IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

ENERGY & ENVIRONMENTAL LEGAL INSTITUTE, Plaintiff, vs. ARIZONA BOARD OF REGENTS, et al., Defendants.	NO. C-20134963 2CA-CV 2015-0086

BEFORE: The Hon. James E. Marner
Judge of the Superior Court
Division 10

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Hearing Re Merits

February 6, 2015

Tucson, Arizona

Reported by: KAREN A. KAHLE, OFFICIAL

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I N D E X

P R O C E E D I N G S

THE COURT: Okay. We're here on cause number C-20134963. Counsel, please announce your presence.

MR. SCHNARE: Your Honor, Dave Schnare for the plaintiff.

THE COURT: Good morning.

MR. MANDIG: Good morning, Your Honor. Michael Mandig for respondents, and with me at counsel table is Kimberly Espy, chief research officer at the University of Arizona and senior vice-president.

THE COURT: Good morning.

MS. ESPY: Good morning.

THE COURT: And good morning to everybody else who came down to observe. All right. We're here on the hearing.

In all candor, I've been thinking about this for the last week or so, and I'm still not sure what I'm going to call this hearing. So I decided I'm just going to call it the hearing.

Gents, I have as -- we had a brief informal conversation off the record when I came out and brought out the materials. As I informed both counsel, I've read everything that's been filed in

this case actually a couple times on some of the things.

Mr. Schnare had brought to my attention that there had been a more recent filing. I just printed it out. Anyway I think it was filed on January 20th that came in. It was a six-page briefing that was attached to the affidavit of Doctors Overpeck and Hughes.

And as I indicated in our conversation where Mr. Mandig was present as well, I had read that as well. Like I said, I've read everything that's come in, so we can discuss that. I'll entertain whatever motion you want to bring on that issue.

What I was planning on doing today is -- we have two hours and I will give you -- I don't think I need to -- unless either side thinks I need to -- split the clock or anything.

And my 11 o'clock fell off, so I hate to say this but we have three hours. But I have a 14 year old I've got to get to a pediatrician's appointment at 1:15, and I have to be out of here at about quarter to noon.

So having said all that, Mr. Schnare, is there any preliminary matter you want to address? And then, Mr. Mandig, I'll posit the same question to

you.

MR. SCHNARE: Your Honor, I hesitate -- may I approach?

THE COURT: You may.

MR. SCHNARE: I hesitate to offer this motion. I want to know if you want to entertain it. If you don't, then we won't but the argument -- the argument is very simple, Your Honor.

At the last hearing we had, we discussed what was going to be done henceforth, and one of the things you told us was there weren't going to be any more briefs and we're done with that.

In fact, the January 20th brief did come forward and constitutes a second sur-reply. As far as I could tell, you weren't asked for permission to file it, and you didn't grant any permission to file it. And under the rules, it's inappropriate for it to be recorded.

Now I accept the fact that I can't un-ring the bell. You've read it. But if you granted a motion to strike, you wouldn't be allowed to rely on it or the affidavit declaration that came with it. So my question to you is whether you want to entertain this or not.

Secondly, there were two declarations

offered 28 July 2014 that were improperly sworn. These were the Overpeck and Hughes declarations. We indicated in our opening brief they were improperly sworn to.

We also indicated there was another one that wasn't even signed. Now they cured that one. They had it signed and sent it in, but they never cured the other two. I mentioned it in open court previously, and I fully expected them to cure it but they didn't.

So as a matter of rule, those, too, are inappropriate to be before the Court. And so, you know, it's a judgment call. It's your -- you're the Judge. You have to decide what you want to do. If you want to take this up, fine. If you don't, we'll just move on to the hearing.

THE COURT: Okay. Let's first address the motion to strike. Give me a minute to -- a couple minutes to read it.

MR. SCHNARE: It's only two pages.

THE COURT: Mr. Mandig, do you have a copy?

MR. MANDIG: Yes. It was delivered to me this morning.

THE COURT: Okay. Give me a minute.

THE COURT: Okay. Mr. Mandig, first on the motion to strike, what's your position?

MR. MANDIG: Well, first, perhaps my memory's failing me, but I don't remember the Court saying that the parties will file nothing more with the Court.

But more to the point, you issued a minute entry on November 17, 2014, and directed us to prepare and present the supplemental logs trying to categorize the documents according to the list of eight items that was contained in your minute entry.

You also said that one of the categories we should identify is the documents that were withheld because the best interest of the State outweighed the public policy in favor of disclosure.

And then you say, quote, if this exception is relied upon, defendant shall identify with specificity how the best interest of the State will be served by an order affirming its decision to withhold the documents, end quote.

Frankly I thought that when we filed our memorandum and the joint declaration of Professors Hughes and Overpeck and the supplemental logs we were doing exactly what you ordered us to do, categorize the documents and explain why those documents that

are placed in Category Number 8 should have been withheld in the best interest of the State.

So I don't have anything else to say. I think we complied with your directive. If there was some other way for us to have complied with it as a lawyer who's accustomed to filing briefs and memorandum with courts, I don't know how to do it.

You didn't direct us to have a telephone conversation or ask us to come back for some interim hearing. We did exactly what you ordered us to do.

THE COURT: On the issue of the affidavits, what's your position?

MR. MANDIG: The two declarations that were filed in July of 2014 had a statement at the end of each that said something like I affirm that the statements in this declaration are true and correct to the best of my knowledge and belief, something like that.

The additional words under the penalty of perjury -- I declare under penalty of perjury were omitted, so I think technically that the attestations on those two documents were formally defective, a problem which we cured in the joint declaration of Professors Hughes and Overpeck when they declared under penalty of perjury that the contents of that

joint declaration were true and correct and also said, quote, we also declare under penalty of perjury that our respective prior declarations in this matter dated July 28, 2014, were and are true and correct.

If the Court thinks it's necessary for us to have asked permission to cure up what I would regard as a highly technical formal defect in the papers that we should ask permission to do so, then please consider this a request that you accept our -- our effort to cure that problem. It seems to me it's over and done with and behind us now.

THE COURT: Okay. Thank you. Last word, Mr. Schnare.

MR. SCHNARE: To the degree that they made their declaration properly in the second declaration and to the degree that you allow it to be in the court, that matter should be dropped. It's irrelevant.

But the question of striking the motion or striking the memorandum itself is before you, and since they raised novel legal issues, particular association -- association which had never been raised before, prejudices us.

If they want to raise it today during their presentation, we could deal with it, but I

don't believe it's appropriate to be in the memorandum. And there's absolutely no authority to do a sur-reply.

Further, if you -- based on the minute order and an examination of their expanded VON log, all their argument about why things ought to be in the best interest of the State are in the VON log which is what clearly they contemplated needed to be done and clearly what I thought would be the way to do it. So the memorandum is surplusage to what they were required and they, in fact, did do.

THE COURT: Okay. Thank you. The motion to strike is denied. In all candor, I don't think my November in chambers was the model of clarity.

However, as you've known, as you probably recall from the previous hearings we had, I struggled with the parties' perceived thoughts on how we're going to proceed in this case.

I can't tell you how many ARS 39-121 cases I've read and reread since I inherited this case and how many cases I've done on -- I've researched on my own extending from the Virginia litigation and things like that, and that's why I think when I came out here and I'm still a bit at a

loss as to the procedure when I'm calling this the hearing. The --

(Whereupon Mr. Larson entered the courtroom.)

THE COURT: I did note that some of the issues raised tangentially were somewhat new in the attachment to the declarations.

What I will do, Mr. Schnare, obviously I'm going to take the matter under advisement. I will give you an opportunity to file a response focused on the issues that you think -- you don't have to but you may file on the -- file a response to the issues that you think were raised for the first time in the January 20, 2015, pleading. If you can have that to me by --

MR. SCHNARE: Your Honor, I'm going to decline your kind offer.

THE COURT: Okay.

MR. SCHNARE: I'm going to address the one point that I think's worth addressing today.

THE COURT: Okay. That's fine. So the motion to strike is denied.

MR. SCHNARE: I'm going to withdraw the motion so you don't have to bother with it.

THE COURT: As for the claimed -- the

claim that the declarations were -- are technically flawed, I agree with Mr. Mandig. I think they're basically compliant enough and I'm going to -- I'm going to and have considered them and I will continue to consider them in my deliberations. So having said that, Mr. Schnare, the floor is yours.

MR. SCHNARE: It is. Well, Your Honor, I'm going to concede the floor to Mr. Mandig. It seems to me, Your Honor, that Mr. Mandig has two rights here today, at least one responsibility and one right, and that is that it is his duty to explain how they overcome the legal presumption for disclosure. And he should make those arguments.

I'll be happy to respond to them and make my own. But as Mr. Mandig -- often he would like to have the last word, and I think that's the way he would do it.

THE COURT: Okay.

MR. SCHNARE: I'm happy to --

THE COURT: I assumed that's what you were going to say, but typically as the petitioner I would -- plaintiff I turn to you first, so Mr. Mandig.

MR. MANDIG: Your Honor, I've got some PowerPoint slides I prepared, and I gave a copy to

Mr. Schnare this morning. Let me hand the Court --

THE COURT: Thank you.

MR. MANDIG: And before I start talking about that, let me explain why I did this. I mean, we have between Mr. Schnare and I filed a fairly large record on paper.

That is -- in my estimation at least for me, it's been a little bit hard to sew everything together in one package, so what I've tried to do is prepare a series of slides that address the issue that Mr. Schnare just mentioned.

And that is why the Court should affirm the exercise of discretion that was made by the University in electing to withhold the papers that were -- or the records that were withheld.

So I'm going to -- I'm going to spend a little bit of time talking about the science, not because I think we want to get mired in a debate about who's right and who's wrong about global warming and human contributions to it, but rather because it helps make clear one of the central points I'll make a little bit later.

So if I can get this going here -- let me see if I can make the toys work. The case that we have here begins with a false premise. It's not

obvious necessarily from the papers that have been filed in court but public pronouncements by the plaintiff together with what is in the court record make clear that E & E thinks that it is to use its words peppering universities around the country with record requests in order to, quote, put false science on trial, end quote.

The reason I say that's a false premise is that E & E shows no interest in science. They haven't asked for reports. They haven't asked for data.

They haven't requested any records that might indicate the methodologies used by Professors Hughes and Overpeck or anyone that they work with in doing their climate science work.

They haven't asked for the usual things you would expect somebody to ask for when they're making a public record request such as who's paying for your work, where's the money coming from and how much are you spending on the work that I have interest in.

They've asked for nothing in any of those categories. The only thing they've asked for are e-mails between them, Overpeck, Hughes and their colleagues. They also at least on their Web site --

they being E & E Legal and formerly American Tradition Institute -- they call the work that was done by Dr. Hughes, Dr. Mann and Dr. Bradley back in the late '90s the worst scientific scandal of our generation.

This is the so-called hockey stick data that produced this graph that you see up on the -- on the screen here. And I think it's important for the Court to bear in mind that this is not a scandal at all.

It is now part of the generally accepted context in which global warming is now being evaluated. Professor Hughes, a regents professor here at the University, worked with these two gentlemen.

The basic conclusion that they reached in 1999 and the main paper that they published was that in the latter half of the 20th century northern hemisphere temperatures increased rather dramatically in comparison with the prior 1,000 years.

Now the process of science is an evolutionary thing as I'll talk about a little bit further. But in 2006, the National Research Council published a paper in which they basically concluded that the conclusions reached by Hughes and Bradley

had been substantiated by six or seven years of additional research by other individuals, you know, crunching the data, analyzing the conclusions, trying to either attack it or support it or build on it, whatever they were doing.

But by 2006, the consensus was that that temperature spike in the second half of the 20th century actually happened. Bringing us up to date in 2014, this scandal that E & E talks about was awarded a prize.

That is, of over 31,000 articles published in the geophysical unions psychophysics research letters -- 31,000 of them in 40 years -- they chose the Mann, Bradley, Hughes article as one of the top 40 most significant contributions to science.

Now what's the significance of that? I'll come back to it in a little bit. Now why was Mr. -- or Professor Overpeck targeted?

He was targeted because he was a co-author of a report issued by the Intergovernmental Panel on Climate Change. Now we're talking about public debate about science.

Mr. Schnare thinks that public debate should include poking around in the private e-mails

of people involved in science. We disagree but there are -- there are clear adversaries lined up against one another in the public debate.

One is the intergovernmental panel on climate change. The other is the non-governmental international panel on climate change.

And I put the IPCC and the NIPCC here on this slide in black and white not because of good or evil, but because if you study the public record in the debate between these two organizations, what you see is if the IPCC says white, the NIPCC says black.

The battle lines or the parameters of the debate that's taking place are clearly mapped out, and more importantly just as an aside, the work that Professor Overpeck participated in as a lead coauthor of the 2007 IPCC report was given 50 percent share of the 2007 Nobel Peace Prize.

Now I suppose we can debate whether people who receive the Peace Prize receive it because of science or politics, but the point is international recognition was given at that level to the value that the IPCC was making to the public debate about science, climate science.

Dr. Craig Idso, one of the plaintiff's witnesses who I think has some sort of a private

company of his own, but as far as his declaration shows is unaffiliated with any university or other major institution as far as I could tell.

He agrees that the work that was coauthored by Overpeck and the others was, quote, a major research effort by a group of dedicated specialists in many topics related to climate change, end quote.

Quote, a valuable compendium of the current state of the science, end quote, and here's one to keep in mind, a way to gain, quote, access to the numerous critical comments submitted by expert reviewers, end quote.

Now I'm quoting there from an NIPCC report that was responding to the international panel on climate change. That's Exhibit J at Page 13 of our materials.

Now one of the things that Dr. Idso somehow neglected to mention in his declaration is that he was a lead coauthor of the NIPCC paper from which I extracted these quotes.

What is my point? My point is that the plaintiff's own witness acknowledges that the type of information that's among the universe of records that Mr. Schnare wants in this case -- that is, access to

reviews of work done by people involved in climate science -- that's in the public record.

It's at databases created by the IPCC, and that's why Mr. Idso says that the IPCC paper gives access to the numerous critical comments submitted by expert reviewers. That information is out there.

Now just to wrap it up, as I said before, the research and writing and analysis and criticism and commentary and debate on climate change continues.

As of 2014, the IPCC came out with its fifth review of this -- the status of climate scientists, and these are the two conclusions that they have reached that the science has evolved into. The human influence on the climate system is clear, and warming of the climate system is unequivocal.

And since the 1950s, many of the observed changes are unprecedented over decades to millennia.

Now I haven't seen what the NIPCC is going to say about this. Presumably they're going to say, well, yes, maybe there has been warming, but there's no convincing evidence that humans caused it. Fine, if that's what they want to say.

But the point is that the -- if E & E were really interested in the science, it's out there in the public domain, and they don't need access to the private e-mails of the researchers in order to challenge, if that's what they want to do, this so-called hockey stick scandal which is not a scandal at all.

They have all the tools they need so -- which really brings me to the question that you have to address, and that is, you're faced with a decision that was made by two university professors in collaboration with an in-house lawyer at the university and a public records coordinator to withhold the records that are shown on the indices that are on file with the Court.

The implications of your ruling which I think was correct on what the standard of review is are these. In a special action challenging the decision to withhold public records, the trial court's job is to give deference to the agency or official that decided not to turn something over.

And you have to decide because they have discretion in making that decision whether the discretion was abused. And I picked through the case law in Arizona to try and figure out how our

appellate courts have defined the concept of abuse of discretion because it's kind of a slippery concept.

And what I find in the case law, Quigley against City Court, Toy v. Katz, is discretion is abused if the decision was manifestly unreasonable, made on untenable grounds for untenable reasons or had to be found beyond the bounds of reason. That's what the case law says the rules are that have to be applied here.

With those in mind, the question is what is it that the -- what is it that the agency or official has to weigh in deciding whether to turn records over.

Well, I've got a couple of passages here from two Arizona decisions. I didn't put the entire name of each one in there, but the official sites are correct.

The official has to decide whether the release of the information will have an important and harmful effect upon the official duties of the official or agency. That's the Church of Scientology case.

And if there's evidence of significance risk of harmful effects, then the decision has to be are those potential negatives sufficiently weighty

reasons to tip the balance away from the presumption of disclosure and toward nondisclosure.

Sounds pretty simple, but it's going to take me walking through a little bit of the details of the record in the case to demonstrate to you why in our view turning over the requested e-mails would do more harm than good and that withholding these e-mails was, in fact, in the best interest of the State, the University and the professors that work in our public university.

Now there are some cases that I'm sure you've taken a look at, probably read more than once, I would imagine, that are the three cases that address this or very similar circumstances.

And they tell us what the key factors are that an agency or official needs to look at in deciding whether or not he is going to release a requested record.

One is the potential chilling effect that the release will have on otherwise legitimate conduct, and you can call it freedom of association. You can call it academic freedom, or you can call it as the Board of Regents case said in 1991 a concern about driving away people who may want to be candidates for a university president's job but the

point is the same.

If the effect of release might well be to chill legitimate conduct, that's something that the agency has to take into consideration. In addition, as the Humane Society case in California tells us, it is also important to prevent impairment of the academic research process.

And finally for our purposes today, we are here -- I represent the Arizona Board of Regents which administers three universities, all public, all living in times of increasingly scarce financial and academic resources, and it is entirely appropriate, therefore, to consider the extent to which releasing records might damage the ability of the university to compete with private universities and other public universities who may be vying for limited private funds or a limited number of top-notch researchers and scientists.

All of those factors are to be placed in the balance. So turning to our record, if we start with the premise that one rule at the university should be applied in deciding what to release and what to withhold is do not chill research innovation, inventions, experimentation or other academic inquiry, what does our record tell us?

First, Dr. Vicki Chandler, supported by numerous others of our declarants as our supplement in Footnote 2 will summarize for you, says a couple of things that are very important.

Number one, that confidential -- confidentiality in the dealings and communications between and among researchers either within the University of Arizona or located in other institutions around the world is a customary and generally expected fact of the process of science.

As all of the declarations that we submitted suggest, that means when people are working on their research, their writing, they're trying to decide how they're going to confront even their opponents out there in the public domain. They all assume that those communications are going to be confidential.

She also said, quote, we all generally expect that barring theft or other interception those communications will be kept confidential. All of our witnesses confirm this.

And she also says that after analyzing her understanding of what this case is about, that if E & E gets what it wants, that will be a violation of the normal, customary standards of confidentiality

and privacy.

Now a small detour, the best interest of the state test. What the cases actually say is that the discretion to withhold may be exercised when considerations of confidentiality, privacy or the best interest of the state indicate that that's the right thing to do.

In the analysis of these cases, those three concepts sort of get mashed together, but the point is what we're talking about here is a process of communication among scientists using modern tools like e-mail that has certain norms that apply to it which would be violated in the opinion of the various folks that we talked to if the university's decision were overturned.

Just another example, Dr. Hunter Rawlings, III, former president of Cornell and University of Iowa and current president of the Association of American Universities which is apparently kind of an exclusive organization because it, I think, has only 60 members who are among the top -- recognized as the top research institutions in the country including University of Arizona.

He says based upon decades of being a scientist and administrator and so on, that giving

general access to the information requested by E & E, quote, will stifle collaboration between researchers at public and private institutions.

Why? Because they will be trying to collaborate in fear that there will be forced disclosure of confidential material through public record requests. We've -- we've been involved in litigation, all of us, for a long time. We see experts come, and we see experts go.

I think the Court should consider whether or not this surprising array of leading members of the academic and scientific community that has come out to support the University of Arizona in this case is comprised of people who have real and serious concerns about what is happening here.

These are not experts you look up in a catalog or experts for hire. These are serious people with extensive records in academia and science who are worried about this case.

Well, my boss here, Professor Kimberly Andrews Espy, when I asked her as the incoming vice-president of the University and the chief research officer position she assumed right about the time we were embroiled in answering Mr. Schnare's brief, her answer to this case was that needless

disclosure of e-mail, quote, will cause collaboration not to be as free or candid as is necessary to ensure research meets the standards of accuracy, integrity and excellence we strive for.

She is obviously echoing concerns stated by various other of our witnesses including Dr. Chandler and Dr. Rawlings.

So Professor Lynn Nadel who's here in the courtroom with us, the chair -- elected chair of the University of Arizona faculty, he basically says the same thing that the process of research investigation, writing, criticism, commentary and so forth is oftentimes rough and tumble but ordinarily takes place with some expectation that strangers will not be meddling in your day-to-day affairs so that you can be open and candid while doing your work.

And he fears, as all of our folks do, that the precedent that would be established by releasing or ordering the release of these records in this case would have erosive and corrosive effects not just here but elsewhere.

Now what is more important today than even two weeks ago before Governor Ducey announced that he was going to propose a budget cutting another $75 million from our public universities than

worrying about the availability of the private funding, what do our witnesses say -- what do our witnesses say about that?

Vicki Chandler who is in charge of the grant program at the Moore Foundation says that as a private funder she would seriously question making a grant to an institution that could not assure the confidentiality of the researcher's communications.

Again, read her declaration. She is not a fly-by-night person. She is a serious individual with a long career in research of her own before she became the science officer at the foundation.

Even Mr. Schnare's own witness Dr. Patrick Michaels in a -- in an affidavit that he filed in the Federal District Court in Vermont in another case which we've attached as our Exhibit W acknowledges that the big companies that were funding his research to adopt the contrarian's view about climate change and human contributions to it got skittish when faced with the prospect that he might even have to identify merely who they were, where his money was coming from.

And he says, quote, public disclosure of his private funding sources caused considerable financial loss, end quote, to his business.

Mr. Schnare has often said that we are worried about ghosts and suffering from unsubstantiated fear, but his own witness in this case when he was talking to another court at the other end of the country acknowledged that the risk of losing funding if this issue is not handled right is real and tangible and measurable.

The whole subject of competitive disadvantage which is what was talked about in the University of Virginia case in which the Supreme Court said we don't -- we do not want to order release of documents where that would have the unintended effect of placing our public university at a disadvantage with respect to private institutions.

What's the record before us on that? Dr. Joshua LaBaer is the head of the Virginia G. Piper Center for Personalized Diagnostics at Arizona State University. He's also teaching medicine at the Mayo Clinic and as a professor of chemistry and biochemistry at ASU.

Arizona successfully recruited this fellow from Harvard University, a private institution, and he hasn't been here very long. But he confirms what all the other witnesses on our side say and that is that the work that he does which

involves genotyping and proteomic analysis to figure out whether you can predict diseases that may show up in a particular individual based on genetic analysis, that process he says requires, quote, intense, highly focused and carefully compartmentalized design, end quote, that the confidentiality of, quote, unpublished communications data and informal observations of scientists and other scholars, end quote, needs to be assured.

And that if that's not assured, our willingness -- that is the willingness of himself and his colleagues -- to engage in this sort of work may be reduced and our candor lessened to mankind's detriment.

Is he only talking about theoretical things? No. If you look at Paragraph 21 of his declaration, what he says is if I'd known the kinds of risks I might be subject to in Arizona with its public record laws, that, quote, would have impacted my decision to move to Arizona as part of my recruitment here, end quote.

Why does he say that? Because when he was at Harvard University, a private institution, he simply had no worries about this whatsoever and operated under the umbrella of the notion of research

confidentiality and the privacy of communications that everybody takes as a given.

Now this is the kind of fellow who if you review online what they do at the Piper Center is somebody we want in Arizona.

We don't want him to go back to Harvard. We don't him to move to Stanford. We don't want Gene Levy to recruit him to go to Rice University. We want him here because he will do great things.

During the process of going through categorizing documents or records, I worked very closely with Malcolm and Peck, Dr. Hughes and Dr. Overpeck.

I was really surprised as we were putting that joint declaration together to hear Peck say if this case goes the wrong way I'm going to be among those people looking for someplace else to work.

I was very surprised to hear that, but we put it in the declaration to make a point. Mr. Schnare thinks we are -- we are imagining bogeymen. We are imagining nothing.

We are seeing the reality of what the effects of this case may be if it's decided against the University. We don't want somebody who

participated -- participated in the creation of a work product that shares the 2007 Nobel Peace Prize to pack up and go to Rice University, Harvard or Stanford. We want him here.

And Gene Levy, he's a character. I wish -- I almost wish we had live testimony here because I imagine he would be an interesting fellow. He wrote his own declaration with no help or encouragement from me and said through these three things which really got me focused on what the problem is with competitive disadvantages that could be created by public record abuse.

He is with Rice University. He used to be the provost, and in most universities as I understand it, part of the provost's job is to recruit top people to join the faculty.

And he said, well, if I were still the provost, I would not hesitate to play the public records law card to underscore the risk inherent in working in an Arizona university as compared with the relative intellectual security of my own.

This is a guy with decades of experience as an astro -- not only as an astrophysicist but also as a university administrator and teacher.

He also believes based upon his decades

of experience that other private universities will probably follow the same approach to competing for top recruits as he would follow and says, also, that public universities in other states would do the same thing such as Virginia where his perception of the Supreme Court of Virginia's decision is that they have interpreted their public record laws with, quote, nuanced judgment, end quote, which, of course, is what we're asking you to exercise here in reviewing what the University did.

He feels so strongly about the public records card that he says that I would be derelict if I failed to employ such a potentially effective recruiting tool.

Now I suppose we could try and conduct a national survey to find out if there are other people who agree with Dr. Levy or if he's maybe some sort of an outlier, but common sense tells us he is no outlier. His own background tells us he is no outlier.

And so where we are is we've got to -- we've got to assess the University's decisions here in light of what we learned when we canvassed preeminent people in these fields and asked them what they thought.

They are, to put it mildly, alarmed by the potential bad effects of a wrong decision in this case and with good reason.

Now returning to this whole concept of what this case was about in the first place, why E & E filed the lawsuit or ATI filed the lawsuit and later changed its name, I'll just go to the joint declaration that we filed on January 20th.

And I quote it only because I can't say it much better myself than the way these two gentlemen, Professor Hughes and Professor Overpeck, have said it.

If E & E really wants to put false science on trial as it claims on its Web site, then all the research, all the supporting data, all the methodological information needed to do that are already in the public domain.

There's also been kind of a strangely presented question about academic misconduct that is mentioned in Mr. Schnare's papers on file with the Court, but he seems to somehow dance away from it whenever the subject comes up.

But the central point is if his client really thought that either Peck or Malcolm had engaged in serious academic misconduct of the sort

alluded to in their court papers, the University has procedures available to process those claims.

We filed those with the Court as our Exhibit S, and E & E according to the way we read it would have standing to file charges against either Professor Overpeck or Professor Hughes. They've elected not to do that, I think, because of a recognition that there's nothing to go on.

But the point is, if academic misconduct were the question, there's a procedure in place to address it, the important facet of which is according to the University's own procedures that process is confidential.

It would not be accompanied with the kind of public parading of e-mails that E & E Legal wants to make following obtaining whatever it's trying to get its hands on here.

The targets of allegations of academic misconduct would have a confidentiality protection similar to that enjoyed by the communications that researchers expect and enjoy on a daily basis.

So just to sum up, the rejection of the University's decision would turn risks into realities for all the reasons described by our various witnesses.

And Mr. Schnare often says, well, he doesn't have to say what he needs it for, what he wants it for and doesn't have to justify his request under Arizona law.

That applies to making the request, but once the agency comes forward as we have with information plainly indicating that a misstep in the release of the information will cause harm, then we have to go back to balancing the risk of harm against the benefit to be derived from disclosure.

And in a nutshell, there's no discernible public benefit to be derived by the State of Arizona or its citizens from placing the University at the risks that have been identified here.

So the question you have to ask yourself is when the University decided that for all the reasons that we very carefully articulated for you it wouldn't be a good idea to release these e-mails, were they acting in a manifestly unreasonable fashion on an untenable factual basis and in the words of Toy v. Katz exceeding the bounds of reason by deciding with measured judgment that these things shouldn't be released?

And we simply do not see how one could

say that sort of poor judgment had been exercised here, and so we believe that the claims of E & E should be rejected. Now if you have any questions for me, I'd be happy to answer them. If not, I'll pass the microphone to Mr. Schnare.

THE COURT: I do, and actually it's on an issue you just concluded with, Mr. Mandig. And if you could expand on it a little bit, it was my understanding based on my review of the law is motivation is irrelevant essentially.

As a consequence, Mr. Schnare could say, I'm a lobbyist for the coal industry and I've been hired to see if I can come up with a way to debunk the hockey stick theory or whatever, because if I can do that, my industry will likely benefit and we can build more coal burning power plants and that's good for my bosses who are paying me.

It's my -- my understanding is it really -- it could be that. It could be what Mr. Schnare is offering as his client's motivation, or it could be anything in between. And it really is not relevant in my initial consideration. Am I wrong? Do you think I'm wrong?

MR. MANDIG: Yes and no. First of all, one of the -- one of our leading cases is the

decision in London versus Broderick.

And in that case, the Court says that the agency or official may reject a public record request if it would be unduly burdensome or constituted -- and this is the Court's word, not mine -- harassment.

And I guess when putting in the balance the claimed needs that E & E put in its opening brief and then ran away from claiming their motives are irrelevant, if you put -- if you put the flimsy basis upon which they are saying they need this information and you balance it off against the possible harm that would result from turning it over, that is a legitimate thing for the University to consider.

And if the University has some basis for concluding that their -- that E & E's claims of need are really false premises as we say they are, then you have to ask yourself is that a bad judgment on the University's part or not.

Let me give you a couple of examples. There's the case of A.H. Belo against -- I think it was Mesa Police Department public record request in which I don't remember whether it was Mesa Tribune or who it was, but one of the papers up there in east Maricopa County asked for the actual verbatim tape of

a 911 call.

And it involved an au pair who had care of a child. The child ended up dead, and the au pair was being prosecuted or investigated. I forgot exactly which.

The police department gave the requesting party a printed transcript of the 911 call but declined to give them the actual audio recording. And the question before the Court was are they required -- were they required essentially to give up the audio recording because it is what it is.

And the Court concluded that the privacy interests of the family were outweighed by the need or professed need that the newspaper claimed for wanting to have that actual audio recording, wanted -- may have been -- actually it was a TV station.

And the Court said, no. You got the substantial equivalent of the audio recording in printed form, and we're not going to put the family through that. They have privacy interests that are entitled to be protected.

And so, therefore, the media did not get the actual audio recording because they had the substantial equivalent through other means.

That brings me back to the point I made

early on and that is, you know, if there really was some desire to, quote, put false science on trial, end quote, they have all the ammunition in the world to do that. It's all out there, and they can find it on the Internet just like I did.

And what our cases say is if those privacy or confidentiality interests are just not very heavy or the public claimed interest in the information they're after is not very substantial and the probable risks of disclosure are pretty heavy, then the agency is justified in saying, no, we're not going to give it to them.

And so it is important whether E & E Legal is fishing for something that can be clipped out of context from an e-mail to suggest to the outside public that the spirited debate normally engaged in by scientists is really they're talking mean about somebody else.

Well, that's just not enough of a reason to force the University to accept the kinds of risks of harm that have been described by all of our witnesses.

Another example, the Scottsdale Unified School District case is another one involving Phoenix newspapers making a public record request. The

newspaper asked for a list of the names and birth dates of the teachers employed by the school district, and the district evidently gave them names and refused to give them the birth dates.

The case comes up to the Appellate Court, and the question is what was the reason for asking for the birth dates.

The newspaper said they wanted to run criminal background checks on all the teachers employed by Scottsdale Unified School District, and the Court said, sorry, you don't need to do that. They got screened when they were hired.

And I think if I remember correctly the district was also running criminal background checks of its own to update its records or some such thing.

And so the Court basically said, you know, your claim that you should be given this so that you can do criminal background checks is at best a speculative justification, and that's the word -- words used by the Court were speculative at best.

We really have the same thing going on here. It is pure and simple conjecture, speculation and fantasy that E & E thinks it will uncover evidence of hidden academic misconduct or uncover evidence indicating that the conclusions reached by

Doctors Hughes, Mann and Bradley in 1999 are really fake.

Why? Because we all know now after the continuing evolution of science that their conclusions have been confirmed in spades.

So the short answer to your question is when you -- when you confront real actual harm that's likely to occur if the release takes place, then you do have to weigh the public interest that's advanced by Mr. Schnare who says, well, the public presumptively is entitled to what I want.

And they're only presumptively entitled to ask for it. Once there's evidence that turning it over will be a bad thing on balance, their professed purpose and motivation is important as shown by those two cases. Anything else?

THE COURT: No. That's it. Thank you, Mr. Mandig. I appreciate that.

MR. MANDIG: All right.

THE COURT: Anybody need to take a break before we get started? Are you all right, Mr. Schnare?

MR. SCHNARE: I'm okay. Did you want to take a break?

MR. MANDIG: No. That's all right. I'm

just going to get some water.

THE COURT: Mr. Schnare, your thoughts.

MR. SCHNARE: All right. Well, as a Ph.D. scientist and I worked for TPA for 33 years as a science policy and attorney and having had academic appointments as well, I have to admit that I haven't had so many words put into my mouth since Thanksgiving dinner with my twin sister.

Counsel has said over and over and over what it is we either said or thought or intended, most of which is inaccurate, and I'm not going to spend time on it because most of it's irrelevant.

I had intended to have a very fancy presentation for you, but Katy Perry backed out at the last second, Your Honor, and I couldn't replace her.

But what I would like to do is begin with a review of the standard of review reply and cite to the case law on this.

I started out by saying the legal presumption favors disclosure. It doesn't. That is not the standard for asking for the information. That is the standard that you apply as you do a de novo review of these documents.

You are asked -- being asked to do a --

and it's not really a balancing between the value of disclosure or the presumption of disclosure and the effect on the State.

The balancing is really inside this question of what's the best interest of the State because there are going to be some that favor and some that harm within the interests of the State, and you've got to balance those.

It's a tough job as Justice Scalia explained it. These kinds of rule reason analyses are like trying to determine whether the length of the line is greater than the weight of a rock. Nevertheless, you must do it.

So I begin with Moorehead v. Arnold, Arizona law 1981, states publicly funded activities are not meant to be clothed in secrecy but are subject to open discussion and debate.

And in the sciences, this is particularly important where you have an extremely influential area of investigation that drives public policy.

It is not merely the published report that's important. It is the process by which the results arose and any potential biases within them which is why for some reason counsel for opposing

wishes to know or concentrate on asking the question who gave you the money to do your research as though these faculty members would be influenced by who gave them their money.

I don't think they would. Honest scientists never are. You give me more money so I can do my work but back off. I'm not doing my work. Possibly the greatest line in Ghostbusters, back off, he's a Ph.D.

Carlson v. Pima County, to withhold records, ABOR must show the release of the documents result -- would result -- not may -- would result in, quote, substantial and irreparable private or public harm.

That's the question before you. Is it substantial and is it irreparable. I submit to you they've offered no evidence showing that that will happen.

Cox v. Collins we discussed in our opening brief, Page 13, also makes clear that generalized claims are inefficient. They must be specific. Who would be harmed, how would they be harmed, to what degree would they be harmed.

This would have to take the form of, quote, harmful effects on the duties of the officials

or agency in question, Arizona Board of Regents v. Phoenix Newspapers.

As has been stated, I think, five times -- I counted him saying it -- ABOR offered a statement that we have made and we believe is clear, nothing but unsubstantiated opinion. It may be opinion from well respected people.

It remains simply opinion and fear that it would suffer any harmful effects and has offered no actual evidence of substantial or irreparable harm.

We, on the other hand, have offered specific evidence showing that release of these kinds of records at universities has not caused these harms, and that's an important point, Your Honor. Where other universities release these records, they haven't suffered at all.

According to whom? According to their own professors, according to the deans who are responsible for recruitment, and I'll go through the list in detail in a moment.

Let me go back over the eight -- actually the nine categories that we were here to discuss. Category 1, not public records.

We didn't ask for things that weren't

public records. They identified none that were not public records. It's not -- it's an empty set.

Category 2, ongoing research. We have made the point from the get-go that research that is underway must be protected. Absolutely. That is the competitive advantage the university has, and before the Supreme Court of Virginia I made that argument and explained that's what competitive advantage means and that's what they adopted as their rule.

Competitive advantage is where the university has work ongoing that no one else should have -- be allowed to steal from them. Now the Dow case that's been referred to by others, Dow Chemical v. Allen, it's a perfect example where Dow tried to come in and get their hands on faculty research while the research was underway.

And the Court held, no, you can't have it. Dow wanted to know it because the research was on the effects of pesticides that Dow sold. They wanted to know if they were in trouble.

The Court held that this involved a subpoena for data prior to completion of publication of the research, and the facts before us show the potentially probative evidence will not be available for months or years.

That's a legitimate holding. There were very few documents they put in Category 2, but of the ones they did, they gave no specificity whatsoever as to what it was about. Now I haven't seen the documents, and you have.

The question is, who's doing that research today? What graduate students are working on it? How much money have they got into it, or is it just another idea they really sort of would like to pursue someday?

THE COURT: And let me stop you there, because I think in at least one affidavit -- probably several but one of them is just coming to mind -- is coming to mind, excuse me -- one of the affiants indicated that what will happen during research of a bigger picture project is smaller research projects will necessarily spawn from it.

And as the bigger research project moves along, we -- I'll use the legal term, not the scientific term -- the relevancy of that smaller legal -- or excuse me, that smaller research project that is kind of part and parcel of the bigger project at the time kind of falls off by the wayside.

I seem to recall probably at least -- at least one, probably several of the affiants saying

what happens is we come back 10 years later and something happens and technology -- and we come back 10 years later and the relevancy of those smaller research projects basically blooms again. What's your thought on that?

MR. SCHNARE: I have two thoughts on that. First of all, there's a good example of that in what is labeled Exemplar Number J.O. Number 2 which apparently identifies a document or some documents where there was ongoing research at the time, but Professor Overpeck dropped out of that collaboration. And he didn't even know if that research continued or not.

THE COURT: Give me that exemplar one more time.

MR. SCHNARE: J.O. Number 2.

THE COURT: Those would have been one of yours submitted?

MR. SCHNARE: No. It's -- this is on the --

THE COURT: Oh.

MR. SCHNARE: -- amended --

THE COURT: Never mind.

MR. SCHNARE: -- list. And so this is an example of several problems, one of which is a

complete lack of specificity, you know. I don't know -- he doesn't know whether the research is ongoing or not, but clearly his involvement, it's over.

Now here's how it works. Let us say -- I used this example in Virginia and it was -- it was -- it raised some eyes.

Let's say a professor's working on a cure for cancer, and she moves down the road. She just doesn't have success and doesn't have success. It's just not going well, and then she drops it and goes on to something else.

And then she stops, and she takes a mommy sabbatical. That's a sexist term but it's, in fact -- the concept is she dropped off for a while because she wanted to spend time with her children.

MR. MANDIG: More appropriate might be maternity leave.

MR. SCHNARE: You can call it that, too, because it could be also daddy leave. I mean, it's a situation where a parent says I'm dropping my professional work to do something with my family, and 10 years later comes back and says while they were out, gosh, I had a really bright idea. Now I want to pursue it.

I was just sitting around folding

clothes and I got it. Now they want to pursue it, so it's now 10 years later.

A young student who actually looked at the same papers that were available at the time might have only six months later had that idea but only if they had access to that preliminary unpublished work.

And so without access to that kind of knowledge, you lose nine-and-a-half years. How many children die of cancer in the meantime? And that is why, yes, people would like to come back to work.

And God knows I've been in the university system where some guy will come out and say, here, I looked at this a while ago, I could never make it work, take a look at it.

If, in fact, a university is creating knowledge, it isn't all going to show up in a published paper, never will. It is that which especially has been abandoned for a period of time that may very well lead to something new, but who owns it?

Well, ideas come out of a head, but the data that spawns the ideas do not. And so if you have an idea and you document it and you say, gee, I think I want to look at this later, I think that's protected.

If you simply have information and thoughts -- for example, Professors Overpeck and Hughes at the end of their papers will routinely as all professors do say this is what we did, this is what we looked at, this is what we found, final paragraph, here's the stuff we think we ought to do next. Here are the ideas where we ought to do additional research.

Why do they do that? For the simple reason that the funding agencies when they read these papers will go, okay, that's on our list, things that need to be examined. They've already made it public.

And so the question becomes very narrow and very case specific is this e-mail an e-mail that contains a specific, well organized thought that deserves protection, or is it just a generalized thought that is of the kind that people ought to be able to look at because it will spur a research.

And we have offered faculty to discuss this. Professor Ferraro said when scholars say the release of records generated to research may have a chilling effect, they're unlikely referring to research notes, their materials.

Such records are generally quite mundane, boring, even incomprehensible to an average

layperson, but that's not to say that they aren't of value to that layperson.

For what it's worth, the professor goes on to say, the release of such records is likely to -- if -- let me see -- put it this way. What scholars are more likely to fear is the release of records demonstrating uncivil discourse, one of the fears Mr. Mandig offered.

The release of such records is likely to embarrass researchers and to chill incivility in the future. Chilling incivility is not something that's a bad thing. It's in the best interest of the State.

So much for Category 2. There are very few there, but there are ones that apply. Category 3, free publication research. ABOR claims this is a customary privilege.

What they do in using this term customary privilege is expansive. It is very much like the brief filed by AAUP. They go into emotive form saying this is going to cause the end of the world because when research is ongoing it deserves to be protected and it's customarily privileged.

We just dealt with that. Take that, set it aside and ask, all right, what about information prepublication. I think that, too, should be

protected. Until the publication is done, it shouldn't be released.

And this is the practice even in universities that give out this kind of information later. It is also enshrined in law in Arizona saying once the subject matter has been released so must all the other material.

THE COURT: Isn't that -- I'm sorry, Mr. Schnare. Let me just --

MR. SCHNARE: Yep.

THE COURT: Isn't that the crux of a big part of the argument, the prepublication material for the IPCC? I mean, isn't that something that -- a big driver here?

MR. SCHNARE: The pre -- the intercourse between parties writing a report should be protected until the report is published.

Once that's done, by being able to look at that, you find out what did they include, what did they not include, why didn't they include it, does it demonstrate bias of any kind, does it generate other ideas for further work, all of the things that are extremely valuable and impossible to obtain absent those discussions.

THE COURT: And isn't that the chief

gate that you're asking me to open?

MR. SCHNARE: That gate's already open, Your Honor. It's open at the federal level now. The IPCC communications are considered public records and are released to the degree that they're available to the federal government routinely.

THE COURT: Within the scope of this lawsuit, though, isn't that -- isn't that the main gate?

MR. SCHNARE: That's one. I don't think it's the only one but I think it's -- based on what they've written, apparently there's rather a large amount of that in here.

THE COURT: Okay.

MR. SCHNARE: All right. Student and personnel information, let me just say one word about this. Student information is protected by federal law.

It does not protect, however, what's known as Facebook information. Now I'm old enough -- some who aren't -- to remember when we were freshman there actually was something called a Facebook.

It was a pamphlet, had your picture, had your name, what sports you played, what major you might pursue, what your hometown was.

The courts have said that's not the kind of information that's protected. What's protected is your performance, your grades, evaluations by faculty. That's protected. Your home address is protected.

However, we're dealing with a university system where masters and Ph.D. candidates are doing research. It may be for their own thesis or dissertation, but often they have assistance to a professor doing other work.

And communications about that work are not student records. They're just university research public documents, especially if the students are paid a fellowship under the federal or the state system.

And so you've got to -- when you look at that argument, you've got to ask what was the information that they claimed was, quote, student information.

And there's only a couple of those in here, but it bears some attention to ask are they simply spreading this cape too broadly or is there, in fact, some material here that truly shouldn't be released because it has to do with evaluation of the student.

All right. Personal correspondence not related to work, we didn't ask for any of that. If there's any in here, it wasn't part of the reasonable request. The only important point to be made on this is you've got -- you've got to understand the scope of what a professor's job is. It's teaching, service and research.

Well, teaching and research are pretty clear and easy. Service is another matter. If the service a professor does is, for example, with a professional journal as an editor or reviewer on a committee for a professional association, that's part of service that's credited by the university towards tenure. That's work.

If it's to be a leader of a Boy Scout troop, that is not. Even though that's service the university may credit, we generally recognize that that's not what people would call work related. It is, in fact, personal.

The big categories are seven and eight, and I'm going to come back to seven when I talk about substantial and irreparable harm. On eight, I'll come back to this repeated times, but it's a point that I've made and I want to emphasize it.

What is in the best interest of the

State is that there is lots of information that has not been published, and it is that information that is valuable. And it is in the best interest of the State and the University and the people at large to be able to look at that for a whole vast number of reasons.

If a professor comes under attack like Professor Wegman at George Mason University -- Professor Wegman was asked by Congress to examine a controversy, a controversy that you saw on the screen a little earlier.

Professor Mann was the statistician behind the Bradley, Hughes and Mann paper, the two papers, and Steve McIntyre whose head specialty in mathematics looked at their effort and said, you did it wrong.

The whole book has been written about how they did it wrong, how they impeached the statistical analysis that underwrote that demographics, and the arguments between them were massive, loud, ugly.

And so the Congress asked an independent professor of statistics -- Ed Wegman -- tell us whether McIntyre's right or Mann's right. We want to know the validity of the analysis, so Wegman did it.

While Wegman was doing it, he receives -- he was peppered by e-mail requests, and the university said, it's ongoing research, we're not going to give that up. And that was Wegman's view.

When he finished the report, it had been peer reviewed, and it had been published. At that point, they all came back in and said, give us the e-mails.

Within five days in electronic form, they released them all. That's normal at that university. Any potential biases Wegman may have had, any potential discussions he had with both parties were made available to everyone so that they could find that Mann had not responded to questions Wegman had requested and McIntyre had.

And Wegman was forced to make assumptions about what Mann did but had to make no assumptions about what McIntyre did. And it is that level of knowledge -- it's not going to show up in the final report but helps us understand the quality of the work that Wegman did.

And so when you examine this question of the best interest of the State, you have to ask yourself is that information, it's released, is there value in it, not what I want to know or what my

purposes and intents are which have nothing to do with what he said there.

It has to do specifically with is there value to be gained and have I made the argument that there is.

Category 9 is others otherwise withheld, and they didn't claim anything in Category 9. So I'm only going to address it peripherally.

What I want to point out now is that the University has offered a number of very nice, very fine professionals saying things like, well, we're worried that this could happen. We're concerned that this could happen. This might happen.

They never pointed to a single example of something that did happen that is adverse to the State. For example, Dr. Rawlings' statement giving general access to the information will stifle collaboration, how does he know that?

Well, it's pretty hard to say that it would when Hughes and Wegman who have both been subject to this kind of request for e-mails have continued to produce collaborative work after release of e-mails that they had.

Keep in mind this isn't the first time Arizona has been asked to release e-mails of this

kind. They were asked to do so two years ago, and they did. And, in fact, they released several of them in this case, two of which we gave you as examples in our reply brief.

One of those is extremely short, and I think I'll point to it. It's a January 1st, 2001, e-mail from Michael Mann to Ray Bradley, Phil Jones and Professor Hughes.

MR. MANDIG: Can I have a record reference, counsel?

MR. SCHNARE: It's Exhibit 1 of our reply brief.

MR. MANDIG: Thank you.

MR. SCHNARE: And it's a single paragraph long. It says, seen this, I told Rob there were problems -- there were problem (sic) with the comparison because he needed to subsample our reconstructions over similar spatial domain, then he'd get a closer result, but I was encouraged that his method gave a somewhat more reasonable -- parenthetical, closer to ours -- result. Then Pollack, et al, got the same data. He argues that his method is more reliable.

All right. That's the kind of discussion that doesn't show up anywhere, but if you

have it, you can look at it. You can go back to those papers. You can say, what was that about and why were they arguing that? What was underneath that discussion?

Now one of the things that Mr. Mandig started with was a suggestion that we didn't ask for data and a whole long list of things. Well, he doesn't understand how people do investigations, or perhaps he does but didn't wish to talk about it.

You pull a string, Your Honor, and you see what unravels. Obtaining e-mails gives you the opportunity to say, all right, what is the area in which I wish to do further examination. What will I ask for next?

We have a set of FOIAs into the Federal Energy Regulatory Commission right now. The first one produced a series of e-mails where we finally identified who was doing what about an issue we cared about.

And we went back with a second one, and then they gave us some more and redacted a bunch. We thought, you know, the fact of their redaction leads us to ask a much more pointed set of questions. We went with the third one, and now we're in court because they don't want to give that up.

But that's how it works if you're doing the kind of work that we do where we're trying to find out what's going on inside the government, and that is all we were trying to do here in large part. How did they work.

So ABOR's already released e-mails of the kind we've sought in this case. Their desire for confidentiality is in and of itself insufficient.

In our reply brief at Page 37, we made this point citing to Moorehead v. Arnold. The promise -- quote from the case, the promise of confidentiality standing alone is -- let me back up.

Under Arizona law, not even the promise of confidentiality standing alone is sufficient to preclude disclosure. An individual's desire for confidentiality to keep public records from the public view does not present the material harm necessary.

The mere fact that they want to think -- keep things confidential isn't enough. There has to be a reason why which is why the Category 2 stuff needs to be kept confidential and you don't release it.

But why -- the critical discussion going on once the subject area's been published or the

paper's been published, that confidentiality's no longer necessary.

And Cox Arizona Publications v. Collins, 1991 Arizona Appellate Court case -- I'm sorry, Your Honor. I think I cited -- I wanted to cite to the Arizona Board of Regents v. Phoenix. There is -- nor is there specific material harm once investigative work is stale.

Once it's done, that's what the courts have found. That was Cox Arizona v. Collins. If it's stale, if it's done, there's no harm, and there shouldn't be.

That's what universities are for. That's why we do the work we do. That's why young men and women come out of these schools and they're valuable because they have all this knowledge that's never been published.

That's what people want to get at sometimes, and that's what the public has a right to see. It shouldn't be kept secret. It should be made available.

And, in fact, after we filed in the University of Virginia case, the university psychology department cleverly went out and got a $5 million grant to mount a Web page for unpublished

data and is now recruiting their faculty to put the stuff that didn't get published up on the Web site so that anybody can see it and could help use it.

And if that's the institutional response of a university that didn't want to give up its e-mail, then now you see what the confidentiality boundaries are. Recruitment or retention has not been harmed.

Dean Rychlak stated no harm from FOIA results due to the plethora of equally competent professionals able to fill these positions, and there's great competition for these positions.

Now if you release these documents and Dr. Overpeck decided he's going to move on, that's his choice. I didn't see a declaration from his spouse saying, yeah, I'm ready to leave. I know, let's go to Montana where it's cold.

What he said was I'm unhappy. Okay. But it might be in the best interest of the State for you to be unhappy and let others see what's going on, because I assure you, Your Honor, it's not like there aren't other potential faculty members with the same skill set and capable of doing the same job conceivably at lower cost and with more vigor because they're young and ready to go.

It is not necessarily in the State's best interest to hold onto every professor forever. They choose to do that, but that doesn't mean it's in the best interest of the State. And where it's self-inflicted, that's another matter.

Professor LeBaer had to know when he came to this university that he was going to be subject to the FOIA laws. You have to sign a document saying you understand how the e-mail system works and that the potential for release of those e-mails exists under the statute. He knew that, and he came here anyway.

And Dean Rychlak said he's never in all of his career had someone show any concern about the fact that they would be subject to FOIA. That was simply not part of the equation of recruitment or trying to find a job at universities that routinely give up these e-mails.

Those are facts. That's not fear. That's a long history of fact showing it's not a problem. It's not an issue. Research money has not dried up.

Professor Ferraro, Professor Rychlak both make this point. Money is there because the issues that are identified that need to be addressed

are agreed to as ones deserving of funds.

Now let's take up this question of private funding and a reference made about, gee, if you can't control your own information, then I'm not sure we want to fund you.

This goes back to the Dow case. The control of the information is protected in two ways. one of them is if it's prepublication and you haven't -- you're not ready to release the data, it should be protected. That's fine.

If it is confidential business information -- and many corporate sponsored research projects at a university include confidentiality requirements with binding legal documents. Those, too, are not subject to release because under the Public Records Act those are protected.

So the question then becomes what is it that they're talking about. Well, the reality is they're talking about pretty -- pretty completion of research documents. We've already dealt with that. No one is saying that afterwards this material shouldn't be available.

There's a case in the U.S. Court of Appeals for the District of Columbia right now where the Environmental Protection Agency has simply

refused to give out the raw data, and Judge Tatel is sitting up there saying how can anybody evaluate your work if you won't give out the data?

And that's -- that's the problem we see. Public Records Acts are intended to allow the release of that, and Arizona law as we've stated in briefs say once the subject matter is published, the underlying information is to be publicly released.

Collaboration has not diminished. Professor Hughes and Wegman, both subject to this, have continued to produce collaborative work. We've outlined at some length what Professor Hughes has done since the release of the Climategate ones but also since the release of the earlier e-mail release under another case and a different requester.

They argue they taught -- they say, gosh, this is horrible. Someone's going to look over our shoulder, but they keep doing the work.

We referred to a study that was done with regard to recombinant DNA studies and the use of embryonic cells, and the question was, is all the hullabaloo about using embryonic cells on one side saying that's life and if you harm them you're killing a human being, on the other side saying it's just a cell, we're doing research on it. Highly

emotional.

There have actually been threats against professors, and so a study was done as we describe in brief as to whether this would, in fact, slow down the research in that area. And there were two outcomes.

One, the question was, with this -- do you think this has had harm on the research, and a lot of people, about 55, 56 percent, said yes.

Then they asked the question would it stop you, and 80 percent said never stop me. I don't know about the other 20 percent. I do know it was a self-selected sample, and it wasn't a very good sample.

And it was people who are most interested in the subject, but the reality is the work goes on because it's what they do. It is their life.

And the collaboration is a function of being able to do that work better with people they know or people who have other ideas. That is the nature, and it has been going on at universities that release e-mails routinely.

And I reemphasize that's a fact, that collaboration continuing after release of e-mails by

Wegman is a fact. It's not a fear that won't happen. It's a fact that it has happened. And as you do your weighing, you've got to weigh facts against fears.

Has academic thinking been tempered with? Well, considering the protection of the Category 2 data which we've agreed should be protected, the University's offered absolutely no evidence whatsoever that academic thinking has been harmed.

They haven't given a single example. I couldn't find any description of it in their -- in their log.

There's no evidence in the record that it has been and there are -- there is strong evidence that we've offered in our expert saying it hasn't been a problem anywhere where these e-mails are routinely released.

People think, and there's even a discussion by a gentleman who's name I can't even begin to pronounce. You'll recognize it. It's about 16 letters long in our reply brief that says here's the process by which you do research and thinking.

And the only one that could possibly be released is the pre-research during research prepublication period which as we've said is

protected. So you may wish to go back and look at that one statement.

Have communications been truncated? I'll come back to Dr. Rychlak in a minute who describes this. I've talked about competitive disadvantage, so I'm not going to talk about it again.

Deliberative process was something that was raised at some point, but they backed away from it. They haven't identified a single document that says it's deliberative process protected, and it's not covered in the law.

Now let me make four -- four points that I intended to make, and I might catch up a couple of others. I hope to do it quickly, Your Honor.

First of all, in their second sur-reply, the University raised a new argument. This is why I said I don't think I need to file a response.

Their argument was that there's a freedom of association, a constitutional freedom of association right that would be impinged if these e-mails were released.

Citing to Bates v. Little Rock, they make the point that fear of community hostility and economic reprisals could lead to -- and there was in

that case substantial evidence that public disclosure subjected the NAACP members to harassment and threats of bodily harm.

Well, this case was in the '50s. It was about who were the members of the NAACP. It was clearly an effort by people not of goodwill to create a target list for their incendiary attitudes.

Now I know Mr. Mandig would like to complain that we are just as evil as those people, that we are somehow or another trying to harass faculty.

We're not trying to harass faculty. We are going where the information that we want to look at happens to be.

We recognize that there is this coterie, this small group of people who have controlled a subject area on which the United States has spent over the last six years, eight years -- eight years, $6 billion of federal funds to address.

It's a lot of money, and it's being controlled on the scientific level by this small group. They call themselves the hockey team. We know who they are. We don't need to find their names.

The question is, how do they do their

work? What biases do they have? The argument was made earlier today that we have a Nobel laureate here in the room. Well, we don't actually.

Michael Mann got up and said he, too, was a Nobel laureate, and the Nobel committee came down and said no, no, we didn't award it to the people. We awarded it to the product of the IPCC.

That doesn't diminish the fact that he's done fine work, very good work, but he's part of a group that doesn't want other people to publish papers that disagree with him.

They attempted to and succeeded in getting a journal editor fired, and they discussed it in some of their e-mails that we've seen.

Now that's not something professors are supposed to do. That's inappropriate to attempt to control an area of subject and not allow others to investigate it and to diminish them by so doing.

And if that's been going on, Professor Krauss, professor of ethics at George Mason University who is very protective of faculty and would never want them to be harmed, has said where there's some of that kind of evidence, then the facts should be made public, not the investigation.

Universities will do investigations.

They did a whitewash at Penn State. It's been well documented. That process is a process that's protected, but the underlying facts of the situation Krauss says that should be released.

And so we don't know if there's any of that in here. What we do know is it's a string that we're pulling. Let's see what is there. Let's see if we can exonerate some of these people.

We know that some of the people involved in that discussion said this is wrong, we shouldn't do it, and that's the kind of information that may well be in these records.

So you don't know ahead of time what it's going to say. All you know is that it's important to know.

In Shelton v. Tucker -- I'm going to give you the cite, Your Honor. It wasn't -- it's not in our briefs. Shelton v. Tucker, 364 U.S. 479 at 485, Supreme Court case 1960, it explained why Bates doesn't apply which was the case to which opposing counsel referred.

And it said in those cases there was no substantially relevant correlation between the governmental interest asserted and the effort to compel disclosure.

Here by contrast there can be no question of the relevance of a state's inquiry into the fitness and competence of its teachers.

Well, if the State has a right to look into the competence of its teachers, the facts about that are discovered are public records, and they should be released.

And if the State can do it, one then has to ask who is the sovereign? The sovereign is not the University. The sovereign are the -- are the citizens of the state. They have a right to this.

They may not have a right to what happened during the investigative process. They have a right to the facts.

Now with regard to Professor Overpeck's statement that he wants to leave, if you -- he didn't say would. He said he might -- for calling -- for going there, calling rather than compromising their commitment to the intellectual and political freedom is a peculiar and narrow investigation.

In Elfbrandt v. Russell which is the case they cited, it had to do with a loyalty oath in -- at the time of the McCarthy era. No one is asking people to make loyalty oaths anymore, and this case isn't about loyalty oaths.

This is a case about behavior, what happens, who did what, how did they do it, why did they do it, what can we learn from it. In a case -- again, I give you the cite, Your Honor. It's the Second Circuit case, McBride v. Roland, 369 F2nd 65, at Page 68, the rights he clings to, freedom of association, freedom to allow a chosen profession, freedom from unreasonable governmental enterprises --

THE COURT: Slow down a little bit so the court reporter can get it. Thank you.

MR. SCHNARE: The right he claims -- this is a quote from the case. The rights he clings to freedom of association and freedom to follow a chosen profession, freedom from unreasonable governmental influence -- I'm sorry, interference are constitutionally protected.

To succeed, however, he must show not only that the right is one entitled to protection but that his deprivation of it was without due process, that is, arbitrarily or without sufficient evidence or that the government interference is unreasonable.

Well, based on what they're saying, they want you to write the universities out of the Public Records Act. That's what -- that's what they're asking you to do.

They're saying the legislature has no authority to allow someone to look behind the ivory covered walls and, therefore, that is governmental interference that's unreasonable.

And clearly, because they've already released many e-mails, they don't think it's unreasonable.

The fear factor, Your Honor. The Humane Society case explains that, quote, unsubstantiated fear not supported by evidence is not a basis for denying disclosure of public records.

I accept the fact the vice-president is worried that this will harm them, but there has been no example given of actual harm despite the fact that they've already released many e-mails including the examples I gave you.

And when you go to universities that routinely release them, we've offered you evidence by faculty and deans saying there is no harm. There is no interest of the State that seems to have been harmed.

And, therefore, Your Honor, it's -- it isn't always easy to prove a negative, but when you have decades and decades of experience of releasing public records from universities and they've not

observed any of this harm, that's evidence that there is no harm and that ABOR has been unable to impeach.

I want to quote Dean Rychlak -- Rychlak. For the record, it's R-y-c-h-l-a-k. I'm sorry I didn't say that to you earlier.

He wrote in his declaration affidavit there should be no chilling effect on ongoing research when records from past research are generated. In fact, it should generate better research.

And he then said records generated as a result of research are beneficial to the academic community. In fact, their research should spur additional research and reveal, quote, dead ends so that future work is more precise.

And that is the point I was making earlier about prepublication release once the publication has been made.

Professor Ferraro makes these same points, and I've made the point already. I'll just restate this one sentence. The release of these records tends to demonstrate potential uncivil discourse, and uncivil discourse is inappropriate.

I don't have the quote here, but you can go back to his statement. And he said that when he

ran that department, when he saw that kind of uncivil discourse, he disciplined his own faculty. It's inappropriate for public officials and adults to be that uncivil.

Your Honor, I'm not here to testify, but I can assure you that I have dealt with FOIA at the federal government for decades.

And I cannot tell you how many times I've had to go to new political appointees and say don't use those words again in your e-mail because we have to release this kind of e-mail. Don't hit the send button.

There is no reason why there shouldn't be some discipline put in if, in fact, faculty take this kind of behavior all the time. And one form of that discipline is it becoming known publicly which happens from time to time.

I don't know what it is that's in these that's embarrassing. They're the ones that said that there's embarrassing material in there, but the fact that it's embarrassing is simply not a basis for withholding information.

Just to give an idea of the kinds of things we're talking about in this line, Stephen Schneider -- the late Stephen Schneider was journal

editor of one of the most influential climate journals there was and still is.

He was a major controller over what was published and what wasn't. He was part of the hockey team. And he had made famous quotes dealing with how honest science really needed to be on an issue of such political importance and that they need to balance their honesty against their advocacy.

Most of us are stunned by the statement because that's not what academic work is. You just tell what you know.

If you want to step out into the political framework, then you are an advocate, and people have a right to know that it is an advocate doing the research, not a disinterested scientist.

A true scientist doesn't care if the experiment comes out wrong because he learned something. That is not the way it works in the modern academy sadly because you want to succeed in your hypothesis to some degree to get the next grant or to get personal recognition.

And those incentives tend to outweigh too often the more lofty original intent to be a scientist and simply look and see what you can discover, but the incivility of it all shouldn't

enter in there at all anywhere.

Schneider, a Stanford professor, called those who disagree with him on climate issues, quote, idiots, bozos and laughably incompetent. Well, we heard some of that this morning, too. That's not at issue, and that kind of behavior, that is at issue.

There was a statement made earlier that says that all the evidence that one needs is already out there. Well, if that information was in the e-mails, then there's no problem with releasing the e-mails because it's already, quote, out there and, therefore, there's no harm to anybody.

So to the degree that there are -- that everything you could possibly need to know you could get, then the e-mails should not be a problem to be released.

Your Honor, in the final call, you're confronted with a situation of our organization making -- offering experts who said you've been giving these out for years, there's no harm.

There is significant benefit in having access to these kinds of materials. The best interest of the State is served in expanding knowledge, allowing people to observe how the government does its business, ideas that have been

abandoned or are stale.

All of these are available potentially in these e-mails, and all of them outweigh the fear that has not been documented in actual harm. And it is on that basis we believe in your de novo review of this you cannot find significant irreparable harm because there has been none at universities that have routinely given up this e-mail -- these e-mails including the Arizona universities who have given up similar e-mails. If you have questions, I'll be happy to answer them.

THE COURT: I don't. Thank you. What we're going to do is we're going to take a -- let's take about a five-minute bathroom break, let everybody get up and stretch and use the restroom. And, Mr. Mandig, you'll have the last word.

MR. MANDIG: Thank you.

(Whereupon a recess was taken.)

THE COURT: Before we get started -- Arizona federal rates but --

MR. SCHNARE: I'm sure it was my hot rhetoric, Your Honor.

THE COURT: I think we're going to just have to deal with it for the balance of the hearing. I apologize, folks. I was getting a little warm up

here myself.

MR. MANDIG: I was telling your staff, Judge, that probably 30 years ago I was involved in some litigation representing the architect who designed this building, and there were some interesting issues about the mechanical system.

THE COURT: Was it civil or criminal?

MR. MANDIG: It was a civil case.

THE COURT: Okay.

MR. MANDIG: It was a civil case, Judge.

THE COURT: All right.

MR. MANDIG: May I proceed?

THE COURT: You may. And let me -- maybe this will get you started, or maybe you don't need it. But the concerns, the worries, the opinions expressed and the numerous affidavits of the different university officials that you've included, when I was reading them, I thought to myself way back when, wouldn't those have actually manifested with the enactment of 39-121?

I mean, wouldn't this have been an issue well before this case ever came up? And if you think I'm going down the wrong trail on that, tell me why you think so.

MR. MANDIG: Well, I -- yeah. I think

you are a little bit. I think it's a blind alley heading in the wrong direction in this sense. First of all, just to take an example from our own -- is it all right if I stay seated, Judge?

THE COURT: Yeah. Please. That's fine.

MR. MANDIG: To take an example from our own jurisprudence, we have the Board of Regents, Phoenix newspaper case involving the selection of the president of Arizona State University.

And what happened there just in summary was they created a search committee to find candidates who they solicited interest and somehow got the feelers out there.

And I don't remember the exact number, but I think initially they had a couple hundred folks or so that sent in some kind of an indication of interest and maybe a resume or whatever.

And then they went through the process of winnowing down to final candidates, if you will, and the Phoenix newspapers came in and said we want all the resumes of everybody who --

THE COURT: Right.

MR. MANDIG: -- gave some indication of interest. And the case ended up boiling down to the question of what limits could legitimately be imposed

on that kind of request.

And our Supreme Court came out with a decision that, if memory serves me correctly, was along the lines of once they got down to 15 or so folks who were still in the hunt, not necessarily to the final three candidates, at that point in time it was okay to release the information.

But with respect to all of the other people, the couple hundred or however many there were who had given some indication of interest, the Court said it's inappropriate for all of that information to be released for two reasons.

Number one, there had been evidently some sort of an assurance of confidentiality, and secondly, more importantly, it was the Court's conclusion that if you don't protect that process in some similar fashion that you're going to have a lot of people who may be great candidates who won't even throw a hook in the water because they're afraid that, you know, the university they're working at today is going to find out they're trying to go someplace else tomorrow and so on.

MR. SCHNARE: Your Honor --

MR. MANDIG: So --

THE COURT: Hold on.

MR. SCHNARE: Sorry.

MR. MANDIG: So what the Court said was that the limitations that were imposed in that opinion were designed to prevent the -- what the Court called the chilling effect on the process of inviting interested candidates to tell the Board of Regents that they were, in fact, interested.

So what's my point? My point is the Court did not say that we're going to wait until next time this happens and find out if the list is shorter.

They said, well, we reasonably expect that there's a chance that there will be a chilling effect and that the universe of possible candidates will shrink if they feel that their privacy is not protected until the proper moment.

So, you know, the suggestion that Mr. Schnare keeps insisting upon that we have to actually document harm that we're trying to prevent from occurring is a little bit backward.

I mean, the whole idea behind allowing the withholding of the records in order to prevent harm is just that. The question then is, is there a reasonable basis for believing that there is some measurable likelihood to allow that happen.

And in our case, you know, when we read the declarations from these folks, they don't say will. They don't say may. They don't say might. They don't say could. They say it will chill the process of science if these kinds of communications are not protected which really, you know, raises the question that was kind of implicit in opposing counsel's remarks and that is was the University really entitled to conclude that there -- that there is a real risk of harm that is entitled to try to prevent.

And the best place, I think, you could go to see how a court has handled that question in the very similar situation is the Humane Society case.

And if you recall, there was -- there was a request for records relating to a study of whether or not certain animal protection laws that would regulate how eggs were produced would have some kind of adverse economic impact in California.

The gentleman, a long time researcher who was part of this agriculture institute or department at the University of California gave an affidavit that said, you know, I've been at this research business for 30 years, and if you don't

protect the confidentiality of my sources and the communications leading up to the publication of our work, there will be bad consequences that will damage the quality of the work that we're able to do.

And, you know, of course the Humane Society made the same argument that Mr. Schnare is making that, gee whiz, that's just a bunch of speculation by paranoid individuals who are motivated or provoked by unsubstantiated fear.

And the Court in that case said that that individual could give the opinions and that he did and that they could and should be relied upon.

It is not speculation for him to opine that allowing release of the e-mail involved in this case will fundamentally impair the academic research process.

Now that's the conclusion that was reached by the California Court of Appeals in the Humane Society decision, and we really are confronting the same factors here.

The question you have to decide is whether or not it's reasonable for the University to rest a decision not to -- not to release records upon a concern that doing so will in the long run or the short run harm the process of conducting research in

our universities.

You're entitled to say as was the University that the folks that we got affidavits from to paraphrase Mr. Schnare's inaccurate attempt to paraphrase me, they're not idiots, bozos or laughingly incompetent. They are leaders in their field, and the University's judgment about what to withhold has certainly been confirmed as a reasonable one if you look at what those folks say.

Contrast that with what you see in affidavits that were presented by the other side. They kind of wander around a whole bunch of issues. They don't really necessarily focus on precisely the questions that we've been trying to debate here and -- but I have the same final analysis.

We're not here to determine who wins a battle of the experts. That is so, because contrary to what Mr. Schnare said in his beginning remarks, you are not deciding this case de novo.

You are looking at the record before you and asking the question that the rules of special action say is the question that needs to be asked: Did the University abuse its discretion in acting based upon its concerns about these kinds of harms.

The other thing that's -- I think it's

interesting about the Humane Society case is it quotes a couple of other California cases, one of which in turn cites to United States v. Nixon, the old executive privilege case that was kicking around I think even before I became a lawyer, if memory serves me correctly.

THE COURT: That long.

MR. MANDIG: Huh? Yes, that long. Indeed that long. But, you know, the concept is what was talked about in a couple cases cited in Note 5 of our last filing that, you know -- and they quote from U.S. v. Nixon, the idea that it is not speculative to conclude that fear of public dissemination of one's remarks will, quote, temper candor with the concern for an appearance.

And that -- that is a truth that is drawn from, quote, human experience and not testimony of experts at trial, end quote.

What's the point of that? The point of that is we're all adults in this room, and I think we can all assume that, for example, if somebody asked for all of the e-mails that you might have written in which you said something about Mike Mandig or David Schnare that you would bristle at the concept of turning those over, number one.

And number two, if you walked through life every day thinking I better be careful what I say about Mandig because I might have to cough up that e-mail, you'd change what you put in the e-mails.

Certainly. We all know that. I do it. You would do it. Anybody in this room would do that. It's common sense to expect that people who normally work in a confidential environment will change the way they behave if they think they have no more confidentiality.

Now concrete evidence. Mr. Schnare says we have no evidence in the record whatsoever that any measurable harm has ever occurred because of the release of e-mails.

Please go back, Judge, and take a look at Paragraph 30 of Malcolm Hughes' original July 28th declaration. I'm just going to read a couple of parts of it. It's a little bit lengthy.

But he says -- and I quote -- I have direct experience of the ongoing disruption of my professional and personal life caused by the release of stolen e-mails in November 2009 and the consequent accusations, attacks, innuendo and inquiries.

I have been directly informed by several

colleagues that they have limited their e-mail communications with me because I have been targeted in public records requests.

As e-mail 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.

My coauthor, Professor Raymond Bradley of the University of Massachusetts in Amherst, told me that he has avoided e-mail communication with me because of such concerns.

He goes on then to describe in that same Paragraph 30 that the collaborations between these three gentlemen that have been apparently fairly active up until 2009 had fallen off drastically in subsequent years according to Professor Hughes in significant measure because of the release of these e-mails.

Now counsel for E & E is going to say great. That's as it should be. But the point is not whether what he wants to have access to would enable him or someone that he hands these documents to go out and drum up an artificial dispute in the media.

The question is, did the University of Arizona have the right to decide that with these

kinds of considerations in play it was the better part of valor to withhold the e-mail.

And I think it's pretty hard to say that that was anything other than a pretty sound judgment, and that's been confirmed by all the experts that I've gone to, not because I was looking for somebody who would say what I wanted them to say, but because we wanted to know what the leaders in the business say about this case.

Now the comments about Dr. Overpeck being concerned enough about this issue that he will -- he didn't say might, maybe, et cetera -- will be among those seeking work elsewhere if the case goes in his judgment wrong, let's think about that for a minute.

Talk about Categories 1 through 9. In the joint declaration that we filed on the 20th, one of the things that these gentlemen wanted to be sure that they explained to you is the difficulty of trying to use those categories as a way to parse out what it is they're looking at.

It's somewhat easier, I suppose, today looking back at e-mails from, you know, 2007, let's say. Then it would be on an ongoing basis, but think about the implications of having to turn these

e-mails over now.

That means that everybody engaged in research would have to spend a significant part of their waking workday thinking is this Category 1, 3, 5, 8, 7? And how do I -- how do I adjust what I put in writing to make sure that when I send this e-mail to this fellow at Rice University it's not going to end up in the hands of somebody who really doesn't have an interest in seeing what I'm talking about on a day-to-day basis?

To take from the University the discretion to make a judgment under concrete circumstances about what should or should not be withheld and to in effect force all faculty members to try and, you know, live by this nine item list in conducting their daily communication, in a word nightmare. Another word, seemingly impossible.

So, you know, again, I go back to the same point. What's the question? The question is, did the University exceed the bounds of reason when it said, you know what, on this day with these documents and this factual array involved, it's better not to turn those things over. That's a hard judgment to overturn.

Now Mr. Schnare suggested that what

we're really trying to do is have a judicial blanket exemption for e-mail contrary to what may be statutory law of the State of Arizona.

We're not asking for any such thing. We're asking you to look at the facts of this case and decide whether the University went nuts when they said we just don't think it would be a good idea to turn these things over to these folks at this time.

And I don't think you can say that that's what happened because they didn't. Now I did have one -- oh, I have two more points and then I'll be finished.

One is, I do think that chief gate is an appropriate label for what is sought here and I do think that it is -- borders on being disingenuous to say that what George Mason did -- George Mason University did with respect to Professor Wegman's e-mail in 2010 should be used as a guidepost for a couple of reasons, the first of which is Professor Wegman's study so-called got de-published by the journal that published it due to concerns about plagiarism.

We made note of that in our reply memorandum, I think. But more to the point, George Mason is a public university in the state of

Virginia. And the decision that the university made -- and I don't know whether it was over Wegman's objection or whether he was fully in support of it or not -- but it was made in 2010 which was four years before the Supreme Court of Virginia decided a case that says if Professor Wegman's e-mails were asked for today, the university could withhold them. What happened in 2010 is not important anymore.

And getting back to this notion that there's some -- some sort of couturier (sic), I think is the word that keeps getting kicked around, of -- consisting of a small group of climate scientists who are capable at the drop of a hat of muzzling everybody else who's out there doing climate science if they disagree with them, first of all, we don't have any evidence that that's so, nor do we have any evidence that even if there were such a thing Dr. Overpeck or Dr. Hughes were card carrying members of that organization.

And conversely, well, my folks looked at me kind of strange when I said I was going to tell you this, but I asked Dr. Hughes what time is hockey practice and he didn't know what I was talking about. There is no hockey team.

And the IPCC is not a small group of a

few scientists. It consists of thousands of scientists all over the world who are exchanging and analyzing and commenting about climate science, I don't know, probably something close to all day every day.

Getting back to the question of whether if somebody wants to put false science on trial do they have the tools to do that, absolutely. Part of the reason for that is the IPCC has everything out there that relates to peer reviews, commentary on draft reports.

It's out there. It's available from some other source, and there's no reason why the University isn't free to say you can get what you think you want or you say you want somewhere else but you don't get these e-mails.

And they are indeed -- just to close, these e-mails are the modern equivalent of telephone conversations, chats that occurred in conference rooms, hallways, by the water fountain and so forth years ago until the advent of e-mail and Twitter and all these other things that are driving us nuts nowadays.

And no one would have seriously contended back then that Mr. Schnare because the

public has an interest in what Malcolm Hughes is doing that they would have a right to go in his office and pick up his notes or listen to his conversations or tap his phone or anything of the sort.

And that really is kind of the functional equivalent of what's happening here. They're not asking for research results. They're not asking for the data on which those results were premised.

They are not asking for information about the methodology used to reach the results that have been published. They're not asking about where the money came from and how much to pay for whatever the research was.

They just want to get into this inner sanctum that they really have no business in under the facts of our case, and so you should refuse the relief that's been requested.

THE COURT: Thank you.

MR. SCHNARE: Your Honor, I'd like to correct two -- two issues with regard to --

THE COURT: Hold on. Hold on. We got -- Mr. Mandig got the last word. I mean, that's -- counsel, the way we work is whoever has the burden

goes first and goes last.

MR. SCHNARE: My concern -- my concern, Your Honor, is that he misrepresented two cases of law, and I only wanted to point you to those two cases to look at yourself. I wasn't going to make any argument at all.

THE COURT: I will look at the cases that he cited.

MR. SCHNARE: Would you --

THE COURT: I will look at the cases that he cited.

MR. SCHNARE: Can I now --

THE COURT: If we go back and forth, Mr. Schnare, we're going to be here all day.

MR. SCHNARE: And I don't want to do that.

THE COURT: And you're not going to. We're concluded.

MR. SCHNARE: Your Honor --

THE COURT: Mr. Schnare, you're done.

MR. SCHNARE: May I -- you had offered me the opportunity to write a very brief response to their memorandum.

THE COURT: And you declined.

MR. SCHNARE: And I did decline. On the

basis that I think he misrepresented some of the law here, I'd like to write that down and offer it to you in a timely fashion.

THE COURT: You may. It can be -- can you limit it to five pages, or do you need 10?

MR. SCHNARE: It will be less than that, Your Honor. And I'll have it within 72 hours.

THE COURT: You don't have to do that. You can get it to me -- if possible, Mr. Schnare, can you get it to me by Friday, the 27th of February 2015?

MR. SCHNARE: I will, Your Honor.

THE COURT: Thank you.

MR. SCHNARE: Thank you.

THE COURT: And limit it strictly to those issues, please.

MR. SCHNARE: Two cases, Your Honor.

THE COURT: All right, folks. I will take the matter under advisement upon receipt on the 27th. I'm going to need every day I can. I appreciate everybody's hard work.

Those of you who are here and who have been here, I appreciate your concern. You've seen some excellent lawyering. You should be impressed, because I certainly am.

Also, I noticed during the proceedings there was some brisling and things like that. I think we should all really appreciate what we have here. I feel privileged to be part of this.

I know hard feelings raise, and I see scowls and eye rolling and literally brisling. But it's the best system in the world, and to be part of this I truly feel privileged.

And, you know, if it's your ox being gored, you want somebody like Mr. Mandig and Mr. Schnare in there fighting for your right, so everybody can just kind of decompress and go about your day but recognize what's been going on here. Thank you.

MR. SCHNARE: Thank you, Your Honor.

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C E R T I F I C A T E

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

I, Karen A. Kahle, RPR, do hereby certify that as an official Court Reporter for the Pima County Superior Court, I reported the foregoing proceedings to the best of my skill and ability; and that the same was transcribed under my supervision via computer-aided transcription; and that the foregoing pages of typewritten matter are a full, true, and accurate record of all the proceedings had as set forth in the title page hereto.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 13th day of May 2015.

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Karen A. Kahle, RPR
Certified Reporter
Certificate Number 50075