IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 102359

KENNETH T. CUCCINELLI, II, ATTORNEY GENERAL OF VIRGINIA,

Appellant/Cross-Appellee,

V.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA,

Appellee/Cross-Appellant.

BRIEF FOR AMICI CURIAE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC., UNION OF CONCERNED SCIENTISTS, AND THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION IN SUPPORT OF AFFIRMANCE

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INTERESTS OF AMICI CURIAE

Amici curiae American Association of University Professors, American Civil Liberties Union of Virginia, Inc., Union of Concerned Scientists, and Thomas Jefferson Center for the Protection of Free Expression respectfully submit this brief in support of affirmance of the circuit court's decision. Pursuant to this Court's Rule 5:30, the written consent of both parties accompanies this amicus brief.[1]

The American Association of University Professors (AAUP) is a non-profit organization of over 48,000 faculty, librarians, graduate students, and academic professionals who serve at institutions of higher education in Virginia and across the country. Founded in 1915, the AAUP is committed to the defense of academic freedom and the free exchange of ideas. The AAUP's policies are widely respected and followed in American colleges and universities and have been cited by the Supreme Court of the United States. *See, e.g.*, *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971); AAUP Policy Documents and Reports, *1940 Statement of Principles on Academic*

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[1] In his letter of consent, counsel for the Attorney General reminds amici that submissions are to be confined to "issues that are actually before the Court." As we explain in footnote 8 below, amici's submission pertains directly to the Attorney General's first and third assignments of error.

Freedom and Tenure (10th ed. 2006) (endorsed by over 200 organizations). The AAUP frequently submits amicus briefs in cases that implicate AAUP policies or otherwise raise legal issues important to higher education or faculty members. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985); *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967); *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc); *Columbia Union Coll. v. Oliver*, 254 F.3d 496 (4th Cir. 2001); *Smith v. Virginia Commw. Univ.*, 84 F.3d 672 (4th Cir. 1996).

The American Civil Liberties Union of Virginia, Inc. (ACLU of Virginia) is the Virginia affiliate of the American Civil Liberties Union; it has approximately 10,000 members in the Commonwealth of Virginia. The ACLU of Virginia's mission is to protect the civil rights of Virginians under federal and state law, including freedom of speech. The ACLU of Virginia appears regularly as counsel and amicus before Commonwealth courts and federal courts in Virginia.

The Union of Concerned Scientists (UCS)—an alliance of more than 300,000 citizens and scientists—is the leading U.S. non-profit organization dedicated to the use of the sciences to foster a healthy environment and a safe world. UCS combines independent scientific research and citizen

action to develop innovative and practical solutions to pressing environmental and security problems and to secure responsible changes in government policy, corporate practices, and consumer choices.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of the freedom of speech and of the press. The Center has pursued that mission in various forms, including the filing of amicus briefs in federal and state courts around the country. A particular focus of the Center's litigation and program efforts is the relationship between the First Amendment and academic freedom. The Center is governed by an independent Board of Trustees and the University of Virginia plays no role in the Center's governance or financing.

STATEMENT OF THE CASE

On April 23, 2010, the Attorney General served two civil investigative demands (CIDs) on the University of Virginia, asserting that they were part of an investigation into "possible violations by Dr. Michael Mann of §§ 8.01-216.3(A)(1), (2), and (3)" of Virginia's Fraud Against Taxpayers Act (FATA). JA14. Dr. Mann is a former University of Virginia professor and one of several credentialed research scientists studying climate change.

The University petitioned to set aside the CIDs, arguing, among other things, that the CIDs were not enforceable because they did not comply with FATA. The University also emphasized that enforcing the CIDs would chill academic inquiry and interfere with academic debate. After full briefing and a hearing, the circuit court set aside the CIDs in their entirety, explaining that the CIDs did not state the nature of any conduct by Dr. Mann constituting an alleged violation of FATA and the Attorney General had not established a reason to believe that the University had material relevant to investigating FATA violations by Dr. Mann. JA872-873.

This Court granted the Attorney General's petition for appeal and the University's petition for cross-appeal. Amici address only issues bearing on the Attorney General's appeal.

STATEMENT OF THE FACTS

A. The CIDs

The CIDs generally aver that the Attorney General's investigation "relates to data and other materials that Dr. Mann presented in seeking awards/grants funded, in whole or in part, by the Commonwealth of Virginia" and to "communications that Dr. Mann created, presented or

made in connection with or related to [five specific] awards/grants." JA14.[2]

The CIDs are broadly framed. Not only do they seek "[a]ny and all documents, things or data that were submitted as part of the award/grant process" and "[a]ny and all documents, drafts, things or data that were generated as a result of any activities conducted pursuant to the Grants" (JA23), they also demand "all computer algorithms, programs, source code or the like created or edited by Dr. Mann . . . from January 1, 1999, to the present" that Dr. Mann used in his "day to day research or to produce any work product or result" (JA24) and all "correspondence, messages or e-mails" between Dr. Mann and 39 named scientists and academics, as well as all documents that "are in any way related to" correspondence with any of these individuals (JA20-23).

The CIDs do not themselves identify any alleged statement by Dr. Mann to the Commonwealth to which the Attorney General's investigation is directed. In his brief to this Court, the Attorney General asserts that "significant questions" exist as to whether Dr. Mann "knowingly and intentionally utilized false or misleading data and other statements to either win government grants initially or to support claims for payment under

[2] The CIDs are identical in all respects except that one is addressed to the "University of Virginia" and the other to the "Rector and Visitors of the University of Virginia." *Compare* JA14-26 *with* JA28-41.

those grants." Opening Br. 35-36. Yet even the Attorney General's brief does not identify with specificity any "statements" of Dr. Mann's that could even arguably have been "false or misleading." Instead, the Attorney General's claim of "significant questions" appears to rest on the following three matters:

1. The Attorney General questions a particular graph that appeared in two papers coauthored by Dr. Mann in 1998 and 1999, prior to his arrival at the University of Virginia. The graph—which showed a slight cooling trend from 1000 AD onward, with temperatures rising in the twentieth century—resembles a "hockey stick." Opening Br. 6. According to the Attorney General, this graph depicts climate change in a manner that was "contrary to what had been previously regarded as the known historical record." *Id.* The Attorney General then notes that other scientists and public reports have criticized Dr. Mann's methodology and conclusions. *Id.* at 7-9.

2. Next, the Attorney General notes that Dr. Mann "historically ha[s] been associated with" certain scientists from the Climate Research Unit (CRU) at the University of East Anglia (UEA) who are involved in the Intergovernmental Panel on Climate Change (IPCC). Opening Br. 8. According to the Attorney General, Dr. Mann "was a recipient" of a

November 16, 1999 e-mail in which Professor Phil Jones of the CRU "wrote of 'Mike[] [Mann's] Nature trick' being used to 'hide the decline.'" Opening Br. 9. The Attorney General then reviews four investigations, none of which concluded that Dr. Mann had made any false statement. First, the Attorney General mentions a report of a committee of the U.K. House of Commons, which "specifically declined to review the scientific validity" of the work of the CRU scientists or Dr. Mann.[3] *Id*. Second, the Attorney

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[3] The House of Commons Committee did explain, however, that Professor Jones's use of the words "trick" and "hide the decline" does not suggest deceit or any wrongdoing:

> Critics of CRU have suggested that Professor Jones's use of the word "trick" is evidence that he was part of a conspiracy to hide evidence that did not fit his view that recent global warming is predominantly caused by human activity. *The balance of evidence patently fails to support this view.* It appears to be a colloquialism for a "neat" method of handling data.

JA194 (emphasis added); *see also* Opening Br. 10 (admitting that Pennsylvania State University agreed that the word "trick" was "easily misunderstood benign scientific jargon"). With respect to the phrase "hide the decline," the House of Commons Committee likewise determined:

> Critics of CRU have suggested that Professor Jones's use of the words "hide the decline" is evidence that he was part of a conspiracy to hide evidence that did not fit his view that recent global warming is predominantly caused by human activity. That he has published papers—including a paper in *Nature*—dealing with this aspect of the science clearly refutes this allegation. *In our view, it was shorthand for the practice of discarding data known to be erroneous.* We expect that this is matter the Scientific Appraisal Panel will address.

JA195 (emphasis added).

General summarizes a UEA panel report that likewise "did not review Mann's work." *Id.*[4] Third, the Attorney General discusses a Pennsylvania State University panel that concluded that Dr. Mann did not engage in any actions that seriously deviated from accepted academic practices. *Id.* at 10. Fourth, the Attorney General discusses a 2010 UEA committee report that concluded that a figure that was generated not by Dr. Mann, but by CRU scientists based on Dr. Mann's work, was "misleading." *Id.*[5]

From these materials, the Attorney General appears to deduce that "at the very least," Dr. Mann "devised a method of splicing data which *could be misleading*, was told that it was being used in a manner *now found* by [a committee from] UEA to be misleading, and said nothing about it." Opening Br. 10-11 (emphasis added). The Attorney General does not suggest, however, how an e-mail from Professor Jones or the UEA

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[4] When Dr. Mann's work has been reviewed, it has been upheld as scientifically valid. *See, e.g.*, National Academies of Science, *Surface Temperature Reconstructions for the Last 2,000 Years* (2006), *available for free download at* http://www.nap.edu/catalog.php?record_id=11676.

[5] The UEA committee report did not find that *Dr. Mann's work* was misleading; rather, the Committee focused on a figure generated by CRU scientists for inclusion in a 1999 World Meteorological Organization Report. JA633. The UEA Committee was quick to note that "[w]e do not find that it is misleading to curtail reconstructions at some point *per se*, or to splice data, but we believe that both of these procedures should have been made plain—ideally in the figure but certainly clearly described in either the caption or the text." *Id*.

committee's 2010 conclusion regarding the work of *CRU scientists* could raise "significant questions" about any statement Dr. Mann made *to the Commonwealth* in applying for grants years earlier. *Id.* at 35-36.

3. Finally, the Attorney General adds a "contextual matter" that involves lengthy quotations from scientists other than Dr. Mann regarding "Post Normal Science." Opening Br. 11-13. According to the Attorney General, Post Normal Science produces "jargon" that "might be misleading/fraudulent in the context of a grant application if its specialized meaning is not disclosed or otherwise known to the grant maker." *Id.* at 13. Again, however, the Attorney General does not offer any indication that Dr. Mann himself ever used any such "jargon" or did so in a "misleading" way in communication *with the Commonwealth*.[6]

B. Proceedings In The Circuit Court

On May 27, 2010, the University petitioned to set aside the CIDs. JA1-11. After full briefing and a hearing, the Circuit Court for the County of Albemarle rejected the Attorney General's claim to "unbridled discretion" to

[6] Before the circuit court, the Attorney General identified what he thought "appears to be Post Normal jargon" in an e-mail that Dr. Mann sent to *another scientist*, not to the Commonwealth. JA493. There is no indication, however, that Dr. Mann used scientific terminology improperly. Nor could the mere use of scientific terminology alone constitute fraud. To the contrary, Mr. Mann's use of scientific terminology is consistent with normal scientific discourse.

issue CIDs unreviewable by the courts. JA872. Rather, the court ruled, FATA requires that the Attorney General have "some objective basis to issue a [CID]" and that that basis be indicated in the CID as part of "the nature of the conduct constituting the alleged violation of a false claims law that is under investigation." *Id*.; *see* Va. Code Ann. § 8.01-216.11. The statement of the "nature of the conduct" must provide some indication from which a "reasonable person could glean what Dr. Mann did to violate the statute." JA872. The court noted that the Attorney General's own counsel could not clearly identify the "nature of the conduct constituting the alleged violation"; instead, he simply referred the court to "the first 15 pages" of the Attorney General's brief. JA873 (referring to JA481-495). The court concluded that it was not clear what Dr. Mann supposedly did that "was misleading, false or fraudulent in obtaining funds from the Commonwealth of Virginia." *Id*.[7]

ISSUES PRESENTED FOR REVIEW

Of the five assignments of error raised by the Attorney General, *see* Opening Br. 14-15, this brief addresses the first and third—whether there is "'reason to believe'" that the CID seeks material "relevant to a [false claims law] investigation" and whether the CID appropriately states the "nature of

[7] Although the court noted the University's invocation of academic freedom, the court did not discuss the argument on the merits. JA873.

the conduct being investigated."

STANDARD OF REVIEW

A circuit court's decision to set aside a CID is reviewed for abuse of discretion. *See, e.g.*, *In re Civil Investigative Demand*, 1981 WL 291003, at *13 (Va. Cir. Ct. June 3, 1981) (whether to set aside a CID is a discretionary decision for the circuit court); *see also America Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350, 359 (2001) (reviewing decision denying motion to quash subpoena for abuse of discretion). Legal questions underlying the court's discretionary determinations are reviewed *de novo*.

ARGUMENT

Uncertainty regarding the validity of academic research, without more, cannot constitute allegations of fraud on the Commonwealth. The circuit court implicitly recognized this principle when it correctly ruled that the Attorney General's CIDs do not state the "conduct constituting the alleged violation" in a manner sufficient to justify their very broad disclosure demands, Va. Code. Ann. § 8.01-216.11, and that the Attorney General offered no "reason to believe" that the demands would yield information "relevant to a false claims law investigation," Va. Code Ann. § 8.01-216.10(A). These statutory requirements can and should be applied with

particular care in light of the First Amendment's established protection of academic freedom and the serious risks of a chilling effect when an investigating official targets scholarly or scientific research under the guise of a broad-ranging investigation into vague and ill-defined assertions of "fraud."

Amici do not argue that academic institutions are immune or exempt from responding to a CID. However, the Attorney General is wrong to presume that the First Amendment's protection of academic freedom is irrelevant to this case. Rather, in situations where an investigating official targets information subject to that protection, courts scrutinize the strength of the investigating official's suspicion of wrongdoing and weigh it against the significant chilling effects that will result if scholars or institutions face burdensome investigations based only on the fact that they have employed research methods and reached conclusions that might prove unpopular. FATA permits that scrutiny and balancing in the context of the court's review of the "nature of the conduct constituting the alleged violation." Va. Code Ann. § 8.01-216.11. When an official attempts to make scientific research the subject of a FATA investigation, the courts may and should require that the official frame the investigative demands narrowly and with due sensitivity to the constitutional protection of academic freedom.

Here, the circuit court correctly found that the Attorney General's

CIDs—broadly framed and thinly justified—do not sufficiently identify the "nature of the conduct constituting the alleged violation" of FATA. Va. Code Ann. § 8.01-216.11. That conclusion is bolstered by the fact that the CIDs are directed to the validity of Dr. Mann's scientific methodology, an issue that should be the subject of peer review and debate, not of a fraud investigation. Actual allegations of fraudulent statements to the Commonwealth should be investigated, but when the claimed allegations—to the extent they are even discernable—turn on the validity of scientific analysis, courts should protect the academy's role as an area where free inquiry may proceed regardless of whether public officials disapprove of the results.

If the Attorney General's view of judicially-unchecked investigative authority prevails and the CIDs at issue are permitted, it will be possible for fraud investigations to be directed solely to novel or politically unpopular scientific theories. But courts have recognized that doubts about the validity of scientific work are not the equivalent of fraud and have not hesitated to set aside CIDs that, like these, will have the effect of suppressing research rather than unearthing wrongdoing. This Court should do likewise and affirm the circuit court's order.

I. JUDICIAL REVIEW OF CIDS UNDER FATA INCLUDES CONSIDERATION OF THE FIRST AMENDMENT'S PROTECTION OF ACADEMIC FREEDOM

FATA does not authorize indiscriminate issuance of CIDs in the Attorney General's unreviewable discretion. Rather, FATA conditions the Attorney General's significant investigative power on compliance with certain statutory requirements, which courts are empowered to review and enforce. Among other requirements, the CID must state "the nature of the *conduct constituting the alleged violation* of [FATA] that is under investigation." Va. Code Ann. § 8.01-216.11 (emphasis added). The Attorney General must also have "reason to believe that any person may be in possession, custody, or control of any documentary material or information *relevant to a false claims law investigation*." Va. Code Ann. § 8.01-216.10(A) (emphasis added). The First Amendment's protection of academic freedom is a proper consideration in determining whether the information sought is sufficiently "relevant to a false claims law investigation" and whether the CID identifies "conduct constituting [an] alleged violation." Va. Code Ann. §§ 8.01-216.10(A), 216.11. Indeed, numerous courts have considered academic freedom in just such circumstances.[8]

[8] Contrary to the Attorney General's apparent view, the issue is not whether scientific research is "somehow exempt from the provisions of

A. The First Amendment Protects Universities From Overbroad Investigative Demands That Chill Scholarly Research

As the Supreme Court of the United States has observed, "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978). Accordingly, the Court has repeatedly recognized the importance of preserving academic freedom:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

FATA." Opening Br. 26. The University of Virginia did not advocate a "strict First Amendment constitutional right" (JA 00864), and neither do amici. The point is that the First Amendment's protection of academic freedom is a proper *consideration* in the court's enforcement of FATA's requirements and informs whether the CID appropriately states the "nature of the conduct constituting the alleged violation," Va. Code Ann. § 8.01-216.11, and whether there is "reason to believe" that the CID seeks material "relevant to a false claims law investigation," Va. Code Ann. § 8.01-216.10(A). The issue that amici discuss accordingly falls well within the first and third assignments of error before this Court.

Sweezy v. New Hampshire ex rel. Wyman, 354 U.S. 234, 250 (1957); *see also Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."); *University of Pa. v. EEOC*, 493 U.S. 182, 198 (1990) (suggesting that, in some circumstances, the burden imposed by a government subpoena could "direct the content of university discourse toward or away from particular subjects or points of view"); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) ("[T]he university is a traditional sphere of free expression so fundamental to the functioning of our society.").

The Commonwealth's courts have likewise recognized the importance of academic freedom. *See Feiner v. Mazur*, No. LM-4053-3, 1989 WL 646381, at *2 (Va. Cir. Ct. Sept. 15, 1989) (considering impact on academic freedom in ruling on motion to compel); *Corr v. Mazur*, No. LL-3250-4, 1988 WL 619395, at *2 (Va. Cir. Ct. Nov. 22, 1988) (describing academic freedom as "basic to our society"). The United States Court of Appeals for the Fourth Circuit recently reiterated the First Amendment protections afforded to scholarship. *Adams v. Trustees of Univ. of N.C.-Wilmington*, No. 10-1413, 2011 WL 1289054, at *5-6, *9-10, *11 (4th Cir. Apr. 6, 2011) (noting that speech involving scholarship and teaching

implicated First Amendment protection afforded to academic freedom).[9]

The Virginia General Assembly has also recognized the importance of protecting academic research from undue intrusion. The Virginia Freedom of Information Act specifically exempts from disclosure "[d]ata, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education . . . *in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues* . . . where such data, records or information has not been publicly released, published, copyrighted or patented." Va. Code Ann. § 2.2-3705.4(4) (emphasis added). This exemption, which recognizes the importance of protecting non-public scholarly research from unwarranted or premature disclosure, makes Virginia one of few "Research Encouraging" states. *See* Christopher S. Reed, *Stuck in the Sunshine: The Implications of Public Records Statutes on State University Research and Technology Transfer* 11 (2004), *available at* http://ipmall.info/hosted_resources/ip_courses/hersey_karen/Reed_Christopher_Sunshine.pdf; *see also id.* at 8-12 (as of 2004, 18 states, including Virginia, had FOIA statutes protecting academic work product from disclosure).

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[9] The Attorney General appears to recognize the First Amendment interest in academic freedom. *See* Opening Br. 13 (recognizing that academics "are free to follow any philosophy of science they wish").

These many authorities confirm that, in determining the propriety of the CIDs under FATA, the First Amendment's protection of academic freedom is an appropriate and, indeed, a necessary consideration. *Cf. Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (interpreting statute to avoid constitutional questions); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (same).

B. In Considering Investigative Demands For Academic Materials, Courts Balance The Investigating Official's Identified Need For Information Against The Risk Of Chilling Effects Posed By Overbroad Requests

Of course, the First Amendment's protection of academic freedom has never been absolute, and amici do not contend otherwise. *See* JA864. CIDs and other investigatory tools may be properly directed to academic institutions, subject to compliance with applicable law. The point is that, in determining whether such a CID is a proper exercise of investigative authority, the Attorney General's interest in seeking the information must be weighed against the chilling effects that forced production of such materials may cause.

This Court has taken such a balancing approach in connection with other First Amendment interests, such as the reporter's privilege. In *Brown v. Commonwealth*, 214 Va. 755, 757-58 (1974), this Court upheld a trial court's determination that a reporter should not be compelled to disclose

her confidential source in a criminal trial, even though it might infringe a defendant's right to impeach the credibility of the prosecution's witnesses. *Id*. The Court recognized that the confidentiality of sources is an "important catalyst to the free flow of information guaranteed by the freedom of press clause of the First Amendment." *Id*. at 757. The Court determined that, although not an absolute right, the reporter's privilege should yield "only when the defendant's need is essential to a fair trial," and that whether a need is "essential" "must be determined from the facts and circumstances in each case." *Id*.; *see also Philip Morris Cos. v. American Broad. Cos.*, No. LX-816-3, 1995 WL 1055921, at *2 (Va. Cir. Ct. July 11, 1995) (recognizing that the reporter's privilege of confidentiality of information is related to the First Amendment and employing the balancing test articulated in *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

Other jurisdictions likewise weigh First Amendment interests in considering the appropriateness of a subpoena or investigative demand. For example, in *Cusumano v. Microsoft Corp*., 162 F.3d 708 (1st Cir. 1998), the First Circuit upheld the district court's refusal to compel production of research materials compiled by two academic investigators. "Mindful that First Amendment values are at stake" and recognizing that "compelling the disclosure of research materials denigrat[es] a fundamental

First Amendment value," the First Circuit held that "when a subpoena seeks divulgement of confidential information compiled by a journalist or academic researcher in anticipation of publication, courts must apply a balancing test." *Id*. at 710, 716-17. Similarly, in *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1265-66 (7th Cir. 1982), the Seventh Circuit upheld a district court's refusal to enforce an administrative subpoena that sought to compel researchers from the University of Wisconsin to produce notes, working papers, and raw data relating to ongoing, incomplete studies. The Seventh Circuit stressed that "respondents' interest in academic freedom may properly figure into the legal calculation of whether forced disclosure would be reasonable." *Id*. at 1276-77.

The burden on First Amendment interests and the risk of chilling effects are particularly problematic when a subpoena is not narrowly tailored to specific allegations, but—as here—casts a very wide net. For example, in *Reyniak v. Barnstead International*, No. 102688-08, 2010 WL 1568424, at *2 (N.Y. Sup. Ct. Apr. 6, 2010), a party subpoenaed a hospital for "all correspondence exchanged between Dr. Irving Selikoff and third parties" relating to asbestos research. Relying in part on "a scholar's right to academic freedom," the court granted the hospital's motion for a protective order and found that the expense the hospital would incur as a

result of such a broad interpretation of the subpoena "could well discourage other institutions from conducting vital health and safety research." *Id*. at 3. Similarly, in *In re Philip Morris, Inc.*, 706 So. 2d 665, 666 (La. Ct. App. 1998), the court affirmed the trial court's rejection of a subpoena duces tecum seeking production of "all raw data including computer tapes and/or disks and supporting documentation" in connection with research relating to causes of cancer. The appellate court recognized that such "[b]lanket subpoenas . . . may deter scientists from engaging in research in particular fields." *Id*. at 668. Numerous courts have conducted a similar balancing in the context of efforts to compel production of other material protected by the First Amendment, such as subscriber and membership lists.[10]

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[10] *See Lubin v. Agora, Inc*., 882 A.2d 833, 842 (Md. 2005) (holding that, in order to enforce a subpoena for a subscriber list, First Amendment concerns required that the state establish a substantial relation between the information sought and an overriding and compelling interest); *SEC v. Hirsch Org., Inc.*, No. M-18-304, 1982 WL 1343, at *2-3 (S.D.N.Y. Oct. 25, 1982) (citing First Amendment interests in denying enforcement of an investigative subpoena requesting a subscriber list); *In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570, 573 (W.D. Wis. 2007) (holding that courts must consider First Amendment concerns in determining whether to compel compliance with subpoena seeking customer list); *see also Hagaman v. Andrews*, 232 So. 2d 1, 7-8 (Fla. 1970) (applying First Amendment balancing to legislative committee subpoena for bank deposit and disbursement records to "insure that the Legislature does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty, his speech, or assembly, nor engage upon unwarranted witch hunts"); *Ex parte Lowe*, 887 S.W.2d 1, 1 (Tex. 1994) (per curiam) (requiring heightened showing under the First Amendment in

Even in the context of a *criminal* investigation, where the investigator's interests are arguably even stronger than in a civil investigation, First Amendment protections are to be weighed in the balance. *See, e.g., Butterworth v. Smith*, 494 U.S. 624, 630 (1990) (noting that "grand juries are expected 'to operate within the limits of the First Amendment'"); *Branzburg*, 408 U.S. at 710 (Powell, J., concurring) ("The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."). As the Fourth Circuit summarized:

> The public's undoubted "right to every man's evidence" does not give government, for example, "an unlimited right to access to [private parties'] papers with reference to the possible existence of [illegal] practices." "It is contrary to the first principles of justice to allow a search through all [a corporation's] records, relevant or irrelevant, in the hope that something will turn up."

In re Grand Jury Subpoena, 829 F.2d 1291, 1297-1298 (4th Cir. 1987) (quoting *Branzburg*, 408 U.S. at 668, and *FTC v. American Tobacco Co.*, 264 U.S. 298, 305 (1924)). Thus, when deciding whether to enforce a broad subpoena that seeks materials protected by the First Amendment, the Fourth Circuit directed courts to "balance" the concerns of the public

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order to enforce an administrative subpoena seeking membership lists of the Ku Klux Klan).

and the government in investigating crime with the interest of the subpoena's target in "conducting a business or any other personal affairs." *Id*. In that analysis, "[t]he critical inquiry, assuming that the hurdle of relevancy has been cleared, is whether there is too much indefiniteness or breadth in the things required to be produced by the subpoena." *Id*.

Accordingly, courts generally require a party seeking disclosure of academic research or similar protected material to make a clear showing of need for and relevance of the information sought. In *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963), the Supreme Court of the United States held that a Florida legislative committee empowered to investigate subversive and Communist activities could not compel production of information when the committee failed to show a substantial connection between the targeted association and Communist activities. In so holding, the Court made clear that "it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." *Id*. at 546.

Similarly, in *Sweezy*, the Supreme Court of the United States

reversed a professor's conviction for contempt when the professor refused to answer questions propounded by the New Hampshire Attorney General. 354 U.S. at 238-45. Concurring in the decision to reverse the conviction, Justice Frankfurter outlined the parameters for when inquiry into areas protected by the First Amendment might be appropriate: "Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling." *Id*. at 262 (Frankfurter, J., concurring in the result); *see also Dow Chem. Co.*, 672 F.2d at 1274-75 (holding that, when a subpoena intrudes into "the sphere of university life," the "interests of government must be strong and the extent of intrusion carefully limited"); *Cusumano*, 162 F.3d at 716 (courts apply a "balancing test" when a subpoena seeks production of journalistic or academic research); *Plough Inc. v. National Acad. of Scis.*, 530 A.2d 1152, 1160-61 (D.C. 1987) (balancing the need for information against the injury that would result from disclosure and holding that an aspirin manufacturer could not demand discovery of a study reflecting a committee's closed deliberations and preliminary draft reports).

Again, this does not mean that protected material is never discoverable; it simply means that the demanding party must demonstrate

a sufficient nexus between the information sought and a particularized interest, not simply a "'hope that something will turn up.'" *Grand Jury Subpoena*, 829 F.2d at 1298 (quoting *American Tobacco*, 264 U.S. at 305); *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring in the result); *cf. Illinois ex rel. Madigan v. Telemarketing Assocs., Inc*., 538 U.S. 600, 621 (2003) (noting that the regulation of fraud must be "responsive to First Amendment concerns"); *In re Grand Jury Subpoenas Duces Tecum*, 78 F.3d 1307, 1312 (8th Cir. 1996) (upholding subpoena, notwithstanding objection based on First Amendment freedom of association, where government showed "a compelling interest in and sufficient nexus between the information sought and the subject matter of its investigation").

The foregoing principles demonstrate that the Attorney General cannot justify the CIDs in this case simply by asserting that "there is currently pending a FATA investigation" (Opening Br. 16) and that the document demands are "calculated to shed light on whether a FATA violation has occurred" (*id.* at 17). Nor is judicial review exhausted simply by confirming that the Attorney General has "specified the particular subsections" of FATA at issue or stated that the investigation "relates to what Mann presented to win or claim payment under the specific grants." *Id.* at 26. Rather, because the CIDs target material subject to the First

Amendment's protection of academic freedom and scholarship, the "interests of government must be strong and the extent of intrusion carefully limited." *Dow Chem. Co.*, 672 F.2d at 1275. As the following section demonstrates, the Attorney General's submissions do not meet this standard.

II. THE ATTORNEY GENERAL HAS NOT SHOWN ANY COMPELLING NEED THAT WOULD JUSTIFY CHILLING SCHOLARSHIP THROUGH AN OVERBROAD INVESTIGATION INTO DR. MANN'S SCIENTIFIC METHODOLOGY

As the circuit court noted, the Attorney General has provided scant basis for the CIDs. The CIDs themselves do not identify "[w]hat the Attorney General suspects that Dr. Mann did that was false or fraudulent in obtaining funds from the Commonwealth." JA873. And the Attorney General's brief to this Court, like his written submission below, does not identify any statement by Dr. Mann to the Commonwealth as even raising a *suspicion* of falsity or fraud, much less constituting an "alleged violation" of FATA. Va. Code Ann. § 8.01-216.11. This lack of specificity is fatal to such an overbroad document demand, particularly in light of the First Amendment's concern regarding the chilling of academic research.

Although the Attorney General contends that he is investigating whether Dr. Mann "knowingly and intentionally provide[d] false/misleading data or other materials to win government grants or collect payments under

those grants" (Opening Br. 27), the CIDs sweep well beyond submissions made to win grants or collect payments. Among other things, the Attorney General seeks "all computer algorithms, programs, source code or the like created or edited by Dr. Michael Mann . . . from January 1, 1999, to the present" that Dr. Mann used in his "day to day research or to produce any work product or result" (JA24) and all "correspondence, messages or e-mails" to or from Dr. Mann and 39 named scientists and academics, as well as all documents "that are in any way related to" correspondence with any of these individuals (JA20-23). The Attorney General has never explained how this information could relate in any way to any statement Dr. Mann made to the Commonwealth in connection with grants. The only apparent explanation on this record is that the Attorney General wishes to troll through years of Dr. Mann's research and scholarly interactions with other scientists, not because there is any present suspicion of actual fraud, but because the Attorney General "'hope[s] that something will turn up.'" *Grand Jury Subpoena*, 829 F.2d at 1298 (quoting *American Tobacco*, 264 U.S. at 305).

The Attorney General asserts that there are "significant questions" as to whether Dr. Mann made fraudulent statements to the Commonwealth. Opening Br. 35-36. But the Attorney General identifies primarily

statements made by *others*, such as the CRU scientists. *See supra* pp. 5-9 (Statement of Facts). The Attorney General's discussion of Dr. Mann's own work focuses on Dr. Mann's scientific methodology—which the Attorney General calls "Post Normal Science"—and the results of his research, including the "hockey stick" graph. But doubts about the scientific validity of Dr. Mann's research—whatever their source—are not allegations of fraud on the Commonwealth, as numerous courts have recognized. For example, in *United States ex rel. Milam v. Regents of University of California*, 912 F. Supp. 868 (D. Md. 1995), the court granted summary judgment for defendants in a case involving allegations of false statements in applications for federal research grants. Referring to the "nine statements that relate to defendants' scientific findings which relator believes are untrue," the court determined that "at most, the Court is presented with a legitimate scientific dispute, not a fraud case" and "[d]isagreements over scientific methodology do not give rise to False Claims Act liability." *Id*. at 885-86.

Similarly, in *United States ex rel. Owens v. First Kuwaiti General Trading & Contracting Co*., 612 F.3d 724 (4th Cir. 2010), the Fourth Circuit affirmed the grant of summary judgment in a False Claims Act case alleging fraud relating to a government contractor's billing. The Fourth

Circuit distinguished between the type of false statements sufficient to support a claim of fraud and "honest disagreements, routine adjustments and corrections, and sincere and comparatively minor oversights." *Id.* at 734. Specifically, the Fourth Circuit noted: "the common failings of engineers and other scientists are not culpable under the [False Claims] Act." *Id.* (internal quotation marks omitted); *see also Wang v. FMC Corp*., 975 F.2d 1412, 1420-21 (9th Cir. 1992) (upholding summary judgment for defendants and distinguishing between "wrongdoing" and "scientific errors").[11]

Allowing an investigating official to burden a university with a broad-ranging document demand based on questions concerning the scientific validity of a researcher's work—like the CIDs at issue here—would have the strong potential to "direct the content of university discourse toward or away from particular subjects or points of view," *University of Pa.*, 493 U.S. at 198, and will have a significant chilling effect on scientific and academic research and debate. *See Sweezy*, 354 U.S. at 350 ("Scholarship cannot

[11] Analogous principles arise in defamation suits based on controversial scientific statements. For instance, in *Arthur v. Offit*, No. 09-1398, 2010 WL 883745, at *4 (E.D. Va. Mar. 10, 2010), the court dismissed a defamation suit arising from a scientific debate about mandatory vaccinations and their link to autism because the statement at issue was not a fact "capable of being proven true or false." The court also noted that "[c]ourts have a justifiable reticence about venturing into the thicket of scientific debate." *Id*. at 6.

flourish in an atmosphere of suspicion and distrust.").

Moreover, the chilling effect of investigative demands of the type issued by the Attorney General is widely recognized. Seeking to avoid the stigma involved in responding to a fraud investigation, professors would hesitate to research, publish, or teach on potentially controversial subjects. *See, e.g.*, *Philip Morris*, 706 So. 2d at 667-68. Universities would similarly hesitate to employ, or otherwise support the scholarship of, professors whose research challenges conventional thinking, fearing the considerable costs involved in complying with a government investigation. *See, e.g.*, *Reyniak*, 2010 WL 1568424, at *3; *see also Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 706, 718 (4th Cir. 1991) (en banc) (requiring actual malice in defamation case involving scientific debate and noting that a lesser showing "would have [had] the ironic effect of stifling debate within the community of scientists at a time when the implications of scientific research are ever more far reaching"); *Auvil v. CBS "60 Minutes",* 67 F.3d 816, 822 (9th Cir. 1995) (expressing concern over "the spectre of a chilling effect on [scientific] speech" when scientific speech is challenged on the basis of its truth or falsity); *Immuno AG v. Moor-Jankowski*, 567 N.E.2d 1270, 1282 (N.Y. 1991) (dismissing libel action involving scientific debate and noting that "[t]he chilling effect of protracted litigation" in such a case

"can be especially severe").

Such chilling effects are not speculative; they have been confirmed by at least one published study. *See* Joanna Kempner, *The Chilling Effect: How Do Researchers React to Controversy?*, 5 PLoS Med. 1571 (2008), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2586361. The study looked at National Institutes of Health (NIH) grant recipients whose research was questioned in congressional hearings. Over half of the researchers studied engaged in self-censorship following the experience. Researchers "reframed studies, removed research topics from their agendas, and, in a few cases, changed jobs." *Id*. at 1576; *see also Climate Science in the Political Arena, Hearing Before the H. Select Comm. on Energy Independence and Global Warming*, 105th Cong. (2010) (statement of Benjamin D. Santer) ("I firmly believe that I would now be leading a different life if my research suggested that there was no human effect on climate. I would not be the subject of Congressional inquiries, Freedom of Information Act requests, or e-mail threats. . . . It is because of the research I do—and because of the findings my colleagues and I have obtained—that I have experienced interference with my ability to perform scientific research.").

Moreover, where the investigating official also seeks correspondence with other academics, as the Attorney General does here, enforcement of a

broad demand will invariably chill intellectual debate among researchers and scientists. While it is true that academics expect that *published* research will be subject to public disclosure, the correspondence the Attorney General seeks would include not final conclusions, but initial thoughts, suspicions, and hypotheses. Exposing these thoughts to the public eye would inhibit researchers from speaking freely with colleagues, with no discernable countervailing benefit—a concern emphasized by the Seventh Circuit:

> [E]nforcement of the subpoenas [seeking academic documents] would leave researchers with the knowledge . . . that the fruits of their labors had been appropriated by and were being scrutinized by a not-unbiased third party whose interests were arguably antithetical to theirs. It is not difficult to imagine that that realization might well be both unnerving and discouraging. Indeed, it is probably fair to say that the character and extent of intervention would be such that, regardless of its purpose, it would "inevitably tend[] to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor."

Dow Chem. Co., 672 F.2d at 1276 (quoting *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring in the result)); *see also* Letter from Union of Concerned Scientists to Attorney General Cuccinelli (May 26, 2010), *available at* http://www.ucsusa.org/assets/documents/scientific_integrity/Virginia-Scientist-Letter.pdf (letter from over 800 Virginia scientists and academics expressing concern over impact of investigation of scientific

scholarship and debate, including that researchers might "fear[] that any individual statement or email will be taken out of context").[12]

This case differs significantly from the federal False Claims Act cases on which the Attorney General relies. *See* Opening Br. 26-27. In each of those cases, a researcher filed a complaint alleging concrete examples of false claims made in documents submitted to the NIH. To the extent there was any government investigation or intervention at all, it proceeded on the basis of those specific allegations regarding identified statements by the party under investigation. For example, in *United States ex rel. Berge v. Board of Trustees of University of Alabama*, 104 F.3d 1453 (4th Cir. 1997), a former doctoral candidate alleged that the University of Alabama made specific false statements in annual progress reports to NIH. *See id*. at 1456 (listing allegedly false statements). In another case, a

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[12] The Attorney General admits that none of the academic bodies that have evaluated Dr. Mann's research has concluded that Dr. Mann acted improperly. *See* Opening Br. 9-11; *see also supra* pp. 5-9 (Statement of Facts). This type of peer review, not intervention by governmental actors, is what ensures the honesty and quality of academic scholarship. *Cf. Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." (footnote omitted)).

relator alleged that a researcher failed to disclose in NIH grant applications that he received industry funding, including "funding . . . from pharmaceutical companies making the drugs that the NIH paid the researcher to evaluate." *United States ex rel. Cantekin v. University of Pitt.*, 192 F.3d 402, 404 (3d Cir. 1999). The relator claimed that, when he raised the issue, the researcher responded that he withheld the information because it was none of the NIH's business and would "'muddy up the waters.'" *Id*. at 405. And *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 47-48 (4th Cir. 1992), does not involve a government investigation at all: rather, an internal investigation *conducted by the University* based on a relator's complaint revealed that a professor's reported research results were false. None of these cases involved a party, much less a government official, mounting an investigation into the substance of scientific research without a reasonable and articulable suspicion of fraud.[13]

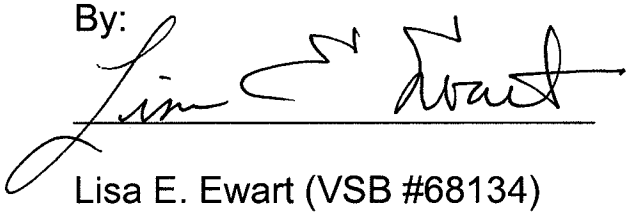
[13] The Attorney General's reliance on *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc), is likewise misplaced, as neither the University nor amici contend that professors are "somehow exempt from laws of general applicability." Opening Br. 26. Rather, the point is that, as the Fourth Circuit recently recognized in a different context, academic scholarship "'implicates additional constitutional interests'" that are to be taken into account in applying the FATA requirements. *Adams*, 2011 WL 1289054, at *11 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)).

Amici do not contend that the Attorney General is barred from issuing a CID directed to academic research materials, and indeed the circuit court's order was correctly made "without prejudice to the Commonwealth to proceed according to law." JA875. As long as the Attorney General reasonably tailors a future CID to allegations of actual fraud and demonstrates a strong government interest in obtaining the information sought, concerns about chilling of academic research may well be minimized. But these broadly-sweeping CIDs, issued without so much as an articulable suspicion of a supposedly fraudulent statement, cannot stand under FATA, particularly in light of the First Amendment concerns implicated here. The circuit court correctly set them aside. *See, e.g.*, *Dow Chem. Co.*, 672 F.2d at 1266 (affirming district court's refusal to enforce subpoena); *Cusumano*, 162 F.3d at 710 (affirming denial of motion to compel production).

CONCLUSION

For the foregoing reasons, the circuit court's order should be affirmed.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on this 25th day of April, 2011, three printed copies of the foregoing were served by first-class mail, postage prepaid on:

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I further certify that I have caused to be filed 15 printed copies of the foregoing with the Clerk of this Court and I have filed an electronic PDF version of the foregoing with the Clerk via e-mail to scvbriefs@courts.state.va.us. I further certify that the foregoing brief does not exceed 50 pages and that I have otherwise complied with Rules 5:26 and 5:30 of the Rules of the Supreme Court of Virginia.

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