IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ARIZONA BOARD OF REGENTS, an educational, non-profit corporation, and **TERI MOORE**, in her official capacity as Custodian of Public Records for the University of Arizona, Appellants, vs. **ENERGY & ENVIRONMENT LEGAL INSTITUTE**, Appellee.	2CACV-2017-0002 Pima County Superior Court Cause No. C2013-4963

BRIEF FOR *AMICI CURIAE* AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE, AMERICAN METEOROLOGICAL SOCIETY, CLIMATE SCIENCE LEGAL DEFENSE FUND, NATIONAL ACADEMY OF SCIENCES, UNION OF CONCERNED SCIENTISTS, DR. MALCOLM HUGHES, AND DR. JONATHAN OVERPECK, PFIZER INC.
IN SUPPORT OF APPELLANTS

Andrew L. Frey
Karen W. Lin
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500
afrey@mayerbrown.com
klin@mayerbrown.com
(*pro hac vice* admissions pending)

Shane M. Ham (027753)
Osborn Maledon, P.A.
2929 North Central Avenue
21st Floor
Phoenix, AZ 85012
(602) 640-9380
sham@omlaw.com

Counsel for the American Association for the Advancement of Science, American Meteorological Society, Climate Science Legal Defense Fund, National Academy of Sciences, Union of Concerned Scientists, and

Timothy J. Berg (004170)
Theresa Dwyer (010246)
FENNEMORE CRAIG
2394 East Camelback Road, Suite 600
Phoenix, AZ 85016-3429
tberg@fclaw.com
tdwyer@fclaw.com
(602) 916-5421

Counsel for Dr. Malcolm Hughes and Dr. Jonathan Overpeck

John P. Kaites, Of Counsel (012767)
Kristen M. Lee (032958)
FENNEMORE CRAIG
2394 East Camelback Road, Suite 600
Phoenix, AZ 85016-3429
(602) 916-5498
jkaites@fclaw.com
klee@fclaw.com

Counsel for Pfizer, Inc.

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INTEREST OF THE *AMICI CURIAE*

American Association for the Advancement of Science ("AAAS") is the world's largest multidisciplinary scientific society and publisher of the *Science* family of journals. AAAS was founded in 1848 to advance science, engineering, and innovation throughout the world for the benefit of all people. As part of that purpose, AAAS is dedicated to promoting and defending the integrity of science and its use, and to promoting international cooperation in science.

American Meteorological Society ("AMS") was founded in 1919 and is dedicated to advancing the atmospheric and related sciences for the benefit of society. It accomplishes this goal by, among other things, publishing several peer-reviewed scientific journals. AMS has more than 13,000 members, including scientists, researchers, and other climate professionals. It is committed to strengthening scientific work across the public, private, and academic sectors, and believes that collaboration and information sharing are critical to ensuring that society benefits from the best, most current scientific knowledge and understanding available.

The Climate Science Legal Defense Fund ("CSLDF"), a 501(c)(3) non-profit organization, was founded in 2011 in response to the increasing incidence of legal attacks against climate scientists, which prominently include intrusive public records requests targeting climate scientists affiliated with public universities and other public entities. CSLDF's mission is to protect the scientific endeavor in general, and climate science and climate scientists in particular, against such attacks, which divert scientists' limited time and resources away from their research and stifle candid discourse among scientists. In furtherance of that mission, CSLDF provides legal knowledge and support to scientists who would otherwise lack the means to protect themselves against the tactics of well-funded ideologically motivated groups opposed to various scientific endeavors.

The National Academy of Sciences ("NAS") is a private nonprofit membership corporation created by an Act of Congress in 1863 to elevate American science, to recognize distinguished advances in research, and to advise the government on any matter for which science, engineering and medicine can improve the public good. *See* 36 U.S.C. § 150303. The NAS is not an agency of the federal government nor does

it receive a Congressional appropriation. As the preeminent American scientific society, the NAS has approximately 2,500 members, all of whom have been elected for their distinguished achievements in scientific research. The NAS fulfills its mission of advising the U.S. Government through hundreds of projects supported by federal agencies. It also carries out projects for state governments, foundations, and private entities. Every year more than 7,000 NAS members and other experts work on these projects as volunteers and without compensation. Many are faculty members and researchers in state institutions throughout the nation. Because of its mission, the NAS has a strong interest in supporting the academic freedom and the protection of scientists' preliminary analyses and deliberations that are necessary to pursue scientific research, advance new knowledge, and improve the human condition.

Union of Concerned Scientists ("UCS") was founded in 1969 and is supported by an alliance of 500,000 citizens and scientists dedicated to using science to foster a healthy environment and safe world. UCS combines independent scientific research and citizen action to develop innovative and practical solutions to pressing environmental and

security problems like climate change. UCS believes that a crucial ingredient in achieving these goals is maintaining research opportunities that foster an environment of independent and rigorous scientific inquiry free from outside interference.

Dr. Malcolm Hughes and Dr. Jonathan Overpeck are climate scientists at the University of Arizona. Their documents are the subject of the public-records demands at issue in this case, and they anticipate being the target of more such demands in the future should this Court rule in favor of E&E Legal.

Pfizer Inc. ("Pfizer") is a research-based, global biopharmaceutical company that engages in scientific research to discover, develop, and manufacture healthcare products, including medicines and vaccines. During the course of researching and testing new biomedical products, Pfizer often partners with universities, which often have invaluable access to data and expertise. In just the past decade, Pfizer has collaborated over a dozen times with Arizona public universities.

Amici have an interest in ensuring that this Court interprets Arizona's public records law consistently with the public's interest in encouraging scientific research and resulting advances in scientific

knowledge and in protecting scientists from invasive public records requests like the one in this case. Pfizer has an additional interest in ensuring that its communications, drafts, and information regarding in-development pharmaceutical products with scientists at public Arizona universities with whom they collaborated—which contain valuable intellectual property and work that is the result of substantial investment by Pfizer—remain confidential as expected when Pfizer chose to collaborate with Arizona universities. A decision in favor of the Energy & Environment Legal Institute ("E&E Legal") could encourage additional such requests in Arizona and elsewhere that will inevitably harm scientific progress and could dissuade Pfizer and other private entities from investing in future research partnerships with Arizona public universities. Furthermore, CSLDF believes that the Court can benefit from its perspective in light of its extensive experience with this kind of request, and involving this particular area of research.

INTRODUCTION

E&E Legal's overbroad and intrusive public records demands in this case are part of a larger and concerning trend by ideologically-, financially-, or politically-motivated individuals and organizations seeking to silence science that they do not like. Indeed, CSLDF has been involved in helping other climate scientists defend against E&E Legal's requests over the past several years in various venues.

In those cases, as in this one, E&E Legal sought documents—including years' worth of email communications among scientists and other prepublication analyses and drafts—that have traditionally been treated as confidential, and for good reason. Confidentiality of scientists' email communications and prepublication drafts is necessary to ensure the uninhibited and creative collaboration among scientists that is at the heart of the scientific endeavor; to protect scientists from undue burdens; and to encourage scientists to enter into controversial yet important fields. While E&E Legal claims that these important interests must give way in the name of transparency, the reality is that the burdensome and invasive disclosure of scientists' communications

and preliminary analyses and drafts do not further transparency in any meaningful way.

The Arizona Legislature recognized the necessity of maintaining the confidentiality of scientists' communications and prepublication drafts and, as explained in Appellants' briefs, specifically exempted these types of scientific records from disclosure. Even absent the statutory exemption, however, the common law has long recognized that where the interests of privacy, confidentiality, or the best interest of the state outweigh the general policy of open access—as is compellingly shown by the evidence in this record (see pp. 15-36, *infra*)—disclosure is not required. Accordingly, this Court should reverse the trial court's decision and make clear that scientists' traditionally confidential communications with one another and their preliminary drafts are protected from disclosure.

ARGUMENT

I. E&E'S LEGAL'S OVERREACHING PUBLIC RECORDS REQUESTS

Transparency is integral to good science. There is a generally recognized standard of transparency when the results of a scientific study are published: the study results, methodologies, and underlying

data should be shared, and funding sources should be disclosed, but communications (including peer review commentary), drafts, and other preliminary materials are considered confidential.[1] Satisfaction of that standard permits others to test findings for validity by determining whether the findings can be replicated, and it exposes potential conflicts of interest so that other evaluators can consider whether bias may have influenced the research.[2]

But the demands made by E&E Legal under Arizona's open records law go far beyond what is needed for adequate assessment of the scientific validity and independence of published studies. The data and research methods underlying Professor Hughes's and Dr. Overpeck's published studies are already publicly available.[3] What E&E Legal seeks are the kinds of personal documents, correspondence,

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[1] Stephan Lewandowsky & Dorothy Bishop, *Research Integrity: Don't Let Transparency Damage Science*, NATURE, Vol. 529, Issue 7587 (Jan. 25, 2016), available at http://www.nature.com/news/research-integrity-don-t-let-transparency-damage-science-1.19219

[2] *Id.*; Michael Halpern & Michael Mann, Editorial, *Transparency Versus Harassment*, Science, Vol. 348, Issue 6234, at 479 (May 1, 2015); *see also* Decl. of Dr. Donald Kennedy ¶ 3 (July 30, 2014), available at http://science.sciencemag.org/content/348/6234/479.

[3] *See* p. 33 *infra*.

drafts, and discussions whose confidentiality is traditionally recognized by the scientific community as essential to encourage the honest and productive exchange and refinement of ideas leading to new scientific insights and improved experimental designs. E&E Legal sought *all records* (including emails) between Professors Hughes and Overpeck and other scientists—in some instances over a *13-year* period.[4] Additionally, E&E Legal seeks "[a]ll emails" sent to or from Professor Overpeck referencing any of several people or terms, including the term "deadline."[5]

As explained below, E&E Legal's sweeping demands exemplify a broader trend of harassment that threatens the core of the scientific endeavor, and the University of Arizona was well within its right to resist E&E Legal's demands to turn over the communications among scientists of the sort whose confidentiality has always been understood as necessary to ensure good science.

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[4] Explanatory Memorandum Accompanying Documents Filed Under Seal and Notice of Decision in Related Case Ex. 1, *Energy & Environment Legal Institute v. Ariz. Bd. of Regents*, No. C2013-4963 (Ariz. Sup. Ct. May 1, 2014).

[5] *Id.*

II. THERE IS A GROWING TREND IN THE ABUSE OF PUBLIC RECORDS LAWS TO HARASS CLIMATE SCIENTISTS AND OTHER SCIENTISTS

In the past several years, there has been an alarming increase in the use of public records laws by special interest or ideological groups, of the left as well as the right, to harass scientists whose findings—or entire fields of study—they perceive as threatening their financial interests or ideological beliefs.[6] Scientists across a wide range of disciplines have increasingly found themselves the subject of expansive and intrusive requests that seek years' worth of personal documents and correspondence, and other traditionally confidential prepublication materials such as preliminary drafts, handwritten notes, and private

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[6] *See* Michael Halpern, Union of Concerned Scientists, *Freedom to Bully: How Laws Intended To Free Information Are Used To Harass Researchers* 2 (Feb. 2015) [hereinafter CSD Rept.], *available at* http://www.ucsusa.org/sites/default/files/attach/2015/09/freedom-to-bully-ucs-2015-final.pdf ("[I]ndividuals and well-heeled special interests across the political spectrum are increasingly using broad open records requests to attack and harass scientists and other researchers and shut down conversation at public universities."); *see also* Rachel Levinson-Waldman, American Constitution Society, *Freedom and the Public's Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship*, (Sept. 2011), *available at* https://www.acslaw.org/sites/default/files/Levinson_-_ACS_FOIA_First_Amdmt_Issue_Brief.pdf.

critiques from other scientists.[7] Requests even sometimes go so far as to seek the names of human subjects, despite the fact that those subjects have been promised confidentiality.[8]

A small sample of the records demanded from scientists illustrates their breadth and invasiveness:

- *Climate Science*. Recently, numerous climate scientists have found themselves the targets of public records requests and other overbroad inquiries. For example, Dr. Michael Mann, a climate scientist formerly at the University of Virginia, was the target of repeated, duplicative, and burdensome demands for years of his personal emails with other scientists—including by Texas Congressman Joe Barton, then the chair of the House Energy and Commerce Committee[9]; Ken Cuccinelli, then

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[7] *See* CSD Rept., *supra* n.6, at 2, 5; *see also* Levinson-Waldman, *supra* n.6, at 1-8; Michael Halpern & Michael Mann, Editorial, *Transparency Versus Harassment*, SCIENCE, Vol. 348, Issue 6234, at 479 (May 1, 2015), *available at* http://www.sciencemag.org/content/348/6234/479.full.

[8] Steve Wing, *Social Responsibility and Research Ethics in Community-Driven Studies of Industrialized Hog Production*, ENVIRONMENTAL HEALTH PERSPECTIVES 110(5):437–444 (discussing a request made by an industry group for a university to provide "all documentation . . . that contain, represent, record, document, discuss, or otherwise reflect or memorialize the results of the Study" including the identities of participants whose confidentiality the academic conducting the study had assured).

[9] Michael Mann, *The Serengeti Strategy: How Special Interests Try To Intimidate Scientists, And How Best To Fight Back,* BULLETIN OF THE ATOMIC SCIENTISTS, Vol. 71, Issue 1, at 33, 39 (2015), *available at*

Attorney General of Virginia[10]; and E&E Legal (through its predecessor, the American Tradition Institute).[11] Barton's inquiry was heavily criticized by other members of Congress, including fellow Republican Sherwood Boehlert, chair of the House Science Committee;[12] Cuccinelli's and E&E Legal's efforts were ultimately rebuffed by the courts.[13] In siding with Dr. Mann and the University against E&E Legal, the Virginia Supreme Court cited the State's interest in "protect[ing] public universities and colleges from being placed at a competitive disadvantage in relation to private universities and colleges," explaining that this interest "implicates . . . harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression."[14] In addition, the Court noted that, as in this case, "many noted scholars and academic administrators submitted affidavits attesting to the harmful impact disclosure would have" on the scientific endeavor generally.[15]

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http://www.meteo.psu.edu/holocene/public_html/Mann/articles/articles/MannBullAtomSci15.pdf.

[10] Wing, *supra* n.8; CSD Rept, *supra* n.6, at 6.

[11] *Id.*

[12] Juliet Eilperin, *GOP Chairmen Face Off on Global Warming*, WASHINGTON POST, July 18, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/07/17/AR2005071701056.html.

[13] *See Cuccinelli v. Rector & Visitors of Univ. of Va.*, 283 Va. 420 (2012); *Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, 287 Va. 330 (2014).

[14] *Am. Tradition Inst.*, 287 Va. at 342.

[15] *Id.* at 343. The events described above are not a complete chronicle of the tribulations Dr. Mann has had to endure as a result of

- *Biology and Medicine*. Scientists in various fields related to biology who use animal subjects in their research have similarly been on the receiving end of harassment from animal-rights supporters. For instance, activists demanded production of ten years of correspondence of a University of California – Los Angeles (UCLA) professor who used primate subjects.[16] UCLA ultimately found the burden of responding to these and other public records requests so great that it felt compelled to establish a task force "to develop guidelines to protect faculty records while allowing an appropriate level of accountability."[17] In a declaration submitted to the trial court in this case, Professor Carole Goldberg, who co-chaired that task force, summarized the key principles underlying its conclusions, noting that the task force concluded that public records requests are specifically damaging when "used for political purposes or to intimidate faculty working on controversial issues."[18] The University of Wisconsin similarly

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his labors in the field of climate science. In the aftermath of the so-called "Climategate" (*see infra* at pp. 21-22), for instance, Dr. Mann's employer, Pennsylvania State University, received "numerous communications . . . accusing Dr. Mann of having engaged in" misconduct "based on perceptions of the content of the [stolen] emails." Respondents' Opening Mem. at 34 (July 31, 2014). These accusations spurred the University to appoint an Inquiry Committee to consider whether Dr. Mann had "engaged in manipulating data, destroying records and colluding to hamper the progress of scientific discourse around the issue of anthropogenic global warming." *Id.* at 33. Dr. Mann was completely vindicated by the resulting investigation. *See id.* at 33-34.

16 CSD Rept., *supra* n.6, at 12-13.

17 *Id.* at 13.

18 Decl. of Carole Goldberg ¶¶ 3-8 (July 29, 2014) [hereinafter "Goldberg Decl."].

encountered this issue in the context of research using primates.[19] In general, the use of public records requests to seek email and other personal information from researchers who use animal subjects has become so prevalent that the National Association for Biomedical Research, the Federation of American Societies for Experimental Biology, and the Society for Neuroscience have developed a guide to help researchers understand their rights and responsibilities, including advice on how to apply existing exemptions to maximally protect documents from disclosure.[20]

- *Health Sciences*. Beginning in 2012, the Highland Mining Company made a series of public records requests to the University of West Virginia seeking, among other things, draft documents and peer review comments related to the work of Michael Hendryx, who had studied the relationship between a certain kind of mining and adverse health effects.[21] The University refused to provide much of the requested information, and the company took it to court. Ruling in favor of the University, the West Virginia Supreme Court explained

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[19] Noah Phillips, *University of Wisconsin Monkey Research Sparks Opposition*, WISCONSIN CTR. FOR INVESTIGATIVE JOURNALISM, Sep 26, 2014, *available at* http://host.madison.com/ct/news/local/education/university/university-of-wisconsin-monkey-research-sparks-opposition/article_101d3294-4581-11e4-8eda-eb7b71ab5a0a.htm

[20] National Association for Biomedical Research et al., *Responding to FOIA Requests: Facts and Resources*, *available at* http://www.faseb.org/FOIArequest (discussing applicable federal and state open records laws and exemptions, as well as advice to "[a]lways be in full compliance with relevant laws and regulations, but do not provide extraneous information that is not required by law; extraneous information may be taken out of context and used by animal rights activists to target you.").

[21] *Highland Mining Company v. West Virginia University School of Medicine,* 235 W.Va. 370, 376 (2015).

that requiring the "involuntary public disclosure of Professor Hendryx's research documents would expose the decision-making process in such a way as to hinder candid discussion of WVU's faculty and undermine WVU's ability to perform its operation."[22]

- *Environmental Health Science.* In the 1990s, an anonymous party through a prominent law firm targeted Deborah Swackhamer, a scientist researching the unusual concentration of toxaphene in the Great Lakes.[23] The request was for unpublished data, class notes, purchase records, telephone records, and many other items only remotely connected to her research spanning a 13-15 year period, the eventual collection of which "filled a conference room."[24] Ms. Swackhamer described the experience as "intimidating and disruptive," and reported that it took valuable time away from her research.[25]

- *Horticultural Sciences*. In 2015, an activist group named "US Right to Know," an offshoot of the failed California initiative to require labeling for foods containing genetically modified organisms (GMOs), sent public records requests to fourteen scientists at four different universities (University of California - Davis, the University of Nebraska, the University of Illinois, and the University of Florida) seeking years' worth of emails.[26]

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22 *Id.* at 388

23 Maura Lerner, *Researcher Investigating Toxin Becomes Subject of Investigation*. MINNEAPOLIS STAR TRIBUNE, May 17, 1998.

24 CSD Rept., *supra* n.6, at 11.

25 Michael Halpern, Union of Concerned Scientists, *Twenty Years of Open Records Attacks*, (Feb. 13, 2015), http://blog.ucsusa.org/michael-halpern/twenty-years-of-open-records-attacks-629.

26 Alan Levinovitz, *Anti-GMO Activist Seeks to Expose Scientists' Emails with Big Ag*, WIRED MAGAZINE, Feb. 23, 2015, *at* https://www.wired.com/2015/02/anti-gmo-activist-seeks-expose-emails-food-scientists/.

One of those scientists—Dr. Kevin Folta, a plant molecular biologist at the University of Florida—spent months reviewing his communications and producing thousands of pages of emails in response to US Right to Know's requests.[27] Those emails were then cherry-picked and distorted to imply that Dr. Folta's research was secretly being funded by agricultural companies; since then, he has received numerous threats of violence against him and his family.[28]

- *Epidemiology*. Scientists researching the environmental, social, and health impacts of industrial hog production have been the targets of harassing FOIA requests. Interest groups like the North Carolina Pork Council have requested materials associated with pig farming studies, including the identities of study participants assured anonymity.[29] For example, Steve Wing a researcher at the University of North Carolina, has had to engage in negotiations just to keep the names of confidential

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[27] Michael Hiltzik, *GMO Controversy: When Do Demands For Scientists' Records Turn Into Harassment?*, L.A. TIMES, Sept. 30, 2015, *available at* http://www.latimes.com/business/hiltzik/la-fi-mh-a-new-gmo-controversy-20150925-column.html; Jack Payne, *Activists Misuse Open Records Requests To Harass Researchers*, THE CONVERSATION, Aug. 27, 2015, *available at* http://theconversation.com/activists-misuse-open-records-requests-to-harass-researchers-46452; David Kroll, *What the New York Times Missed on Kevin Folta and Monsanto's Cultivation of Academic Scientists*, FORBES, Sept. 10, 2015, *available at* https://www.forbes.com/sites/davidkroll/2015/09/10/what-the-new-york-times-missed-on-kevin-folta-and-monsantos-cultivation-of-academic-scientists/#5d2a44b3619a.

[28] Hiltzik, *supra*; Payne, *supra*; Tanya Perez, *Watchdog Group Sues UCD Over Public-Records Requests*, THE DAVID ENTERPRISE, Aug. 21, 2016, *available at* http://www.davisenterprise.com/local-news/ucd/anti-gmo-group-sues-ucd-over-public-records-requests/.

[29] Wing, *supra* n.8.

study participants redacted.[30] Researchers into the pork industry have cited these kinds of requests as chilling to their research due to fear of similar requests being made of them.[31]

- *Law and Religion*. Abusive public records requests of this sort are not confined to the sciences: in 2014, LGBT student activists targeted University of Virginia law and religion professor Douglas Laycock, who advocated for the defense of laws requiring accommodation of certain religious views, such as religious opposition to same-sex marriage. The LGBT student activists sought all communications between Professor Laycock and various organizations that support religious accommodation laws or oppose same-sex marriage, including two and a half years of cell phone records. The students claimed their FOIA requests were designed to "start a conversation"; one commentator responded that "[y]ou don't start a dialogue with FOIA requests."[32]

This sort of attack is frequently part of a broader strategy of attacking individual scientists or scholars as a way to try to discredit theories or even entire fields of study.[33] Dr. Mann has explained that "[b]y singling out a sole scientist, it is possible for the forces of 'anti-science' to bring many more resources to bear on one individual,

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30 *Id.*

31 CSD Rept., *supra* n.6.

32 Jonathan Adler, "*You Don't Start a Conversation with FOIA Requests*," WASHINGTON POST, May 27, 2014, *available at* https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/27/you-dont-start-a-dialogue-with-foia-requests/?utm_term=.529d702a4200.

33 *See* Michael Mann, *Serengeti Strategy*, *supra* n.9, at 33-45 .

exerting enormous pressure from multiple directions at once, making defense difficult."[34] For this reason, Dr. Mann has labeled this strategy the "Serengeti strategy," comparing such attacks to "a group of lions on the Serengeti seek[ing] out a vulnerable individual zebra at the edge of the herd."[35]

Such tactics are especially effective against university professors, who often cannot entirely control the response to the attack. Public records requests are typically served on the public universities or agencies associated with the scientist. Universities can provide useful support in these situations, as the University of Arizona has done in this case, but their involvement can also involve complications. In spite of the increasing prevalence of this kind of harassment, universities are not always prepared to respond appropriately, and even if they have appropriate policies and procedures in place, they do not always communicate those policies and procedures to scientists.[36]

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[34] *Id.* at 34.

[35] *Id.*

[36] *See* CSD Rept., *supra* n.6, at 15-16.

Furthermore, the interests of scientists and their associated universities (or other public entities) are not always aligned.[37] In Dr. Mann's case, for example, the University of Virginia at first agreed to give the requesting party—E&E Legal's predecessor, the American Tradition Institute ("ATI")—special access to the requested materials under a protective order.[38] Dr. Mann had to intervene "to protect privacy interests he d[id] not think w[ould] be adequately protected by the other parties," including the University.[39] In another case, a university administrator at the University of North Carolina told a professor that he could face criminal charges if he did not turn over documents as directed by the University's attorney in response to an

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[37] *Id.* at 17.

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

[39] Sue Sturgis, Inst. for Southern Studies, *SPECIAL INVESTIGATION: Who's behind the 'information attacks' on climate scientists?*, (Oct. 31, 2011), *available at* http://www.southernstudies.org/2011/10/special-investigation-whos-behind-the-information-attacks-on-climate-scientists.html.

invasive document request.[40] The professor had to hire his own attorney to negotiate with the University's attorney; those efforts ultimately succeeded in limiting the scope of the University's voluntary production.[41]

III. ABUSIVE AND INVASIVE USE OF PUBLIC RECORDS LAWS IMPAIRS SCIENTIFIC RESEARCH AND RESULTING ADVANCES IN SCIENTIFIC KNOWLEDGE

As the examples above demonstrate, abuse of open records laws is not the exclusive domain of liberals or conservatives; these tactics are used by "activists across the political spectrum."[42] Whether this sort of harassment should be countenanced is not about any particular political or special-interest groups; instead, it is a fundamental question about whether anyone can use (or, rather, misuse) public records laws to stifle science. If successful, overly broad and intrusive public records demands for the emails and traditionally confidential prepublication materials of scientists enable economically or ideologically motivated groups to impair science in several ways: (1) they stifle collaboration,

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40 Wing, *supra* n.8.

41 *Id.*

42 Halpern & Mann, *Transparency Versus Harassment*, *supra* n.2.

especially between public university scientists and outside researchers (including research undertaken with and for pharmaceutical and other industry groups); (2) they divert time, energy, and resources away from science by virtue of the need to comply with the often-exorbitant, time-intensive demands of review and litigation; (3) they discourage scientists from working in controversial fields; and (4) they seriously disadvantage public universities and government agencies in recruiting efforts because of the burdens created by the risk of promiscuous disclosures to which scientists would not be subject if at private universities.[43]

A. Requiring Scientists To Disclose Their Email Communications And Prepublication Analyses And Data Will Stifle Essential Collaboration Among Scientists.

First, intrusive public records requests chill the collaborative, iterative, and deliberative process that is critical to the scientific

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[43] Appellants and their other amicus have accurately outlined the serious repercussions of this sort of abusive request on public universities. *See, e.g.*, Appellants' Opening Br. (Apr. 28, 2017) at 25-26, 35-38; Appellants' Reply Br. (June 26, 2017) at 21-24; Brief of Amicus Curiae Am. Assoc. of Univ. Professors in Support of Respondents/Appellees ("AAUP Amicus Br.") at 22-31. Accordingly, our brief focuses on the harms to science and scientists.

endeavor. The very "essence of the scientific process is rigorous deliberation *in which scientists examine, question, test, reject, and modify ideas as they work toward a verifiable conclusion*."[44] This is especially true of science in the modern world: The problems facing the world today—such as climate change, water and food shortages, species extinction, the increasing threat of antibiotic-resistant pathogens, and other human health issues such as cancer—are complex, cut across disciplines, and require the cooperation of many individuals from different specialties to find solutions.[45]

As numerous scientists and academics explained in declarations submitted to the trial court, the threat of having one's emails open to scrutiny by hostile groups discourages that essential frank and creative exchange for several reasons.[46] Scientists who work in controversial

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[44] Decl. of Dr. Susan K. Avery ¶ 9 (July 29, 2014) ("Avery Decl.") (emphasis added); *see also* Decl. of Kimberly Andrews Espy ¶ 17 (July 29, 2014) ("Espy Decl."); Decl. of Dr. Joshua LaBaer ¶ 11 (July 18, 2014) ("LaBaer Decl.").

[45] Decl. of Dr. Vicki L. Chandler ¶ 6 (July 27, 2014) ("Chandler Decl.); Espy ¶ 11; LaBaer Decl. ¶ 20; Decl. of Dr. Eugene Levy ¶ 12 (July 28, 2014) ("Levy Decl.").

[46] Decl. of Dr. Bruce Michael Alberts ¶ 12 (July 29, 2014) ("Alberts Decl.") (threat of requiring scientists to make all emails public "would

fields have often been the target of death threats, false and defamatory accusations, and other harassment[47]—going back even before Galileo,

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have a chilling effect on the practice of science in the United States"); Decl. of Molly Corbett Broad ¶ 5 (July 10, 2014) ("Any trepidation that the uninhibited and free exchange of ideas will be subject to intrusion at the behest of government would tend to dampen scholars' willingness to participate in the [dialectical] process, and to try out novel, controversial or non-mainstream theories and hypotheses."); Chandler Decl. ¶ 8 ("Absent confidentiality the creative process necessary for scientific advances[] will be stifled, with significant negative consequences on research collaborations within public institutions and with scientists at other institutions or in private industry."); Espy Decl. ¶ 17 ("[C]oncerns about accessibility of email under FOIA-type regimes 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 and that is expected of us."); Dr. Donald Kennedy Decl. ¶ 7 (July 30, 2014) ("Kennedy Decl.") ("Th[e] presumption or expectation of confidentiality is essential to ensuring that the creative processes of science can function as openly as possible.").

[47] *See, e.g.,* Daniel Cressey, *Animal Research: Battle Scars,* NATURE 470: 452 (Feb. 24, 2011), *available at* http://www.nature.com/news/2011/110223/pdf/470452a.pdf; Erik M. Conway & Naomi Oreskes, *The Relentless Attack on Climate Scientist Ben Santer*, MOYERS & COMPANY, May 16, 2014, *available at* http://billmoyers.com/2014/05/16/the-relentless-attack-of-climate-scientist-ben-santer/; Frederick Seitz, *A Major Deception on 'Global Warming'*, WALL STREET J., June 12, 1996, at A16, *available at* http://stephenschneider.stanford.edu/Publications/PDF_Papers/WSJ_June12.pdf; S. Fred Singer, *Letter to the Editor: Coverup in the Greenhouse?*, WALL STREET J., July 11, 1996, at A15, *available at* http://stephenschneider.stanford.edu/Publications/PDF_Papers/WSJ_July11_96.pdf; Hughes Decl. ¶ 37.

who was tried and convicted for publishing his evidence that the Earth revolves around the sun.[48] As Dr. Donald Kennedy, a biologist and former Editor-in-Chief of *Science* magazine observed, "most practicing researchers . . . have seen too many cases in which [those with] political or commercial motives have mounted successful efforts to harass their colleagues and damage their reputations."[49] Other scientists may reasonably fear that they will become the target of such harassment if they collaborate with public-institution scientists working in controversial fields. A California court found as much in *Stop Animal Exploitation Now v. University of California Regents*, Case No. BC402237 (Cal. Sup. Ct. July 16, 2010).[50] In that case, an animal rights group sought to use California open records laws to request research protocols, animal care logs, and details about non-human primate research subjects at UCLA. *Id.* at 2. UCLA declined to produce documents pursuant to the request, citing likely resultant

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48 *See* Olivia Solon, *Galileo to Turing: The Historical Persecution of Scientists*, WIRED, June 22, 2012, *available at* https://www.wired.com/2012/06/famous-persecuted-scientists/.

49 Kennedy Decl. ¶ 10.

50 *Available at* http://newsroom.ucla.edu/releases/judge-affirms-campus-position-207666.

harms to the researchers. In the ensuing litigation, the trial judge upheld UCLA's decision to withhold, finding that there was "substantial evidence", based on previous experiences by researchers at UCLA, that when such information was released under open records laws, it had led to attacks on individual researchers and that, consequently, it "deter[red] some faculty from using animals in their research or publicizing the results of such research." *Id.* at 3.

Additionally, scientists will fear that their research and reputations may be attacked based on criticisms that misconstrue their preliminary and incomplete ideas and thoughts expressed in email communications.[51] As Dr. Joshua LaBaer, a chemist, explained, "[s]tatements made in . . . email exchanges [between scientists] often reflect partial thoughts, incorrect interpretations of the data, or interpretations of incomplete data" that are later discarded or clarified and refined in other communications.[52] Opening up email communications between scientists to public scrutiny creates the risk that people will—innocently or willfully—misinterpret and

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[51] Espy Decl. ¶ 12; LaBaer Decl. ¶ 15; Avery Decl. ¶ 10.

[52] LaBaer Decl. ¶ 15.

misrepresent the partial picture of those interactions from emails by seizing on ideas that are later discarded or clarified.[53] "Th[e] potential to have their research and reputations attacked with frivolous assertions based upon misinterpreted information would likely deter researchers from engaging in certain forms of communications that are the most efficient, and in some instances could virtually paralyze collaborative process."[54]

Indeed, this very scenario occurred to several climate scientists whose communications were stored at the Climate Research Unit at the University of East Anglia. In 2009, a hacker stole thousands of emails from the University of East Anglia's Climate Research Unit. [55] Opponents of climate science then lifted snippets of the emails out of their context, assembled them in a highly misleading fashion, and aggressively touted them as "proof" that climate scientists had manipulated data to achieve desired results and otherwise acted

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53 Chandler Decl. ¶ 14.

54 Avery Decl. ¶ 10.

55 Editorial, *Closing the Climategate*, NATURE, Vol. 468, Issue 7322, at 345 (Nov. 18, 2010), *available at* https://www.nature.com/nature/journal/v468/n7322/full/468345a.html.

unethically. [56] Repeated investigations—including investigations conducted by the National Oceanic and Atmospheric Administration Inspector General, the National Science Foundation Inspector General, and the Environmental Protection Agency—completely debunked these claims.[57] Yet opponents of climate science, including E&E Legal in one of its briefs in this case, continue to cite this "scandal" to justify further fishing expeditions into the confidential records of climate scientists and smearing of their reputations.[58]

Even absent the risk of misinterpretation, or other efforts to discredit or attack, disclosure of emails will dissuade scientists from collaborating with each other because it may jeopardize their ability to be published or obtain patents or to otherwise derive the benefit from

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[56] *See id.*; Phil Platt, *The Global Warming Emails Non-Event*, DISCOVER, Nov. 30, 2009, http://blogs.discovermagazine.com/badastronomy/2009/11/30/the-global-warming-emails-non-event/.

[57] *See Closing the Climategate*, *supra* n.55; *Debunking Misinformation About Stolen Climate Emails in the "Climategate" Manufactured Controversy*, UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/global_warming/solutions/fight-misinformation/debunking-misinformation-stolen-emails-climategate.html.

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

their investment in research. Journals often will not publish work that has already been made public; similarly, patents are not available for information that has already been made available to the public.[59] Thus, scientists will be less willing to develop ideas and concepts for future research and share them with other scientists as part of the collaborative process for fear that they will be subject to disclosure under public records laws prior to publication.[60] Failure to collaborate will stifle scientific progress as both development of ideas and peer-critique will be curbed.

This harm is compounded by the fact that even once scientists have chosen to publish certain conclusions of their research, this does not mean that the research has been "completed" and that all underlying documents are ready for disclosure. As the Oregon Attorney General's office has recognized, if broad disclosure occurs after any form of publication, faculty will delay publishing their research results:

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[59] Chandler Decl. ¶¶ 9-10; LaBaer Decl. ¶¶ 14-15, 18.

[60] LaBaer Decl. ¶ 15; Avery Decl. ¶ 10; Decl. of Dr. Malcolm Hughes ¶ 28 (July 28, 2014) ("Hughes Decl.").

> If disclosure of faculty research writings were required after publication of an incomplete, preliminary review of those findings, faculty members of public institutions would refrain from publishing any of their findings until they were absolutely certain that they had gleaned all data that had any possible scientific value from their materials. The substantial delay in the publication of the findings of faculty would result in the inability of faculty of public institutions to gain the recognition that enables faculty members to be the recipients of research grants in the first place . . . . [I]t would also prevent the public institutions from maintaining a reputation of being on the forefront of innovative research.[61]

For all of these reasons, permitting disclosure of traditionally confidential emails among scientists would have a chilling effect on science—and on investments by private companies like pharmaceutical companies in collaborations with scientists at public universities. This is not just speculation. As Appellants and amicus AAUP have established, there is ample evidence that this concern has caused academics to censor themselves and their research and limit their communications with other scientists.[62] The Regents have every reason to be concerned about this state of affairs and to treat it as a compelling

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[61] Ore. Att'y Gen. Op. at 3 (June 19, 1995), *available at* http://www.doj.state.or.us/public_records/orders/speede_61995.pdf

[62] Appellants' Opening Br. at 27-28, 34-38; AAUP Amicus Br. at 24-26.

basis for withholding the documents at issue, and the trial court clearly erred in its offhand rejection of this grave concern.

B. Requiring Scientists To Review And Classify Years Of Emails and Other Records Imposes An Undue Burden On Them.

Allowing individuals and organizations to conduct unrestrained fishing expeditions into scientists' emails and records also imposes an enormous burden on scientists at the expense of their scientific work. A tremendous volume of documents is generated during the course of a study, and those documents are often intermingled with communications of a personal nature or about other projects in which those scientists have been engaged.[63]

In a declaration submitted to the trial court, Dr. Hughes explained that "[r]esponding to the E&E public records request was and continues to be a very burdensome and dispiriting task that diverted [his] energies and attention from productive work to a notable degree."[64] He added that "reviewing [his] emails for information responsive to Petitioner's broad demands took at least ten weeks" and "deprive[d]

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63 *See* Avery Decl. ¶ 7

64 Hughes Decl. ¶ 17.

[him] of one of a small handful of summers remaining in [his] career," a difficult professional burden given that "[f]or an active science professor, summer is . . . a time for intensive scientific activity."[65] As a result of the time needed to review and respond to E&E Legal's demands, Dr. Hughes was unable to complete an analysis of results from a NASA project, and was also unable to prepare a grant request for a project on the relationship between climate and the sustained drought being experienced in California.[66]

Dr. Overpeck similarly stated that "[p]reparing the response to E&E's public records request in this case was . . . a significant burden."[67] He had to review over 90,000 pages of potentially responsive emails, a task that took "all afternoon and into the evening" every day for a period of approximately six weeks.[68]

Moreover, this burden is often multiplied by seriatim requests by multiple individuals and organizations. For example, E&E Legal's

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65 *Id.* ¶ 17.

66 Hughes Decl. ¶ 18.

67 Declaration of Dr. Jonathan Overpeck ¶ 12 (July 28, 2014) ("Overpeck Decl.").

68 *Id.* ¶ 13.

demands on Dr. Hughes and Dr. Overpeck came after an overlapping request by another group. Similarly, E&E Legal's excessive and overbroad demands of Dr. Mann's documents came after he had already spent significant time and resources fighting against other improper attempts to obtain his confidential communications. *See* pp. 6-7 *supra*. And E&E Legal recognized in its brief to this court that "[i]n 2015, alone, the University of Illinois received 517 information requests, nearly a third seeking research information or email, text message and regular correspondence."[69]

C. Subjecting Scientists To These Harassments And Burdens Will Dissuade People From Entering Controversial Fields And Science More Generally.

Given the potential for being attacked and the burden of responding to and defending against such attacks, the unfortunate tendency of an affirmance of the decision below would be to dissuade scientists from tackling controversial issues[70]—or even going into science altogether. For example, Dr. Bruce Michael Alberts—biologist, former Editor-in-Chief of *Science* magazine (which is owned by amicus

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69 Br. of Appellees at 56.

70 Goldberg Decl. ¶ 7.

AAAS), and former president of the National Academy of Sciences and American Society for Cell Biology—stated in a declaration submitted to the trial court "Were I as a young man required to keep every paper data tape from the scintillation counter measuring the incorporation of radioactive nucleotides into DNA (tens of thousands of biochemical reactions), because that data might need to be turned over routinely in response to 'public records' or FOIA-type requests, I might have quit science instead."[71]

IV. INTERFERING WITH CLIMATE SCIENCE IN THESE WAYS IS PRECISELY WHAT E&E LEGAL SEEKS TO DO HERE.

E&E Legal's opening brief in the trial court claimed that it is "engaged in a transparency project . . . related to the important public policy issue of alleged catastrophic man-made global warming."[72] But the reality, as others have recognized, is that E&E Legal is not engaged in any sort of "transparency" project; in fact, the demands in this case are part of E&E Legal's strategy of "filing nuisance lawsuits to disrupt

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[71] Alberts Decl. ¶ 13; *see also* Hughes Decl. ¶ 36 ("[W]ere I a young scientist now, with a family to support, I would certainly consider a different line of work or another institution, in light of the ongoing harrying of climate scientists exemplified by the present action.").

[72] E&E Legal Trial Ct. Br. at 4.

important academic research"[73] because it "wants the public to believe human-caused global warming is a scientific fraud."[74]

In furtherance of its goal of fighting climate science, E&E Legal regularly "abuse[s] open records laws to harass climate scientists across the United States."[75] Indeed, subjecting scientists to public records demands is a central part of E&E Legal's mission: It proclaims that one of the two building blocks of its "cornerstone" work is making public records demands.[76]

That E&E Legal's goal is to harass and silence climate scientists—and not a legitimate desire to ensure the validity and integrity of scientific research—is evident from E&E Legal's history of serving

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

[74] Sturgis, *supra* note 39.

[75] Michael Halpern, *Digging Into Big Coal's Climate Connections*, The Guardian, Aug. 28, 2015, https://www.theguardian.com/science/political-science/2015/aug/28/digging-into-big-coals-climate-connections.

[76] Energy & Environment Legal Institute, Who We Are, https://eelegal.org/who-we-are/; *see also* pp._-_ *supra* (describing some of E&E Legal's other public records attacks on climate scientists).

invasive and overbroad requests on climate scientists, often involving years' worth of communications. *See* p. 7 *supra*. Notably, E&E Legal has never sought the emails and documents of the few but vocal academics who dispute human-caused global warming.[77]

E&E's goals are even clearer in this case, where E&E Legal is seeking *over a decade's worth* of emails and other documents and where disclosure of the demanded materials will not further any legitimate "transparency" purpose. In fact, the scientific consensus has been clear for years: global warming is real, and it is caused in major part by human activity. In 2014, more than 800 scientists from over 85 countries contributed to a report by the Intergovernmental Panel on Climate Change (PCC),[78] which concluded that "[w]arming of the climate system is unequivocal" and "[h]uman influence on the climate system is clear"—"anthropogenic greenhouse gas emissions . . . , together with . . . other anthropogenic drivers, have been detected throughout the climate system and are *extremely likely* to have been the

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[77] Energy & Environment Legal Institute, Transparency, https://eelegal.org/transparency-cases-4/ (listing public records requests)

[78] Intergovernmental Panel on Climate Change, Activities: Fifth Assessment Report, http://www.ipcc.ch/activities/activities.shtml.

dominant cause of the observed warming since the mid-20th century."[79] And nearly 200 scientific organizations worldwide—including every major scientific organization in the United States with relevant expertise—have likewise concluded that humans are contributing to climate change.[80] Indeed, there are *no* scientifically credible dissenting views. Studies have found that 90-100% of published climate scientists agree that humans are causing recent global warming.[81]

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[79] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT 4, 40 (2014) [hereinafter 2014 IPCC POLICY SUMMARY], *available at* http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf; *see also id.* at 47-49.

[80] *See* California Governor's Office of Planning & Research, List of Worldwide Scientific Organizations, https://www.opr.ca.gov/s_listoforganizations.php (list of 198 scientific organizations that hold position that climate change has been caused by human action); *see also* Statement of 18 Scientific Organizations (Oct. 21, 2009), *available at* https://www.aaas.org/sites/default/files/migrate/uploads/1021climate_letter1.pdf; A Declaration on Climate Change and Health (statement of 17 public health, disease advocacy, and medical organizations), *available at* http://www.lung.org/our-initiatives/healthy-air/outdoor/climate-change/declaration-on-climate-change.html?; American Medical Association, REPORT 3 OF THE COUNCIL ON SCIENCE AND PUBLIC HEALTH (I-08), available at https://www.ama-assn.org/sites/default/files/media-browser/public/about-ama/councils/Council%20Reports/council-on-science-public-health/i08-csaph-climate-change-health.pdf.

[81] John Cook et al., *Consensus on Consensus: A Synthesis of Consensus Estimates on Human-Caused Global Warming*, ENVIRON.

In the trial court, E&E Legal attempted to manufacture a need for transparency by claiming that the emails stolen from the University of East Anglia—which E&E Legal and other climate change opponents inappropriately continue to call "Climategate"—demonstrated "apparent unethical behavior of faculty" and suggested that this behavior is widespread among climate scientists.[82] E&E Legal claimed that this behavior was "likely to be further documented in the records sought."[83] But as explained above (p. 21-22 *supra*), the allegations of fraud and misconduct are based on misinterpretations of misleading, cherry-picked statements and have been thoroughly investigated and

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RES. LETTERS, April 13, 2016, at 1, 6, *available at* http://iopscience.iop.org/article/10.1088/1748-9326/11/4/048002/pdf; *see also* John Cook et al., *Quantifying the Consensus on Anthropogenic Global Warming in the Scientific Literature*, ENVIRONMENTAL RESEARCH LETTERS, May 15, 2013, *available at* http://iopscience.iop.org/article/10.1088/1748-9326/8/2/024024; Peter T. Doran & Maggie Kendall Zimmerman, *Examining the Scientific Consensus on Climate Change*, EOS TRANS AMERICAN GEOPHYSICAL UNION 90(3) 22 (Jan. 2009); William R.L. Anderegg et al., *Expert Credibility in Climate Change*, 107 PROC. NAT'L ACAD. SCI. 12107, 12107-12109 (2010) (97-98% of actively publishing climate researchers support IPCC conclusion that most of Earth's recent warming is due to human activity), *available at* http://www.pnas.org/content/107/27/12107.full.

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

83 *Id.* at 13.

repudiated by numerous independent bodies. Those events thus do not provide any basis for demanding massive amount of traditionally confidential communications among climate scientists; rather, they demonstrate that E&E Legal's purpose in demanding the documents and filing this litigation is to perpetuate the myth that wrongdoing occurred.

E&E Legal also claims that the information is needed because citizens do not trust the peer review process to ensure academic honesty.[84] But, Dr. Hughes and Dr. Overpeck have made all of their data and their research methods publicly available for free.[85] Access to their data and methodologies is sufficient to verify (or discredit) their results and conclusions; thus, there is no need for access to masses of their emails. Indeed, others have been able to repeat Dr. Hughes's and Dr. Overpeck's work successfully or to build on it based on that readily accessible data.[86]

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84 Br. of Appellees at 56-59.

85 Hughes Decl. ¶¶ 13-16.

86 Hughes Decl. ¶ 16.

Finally, E&E Legal's conduct with respect to the emails it has obtained belie its claim that it is acting in the public interest. For example, E&E Legal Senior Fellow Chris Horner turned over emails between Dr. Overpeck and a friend who was then at Exxon Mobil to bloggers who then attacked Dr. Overpeck simply for communicating with his friend.[87] As Dr. Overpeck concluded, "it would seem the real reason for E&E's request [wa]s to seek [his] email records merely in hopes of misstating, misquoting, taking [his] statements or those of others out of context, or otherwise twisting their meaning to attempt to burden, embarrass, or harass climate researchers such as [him]self."[88]

V. EFFECTIVE RELIEF IS REQUIRED

A. Serious Societal Harms Will Result Absent Effective Protection Of Scientists Against Abusive Public Records Demands.

It is clear that effective relief is needed to protect scientists at public institutions against invasive public records demands like the ones made by E&E Legal in this case. Permitting E&E Legal and others to abuse Arizona's public records law for the purpose of

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87 Overpeck Decl. ¶ 14.

88 *Id.*

subverting the scientific endeavor will, as explained, have a concrete, harmful effect on society: Important medical, pharmacological, technical, and other scientific advances that improve lives hinge on quality scientific research and collaboration.[89] Indeed, concerns about the very demands at issue in this case—and the impact they and similar requests may have on business and research—recently led Rhode Island to adopt legislation protecting scientists and academic researchers from being required to disclose drafts, notes, and other work product.[90] This means that, as Appellants have pointed out, there are now at least *41 other states* with recognized open records protections for scientific research and academic records.[91]

As explained below, Arizona's legislature has already enacted similar protections for the records and emails of scientists and other

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[89] LaBaer Decl. ¶ 7; Levy Decl. ¶¶ 22, 24; *see also* Broad Decl. ¶ 6 (intrusion into academics' exchange of ideas "would have a harmful effect on society, by impeding the process that gives rise to scholarly insight and valuable innovation")).

[90] Kendra Gravelle, *Legislation To Protect Scientists Signed By Raimondo*, The Narragansett Times, Jul. 2, 2017, http://www.ricentral.com/narragansett_times/legislation-to-protect-scientists-signed-by-raimondo/article_76ed8dd4-5db1-11e7-8576-735f106dec15.html.

[91] Appellants' Reply Br. (June 26, 2017) at 22-23.

researchers at Arizona State University and the University of Arizona; and even apart from those statutory protections, Arizona's common law protects them. As demonstrated above, it is imperative that this Court give effect to those protections.

B. This Court Should Make Clear That Scientists' Pre-Publication Work and Communications Are Presumptively Exempt From Disclosure.

Effective relief requires more than simply reversing the trial court's ruling that the specific emails at issue in this case are not subject to disclosure, while leaving open the need in case after case for document-by-document review of scientists' work papers and confidential pre-publication communications with other scientists. The repetition in case after case of such expensive and burdensome procedures allows entities like E&E Legal to accomplish a large part of their objectives in bringing abusive public records litigation—"while [E&E Legal] lose[s] repeatedly, in one way they are successful: they confuse the public debate, and force universities and scientists to spend hundreds of thousands of dollars defending themselves[,] . . . tak[ing] time away from research and dissuad[ing] scientists from public

engagement."[92] Thus, even though E&E Legal lost its battle to obtain Dr. Mann's records in Virginia, it has continued to file similar public records requests in, at least, Alabama, Delaware, Illinois, Texas, and Washington, D.C., in addition to the instant Arizona public records litigation.[93]

Accordingly, Amici urge the Court to make clear that prepublication drafts, editorial comments, peer reviews, email (between and among researchers, co-authors, reviewers and other collaborators), unfinished or inactive research, and unused data, are protected from disclosure requirements under the Arizona Public Records Law—even when they relate to published studies. As Appellants have explained, such documents fall within the statutory exemptions of A.R.S. § 15-1640(A)(1)(b) and (d). And wholly apart from the availability of any statutory exemptions, they fall within Arizona's established common law exemption to open disclosure because "the interests of privacy,

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92 Halpern, *Digging*, *supra* n.75.

93 *See* CSD Rept., *supra* n.6, at 6; CSD Rept., *supra* n.6, at 6; E&E Legal v. Nasa/Hansen, ENERGY & ENV'T LEGAL INST., http://eelegal.org/?page_id=2220.

confidentiality, or the best interests of the state in carrying out its legitimate activities outweigh the general policy of open access."[94]

Of course, in a small number of circumstances, withholding of such records may not be in the best interests of the state—for example, information regarding potential conflicts of interest, such as funding sources, and where there are extreme circumstances, such as a prima facie showing of crime or fraud. But the default presumption must be that such documents are protected. And here, there is no reason to depart from the default rule. As explained above, there is no legitimate purpose served by disclosure of the communications and prepublication analyses of Drs. Hughes and Overpeck.

CONCLUSION

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

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[94] Appellant's Br. at 13, 21-24, 29-41; *see also* *Carlson v. Pima Cnty.*, 141 Ariz. 487, 491 (1984).

Respectfully submitted,

/s/ Andrew L. Frey
Andrew L. Frey
Karen W. Lin
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500
afrey@mayerbrown.com
klin@mayerbrown.com
(*pro hac vice* admissions pending)

/s/ Shane M. Ham
Shane M. Ham
Osborn Maledon, P.A.
2929 North Central Avenue
21st Floor
Phoenix, AZ 85012
(602) 640-9380
sham@omlaw.com

Counsel for the American Association for the Advancement of Science, American Meteorological Society, Climate Science Legal Defense Fund, National Academy of Sciences, Union of Concerned Scientists

Timothy J. Berg
Theresa Dwyer
FENNEMORE CRAIG
2394 East Camelback Road, Suite 600
Phoenix, AZ 85016-3429
tberg@fclaw.com
tdwyer@fclaw.com
(602) 916-5421

Counsel for Dr. Malcolm Hughes and Dr. Jonathan Overpeck

John P. Kaites, Of Counsel
Kristen M. Lee
FENNEMORE CRAIG
2394 East Camelback Road, Suite 600
Phoenix, AZ 85016-3429
(602) 916-5498
jkaites@fclaw.com
klee@fclaw.com

Counsel for Pfizer, Inc.

CERTIFICATE OF COMPLIANCE

This certificate of compliance concerns an amicus curiae brief, and is submitted under Rule 16(b)(4) of the Arizona Rules of Civil Appellate Procedure. The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 8,314 words. The brief to which this Certificate is attached does not exceed the applicable word limit.

Dated: July 17, 2017

/s/ Andrew L. Frey
Andrew L. Frey
Karen W. Lin
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500
afrey@mayerbrown.com
klin@mayerbrown.com
(*pro hac vice* admissions pending)

/s/ Shane M. Ham
Shane M. Ham
Osborn Maledon, P.A.
2929 North Central Avenue
21st Floor
Phoenix, AZ 85012
(602) 640-9380
sham@omlaw.com

Counsel for the American Association for the Advancement of Science, American Meteorological Society, Climate Science Legal Defense Fund, National Academy of Sciences, Union of Concerned Scientists

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2017, the American Association For The Advancement Of Science, American Meteorological Society, Climate Science Legal Defense Fund, National Academy Of Sciences, Union Of Concerned Scientists, Dr. Malcolm Hughes, Dr. Jonathan Overpeck, and Pfizer Inc.'s Brief For *Amici Curiae* In Support Of Appellants and Certificate of Compliance were electronically filed with the Clerk's Office and copies were sent via email to:

David W. Schnare
The Free Market Environmental Law Clinic
722 12th St. N.W., 4th Floor
Washington, D.C. 20005
(571) 243-7975
Schnare@FMELawClinic.org

Jonathan Riches
Scharf-Norton Center for Constitutional Litigation
At the Goldwater Institute
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000, Ext. 269
litigation@goldwaterinstitute.org

Attorneys for Energy & Environmental Legal Institute
Petitioner/Appellants

D. Michael Mandig
Corey B. Larson
Waterfall Economidis Caldwell Hanshaw & Villamana, P.C.
5210 E. Williams Circle, Suite 900
Tucson, Arizona 85711
mmandig@wechv.com
clarson@wechv.com
Attorneys for Arizona Board of Regents and Teri Moore
Respondents/Appellees

/s/ Rebecca Warinner