege" both require balancing the public interest in disclosure versus nondisclosure, *see* Cal. Gov't Code § 6254(a); *Times Mirror Co.*, 53 Cal. 3d at 1336—effectively merging with the analysis required by the "catch-all" exemption in § 6255(a)—this brief will focus on the overarching public-interest balancing test.

A. The Public Interest in Faculty Communications and Research Deliberations Is Minimal

Disclosure of university professors' communications, deliberations, and research materials does not serve the California Public Records Act's ("CPRA") purpose of "prevent[ing] secrecy in government and contribut[ing] significantly to the public understanding of government activities." *San Diego Cnty. Emps. Ret. Ass'n v. Superior Court*, 196 Cal. App. 4th 1228, 1244 (2011). The public interest in "access to information concerning the conduct of the people's business," Cal. Gov't Code § 6250, is necessarily diminished in the academic context, given that university professors do not act in a representative capacity, have no authority to set public policy, and do not serve the traditional functions of a State agency, like carrying out the police power.[5] *See* Claudia Polsky, *Open Records, Shuttered Labs: Ending Harassment of Public University Researchers*, 66 UCLA L. Rev. 208, 232 (2019); *see also* Nader Mousavi & Matthew J. Kleiman, *When the Public Does Not Have a Right To Know: How the California Public Records Act Is Deterring Bioscience Research and Development*, 4 Duke L. & Tech. Rev. 1-19, ¶24 (2005), https://tinyurl.com/bkt6xpfr (hereinafter "Mousavi & Kleiman") ("Public universities are not elected governments, so the public probably has less interest in participating in their routine affairs."). "Scholars, in stark contrast to agency professionals, operate as intellectually autonomous actors, choosing their own research projects and methods; they do not fulfill the mandates of particular statutes, regulations, or administrative agency leaders." Polsky, *supra*, at 232.

In determining the "public interest in disclosure," courts must consider "how directly the disclosure of that information contributes to the public's understanding of government." *Los Angeles Unified Sch. Dist. v. Superior Court*, 228 Cal. App. 4th 222, 242 (2014). Here, disclosure would contribute little. University faculty are "not hired to speak from a government manifesto," *Garcetti v. Ceballos*, 547 U.S. 410, 437 (2006) (Souter, J., dissenting); rather, they speak for themselves, in service of their "own

[5] Compelled disclosure in this case would conflict with the purposes of the CPRA in more ways than one. The CPRA was enacted in 1968, *Los Angeles Unified Sch. Dist. v. Superior Court*, 228 Cal. App. 4th 222, 237 (2014), well before "the advent of email, a communication medium that has not only replaced written letters and faxes, but also" much of "spoken communication[ ]," CSLDF Report at 2. Put another way, when the legislature enacted the CPRA, it could not have contemplated the vast quantities of written records that have resulted from the "ubiquitous use of email for both informal and formal communications." *Id.*

research projects and methods," Polsky, *supra*, at 232. And "[w]hile [faculty members'] appointment and the subject of their work may well be of interest to the public, the content of that work is not properly a subject of public oversight." *Id.* (quoting Rachel Levinson-Waldman, *Academic Freedom and the Public's Right To Know: How To Counter the Chilling Effect of FOIA Requests on Scholarship*, Am. Const. Soc'y L. & Pol'y: Issue Brief 20 (2011), https://tinyurl.com/5xuzyfzc)); *see also Sussex Commons Assocs.*, 46 A.3d at 546 (emphasizing that "[c]linical legal programs" "do not perform any government functions").

Indeed, "[p]roperly conceived, the public goods that taxpayers purchase" when funding public universities "are final products in the form of published papers, public presentations, expressions of professionally informed opinion, and educated students." Polsky, *supra*, at 238. Protecting the public's interest in receiving returns on that investment thus requires respecting the "processes through which knowledge is generated." *Id.*

To the extent faculty work implicates the public's interest in understanding the allocation of public resources, there are alternative, less-intrusive means to obtain that information: published research, court documents filed or signed by law school professors and clinics, and university governance and financial records, to name a few. *See Humane Soc'y*, 214 Cal. App. 4th at 1268 (finding that availability of alternative records on the issue of scientific methodology served "to diminish the need for disclosure" of "prepublication written communications," which have traditionally been understood to be confidential); *Sussex Commons Assocs.*, 46 A.3d at 547 (because "not even the University, let alone any government agency, controls the manner in which clinical professors and their students practice law," disclosure of "case-related records"—as opposed to "documents about the funding of a clinic or its professors' salaries"—"would not shed light on the operation of government or expose misconduct").

B. Disclosure of Faculty Communications and Deliberations Undermines Academic Freedom, Collaboration, and the Quality of California's Public Universities

The United States and the State of California are "deeply committed to safeguarding academic freedom, which is of transcendent value to all of us." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *see also White v. Davis*, 13 Cal. 3d 757, 769 (1975) (en banc) (quoting *Keyishian*, 385 U.S. at 603). That commitment has proven fruitful. California's public university system is renowned throughout

the world. For nearly 150 years, the UC system has attracted the brightest students and faculty from California and beyond, driving innovation, creating thousands of jobs, generating billions of dollars of revenue, and improving the lives of people across the globe. Univ. of Cal., *The UC System*, https://www.universityofcalifornia.edu/uc-system (last visited Nov. 12, 2021).

Petitioner seeks vast quantities of UCLA faculty communications and deliberative materials. But disclosure of such documents runs counter to California's policy of safeguarding academic freedom, undermining the foundations upon which California's world-class university system is constructed. When academics' otherwise private materials are subject to public scrutiny, it "inevitably tend[s] to check the[ir] ardor and fearlessness . . . , qualities at once so fragile and so indispensable for fruitful academic labor." *Humane Soc'y*, 214 Cal. App. 4th at 1264 (quoting *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1276 (7th Cir. 1982)). That chilling effect "fundamentally impair[s] the academic research process," *id.* at 1267, causing the public to "suffer because the 'quantity and quality' of . . . research on important issues of public interest would be adversely affected," *id.* at 1263. In short, compelled disclosure achieves precisely the opposite of what California's public universities are designed to promote, weakening one of the State's greatest strengths. *See White*, 13 Cal. 3d at 769; *see also, e.g.*, Biddy Martin, Univ. of Wis., *Chancellor's Message on Academic Freedom and Open Records* (Apr. 1, 2011), http://www.news.wisc.edu/19190 (explaining that disclosure of faculty communications imperils "academic freedom" and "threatens the processes by which knowledge is created").

The disclosure of faculty members' correspondence and other private documents also undermines academic discourse and collaboration between students and faculty as well as among faculty members. "In a democratic society, privacy of communications is essential if citizens are to think and act creatively and constructively." President's Comm'n on Law Enforcement & Admin. of Justice, *The Challenge of Crime in a Free Society* 202 (1967), https://tinyurl.com/48um7es9; *see ACLU of Ill. v. Alvarez*, 679 F.3d 583, 605 (7th Cir. 2012) ("protect[ing] conversational privacy" is "easily an important government interest"); *In re Facebook, Inc., Consumer Privacy User Profile Litig.*, 402 F. Supp. 3d 767, 786 (N.D. Cal. 2019) (noting the "countless . . . laws on the books designed to protect our privacy"). That is doubly true in the context of academia, where creativity and "fearless[ ]" inquiry are the main objective. *Humane Soc'y*, 214 Cal. App. 4th at 1264. "Fear or suspicion that one's speech is being monitored by a stranger

even without the reality of such activity," however, "can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas." President's Comm'n, *supra*, at 202; *see ACLU of Ill.*, 679 F.3d at 605 (acknowledging this chilling effect). Even routine communications will be chilled. *See Humane Soc'y*, 214 Cal. App. 4th at 1258 (observing that academics often "communicate informally, . . . in jargon or shorthand, trying new ideas, investigating lines of thinking that do not work out, suggesting ideas that turn out to be wrong, and brainstorming in informal ways open to misinterpretation"). Accordingly, when professors and those they correspond with know their otherwise private communications may later become public, they will likely censor themselves, especially when expressing ideas that may be unpopular or novel. Such a response is only natural. *See id.* at 1259 (recognizing that the "chilling effect" of public disclosure is "consistent with commonly understood general human behavior").

The risk that private communications will be made public also discourages researchers at private institutions—which are not directly subject to open-records laws—from collaborating with their counterparts at public universities. Such individuals "will not feel that it is possible to continue collaborations with [academics] at public institutions if doing [s]o means that every email or other written communication . . . is subject to public release . . . in contravention of scholarly norms and expectations of privacy and confidentiality." *Am. Tradition Inst.*, 756 S.E.2d at 442 (quoting John Simon, the Vice President and Provost of the University of Virginia); *id.* (quoting statement from John Simon that if public-university scholars cannot "protect their communications with faculty at other institutions, their ability to collaborate will be gravely harmed").[6] Moreover, the potential for disclosure of proprietary information and preliminary research results means that "California's public universities could potentially lose millions of dollars in research funding that would go to private universities or to other states . . . ." Mousavi & Kleiman ¶24; *see id.* ¶30 (observing that the failure "to protect confidential research information . . . saddles California's public universities with a significant disadvantage in the national

[6] Decl. of Dr. Malcolm Hughes, *Energy & Env't Legal Inst. v. Ariz. Bd. of Regents*, No. C2013-4963, at 8-9 (Ariz. Super. Ct., Pima Cnty., July 28, 2014), https://tinyurl.com/2f8s4czp ("I have been directly informed by several colleagues that they have limited their communications with me because I have been targeted in public records requests. As email is the essential medium of scientific cooperation in the modern world, there is no doubt that this chilling effect has been an obstacle to collaboration.").

competition to attract . . . research dollars"). The decreased willingness of those outside public universities to collaborate with those within puts the UC system at a serious disadvantage with respect to its ability to produce cutting edge research. *See* Zach Greenberg, *The Chilling Effect of Sunlight: Preserving Academic Freedom in the Face of Abusive Open Records Requests*, 29 Geo. Mason. U. C.R. L. J. 145, 160-61 (2019).

Similarly, compelling the disclosure of faculty communications and research deliberations threatens public universities' ability to recruit and retain qualified faculty, harming the quality of education at public universities and, in turn, the universities' competitive standing. As the Chancellor of the University of Wisconsin put it, "the consequence for our state [of the public disclosure of faculty communications] will be the loss of the most talented and creative faculty who will choose to leave for universities where collegial exchange and the development of ideas can be undertaken without fear of premature exposure or reprisal for unpopular positions." Letter from Biddy Martin, *supra*. That view is hardly unique among top administrators of public universities. *See, e.g.*, *Am. Tradition Inst.*, 756 S.E.2d at 442 (quoting "unequivocal[]" statement of University of Virginia Vice President and Provost John Simon that the "recruitment of faculty to [a public institute] will be deeply harmed if such faculty must fear that their unpublished communications . . . are subject to involuntary public disclosure"). The harm to "faculty recruitment and retention" places public universities at a "competitive disadvantage." *Id.*; *see* Greenberg, *supra*, at 160 n.80 (discussing report detailing how researchers, fearing public scrutiny, have "reframed studies, removed research topics from their agendas, and, in a few cases, changed their jobs").

Ultimately, disclosure of public university professors' private communications and research deliberations chills bold academic inquiry, discourages collaboration, and hamstrings public universities as compared to their private counterparts. That, in turn, harms California's substantial interest in promoting public education and maintaining the outstanding quality and reputation of the State's public universities.[7]

[7] The concern that disclosure of faculty communications and deliberations will jeopardize opportunities for collaboration is likely heightened in the law school context. Law schools—through legal clinics and similar initiatives—have long worked with outside individuals and organizations to increase public access to legal representation. *See, e.g.*, Robert R. Kuehn and Bridget M. McCormack, *Lessons from Forty Years of Interference in Law School Clinics*, 24 Geo. J. Legal Ethics 59, 61 (2011) (describing collaboration between local legal services program and law professors and students at University of Mississippi to

C. Protecting the Confidentiality of Faculty Communications and Research Deliberations Promotes Academic Freedom and Robust Intellectual Inquiry

Just as disclosure of faculty communications and research deliberations undermines academic inquiry, chills collaboration, and decreases the quality of public education, nondisclosure in cases like the one before the Court promotes discovery and learning. For one, responding to public-records requests drains time and resources from both faculty members and their institutions—time and resources better spent on teaching and research. *See, e.g.*, CSD Report at 8 (detailing examples of records requests diverting scholars from their research and costing them weeks of work); Decl. of Dr. Malcolm Hughes, *Energy & Env't Legal Inst. v. Ariz. Bd. of Regents*, No. C2013-4963, at 4, 6 (Ariz. Super. Ct., Pima Cnty., July 28, 2014), https://tinyurl.com/2f8s4czp (explaining that the "task of reviewing [his] emails for information responsive to Petitioner's broad demands took at least ten weeks" and "was a major disruption" that "took [him] away from [his] primary obligations of research, teaching and service, including outreach"); Polsky, *supra*, at 251 (describing how one academic "was required to expend hundreds of hours participating in his litigation defense and responding to media coverage over his records-disclosure battle, representing a major distraction from climate change research"). Indeed, courts have recognized that whether an "overbalance on the side of confidentiality . . . exists may depend on a wide variety of considerations, including . . . the expense and inconvenience involved" in responding to a public-records request. *ACLU Found. v. Superior Court*, 3 Cal. 5th 1032, 1043 (2017) (citations omitted) (internal quotation marks omitted). And "[a]lthough time and opportunity costs for defendants and their counsel inhere in all public records litigation, the policy rationales for"—and the public interest in—"subjecting scholars and universities to such costs are significantly weaker than for conventional government agencies, and the societal losses potentially greater." Polsky, *supra*, at 251.

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desegregate public schools in 1968). That work advances the public interest in nurturing a commitment to social responsibility and in producing qualified lawyers. But if community partners—whose work typically concerns the most vulnerable members of society—must fear the public disclosure of their correspondence with law faculty at public universities, there is a strong likelihood that they will reject future collaboration. *See Sussex Commons Assocs.*, 46 A.3d at 547-48 (declining to compel disclosure where the "consequences are likely to harm the operation of public law clinics and, by extension, the legal profession and the public," including by potentially causing "outside law firms [to] refrain from working with clinics," undermining academic freedom, and "open[ing] the door to additional, and perhaps vexatious, [public-records] requests in the future").

By contrast, nondisclosure in cases like this one ensures that faculty and students can explore new ideas and avenues for research even if they are perceived as unpopular or controversial. *See* pp. 8-11, *supra* (describing how the threat of disclosure chills speech). The "[f]rank exchange" of ideas "among scholars is essential to advancing knowledge," including devising creative solutions to complex problems. UCLA Joint Senate-Administration Task Force on Academic Freedom, *Statement on the Principles of Scholarly Research and Public Records Requests* (Sept. 2012), https://tinyurl.com/ndpb5u9w. The "compelled disclosure of confidential information," however, "would without question severely stifle research into questions of public policy, the very subjects in which the public interest is greatest." *Richards of Rockford, Inc. v. Pac. Gas & Elec. Co.*, 71 F.R.D. 388, 390 (N.D. Cal. 1976).

Encouraging academics to freely explore new ideas and research projects is particularly important when those ideas and projects target serious and immediate real-world problems like climate change. The California State Legislature has found that "[g]lobal warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California." Cal. Health & Safety Code § 38501(a). Accordingly, the work of scholars who investigate and design solutions to the climate change crisis promotes the public interest recognized by the State Legislature. Allowing those academics to perform that work free of distraction, harassment, and the threat that their private communications will be made public is crucial to the public interest.

D. GAO's Records Request Furthers Out-of-State Special Interests Rather than the Interests of California Citizens

GAO is a Wyoming corporation, originally formed in Minnesota, whose officers and directors live and work in Indiana or the Washington, D.C. area. Wyo. Sec'y of State, Foreign Nonprofit Corporation Articles of Domestication, *Government Accountability & Oversight* (Aug. 12, 2021), https://tinyurl.com/p8xexrk5 (click "History"; then open "Initial Filing"); *see* Team Members, Government Accountability & Oversight P.C., https://govoversight.org/#team (last visited Nov. 16, 2021). It is funded at least in part by the coal industry. For example, bankruptcy documents show that a coal mining company gave GAO $300,000—nearly a quarter of GAO's annual revenue. *See* Lisa Friedman, *A Coal Baron Funded Climate Denial as His Company Spiraled into Bankruptcy*, N.Y. Times, Dec. 17, 2019, https://tinyurl.com/2khm5wfw; *see also* Government Accountability and Oversight PC,

Cause IQ, https://tinyurl.com/jx84yy. The coal industry also funded prior efforts by Chris Horner—now GAO's counsel and a member of its board of directors, but previously part of ATI/E&E—to obtain documents from climate scientists. *See* Coral Davenport & Eric Lipton, *How G.O.P. Leaders Came To View Climate Change as Fake Science*, N.Y. Times, June 3, 2017, https://www.nytimes.com/2017/06/03/us/politics/republican-leaders-climate-change.html; Lee Fang, *Attorney Hounding Climate Scientists Is Covertly Funded by Coal Industry*, The Intercept (Aug. 25, 2015), https://tinyurl.com/298dfcbm; *see* pp. 3-4 & n.1, *supra*. GAO has no apparent ties to California.

GAO's records request therefore has little to do with the right of California residents to understand how their government functions. Rather, the request is the work of an out-of-state organization—directed and managed by individuals who live and work thousands of miles away—that serves the interests of an industry wholly unconnected to the State of California. *See* U.S. Energy Info. Admin., California: State Profile and Energy Estimates (Feb. 18, 2021), https://tinyurl.com/6bdp5by3 (noting that California "does not have any coal reserves or production and has phased out almost all coal-fired electricity generation" and that "[e]ssentially all of California's imports of coal-fired generation are projected to end by 2026").

CONCLUSION

Public records requests directed at academics in public universities seriously harm the public interest while doing little to promote California citizens' understanding of how their State government functions. For the foregoing reasons, the Court should deny GAO's Petition.

DATED: November 19, 2021

Respectfully submitted,

/s/ Matthew Becker

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PROOF OF SERVICE

The undersigned declares as follows:

I am a citizen of the United States and employed in San Francisco County, State of California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Fenwick & West LLP, 555 California Street, 12th Floor, San Francisco, CA 94104. On the date set forth below, I served a copy of the following document(s):

- [PROPOSED] *AMICUS CURIAE* BRIEF OF THE CLIMATE SCIENCE LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT THE REGENTS OF THE UNIVERSITY OF CALIFORNIA;

on the interested parties in the subject action by placing a true copy thereof as indicated below, addressed as follows:

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☐ **BY US MAIL:** by placing the document(s) listed above in a sealed envelope for collection and mailing following our ordinary business practices. I am readily familiar with our ordinary business practices for collecting and processing mail for the United States Postal Service, and mail that I place for collection and processing is regularly deposited with the United States Postal Service that same day with postage prepaid.

☑ **BY OVERNIGHT COURIER:** by placing the document(s) listed above in a sealed envelope with a prepaid shipping label for express delivery and causing such envelope to be transmitted to an overnight delivery service for delivery by the next business day in the ordinary course of business.

☐ **BY FACSIMILE:** by causing to be transmitted via facsimile the document(s) listed above to the addressee(s) at the facsimile number(s) set forth above.

☑ **BY E-MAIL:** by causing to be transmitted via e-mail the document(s) listed above to the addressee(s) at the e-mail address(es) listed above.

☐ **BY PERSONAL DELIVERY:** by causing to be personally delivered the document(s) listed above to the addressee(s) at the address(es) set forth above.

I declare under penalty of perjury under the laws of the State of California and the United States that the above is true and correct.

Date: November 19, 2021

/s/ Aurelia Nolan
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