IN THE ARIZONA COURT OF APPEALS

DIVISION TWO

ENERGY & ENVIRONMENT LEGAL INSTITUTE Petitioner/Appellant, vs. ARIZONA BOARD OF REGENTS and TERI MOORE, in her official capacity as Custodian of Public Records for the University of Arizona, Respondents/Appellees. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, Amicus Curiae.	NO. 2-CA-CV-2015-0086 Pima County Superior Court Cause No. C2013-4963

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN SUPPORT OF RESPONDENTS/ APPELLEES

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INTEREST OF AMICUS CURIAE

The American Association of University Professors (AAUP) is a non-profit organization representing the interests of over 40,000 faculty, librarians, graduate students, and academic professionals at institutions of higher education in Arizona and across the country. Founded in 1915, AAUP is committed to the defense of academic freedom and the free exchange of ideas. AAUP's policies are widely followed in American colleges and universities, and have been cited by the U.S. Supreme Court. *See Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Tilton v. Richardson,* 403 U.S. 672, 681-682 (1971); AAUP Policy Documents and Reports, *1940 Statement of Principles on Academic Freedom and Tenure* (10th ed. 2006) (endorsed by over 200 scholarly and educational groups). AAUP frequently submits amicus briefs in cases that implicate its policies or otherwise raise issues important to higher education or faculty members. *See, e.g. 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*). Since 1987, AAUP has also addressed the threat to academic freedom posed by burdensome and intrusive requests made to public colleges and universities under freedom-of-information laws. *See, American Tradition Institute v. University of Virginia*, 287 Va. 330 (2014).

Amicus AAUP has an interest in ensuring that the public's right to obtain certain information is properly balanced with professors' and other scholars' rights to academic freedom, and that public records laws are not misused in order to chill academic freedom. Amicus AAUP filed an amicus curiae brief in the Arizona Superior Court in the instant case.

STATEMENT OF THE CASE

This case arises from Energy & Environmental Legal Institute's (E&E) public records requests to the University of Arizona, under the Arizona Public Records Law, A.R.S. §39-121. The University responded by providing some emails, withholding others and providing indexes describing the items withheld. On September 25, 2013, Petitioner E&E appealed the denial through a special action in the Arizona Superior Court for Pima County. A.R.S. §39-121.02(A). On March 24, 2015 the court issued its ruling, denying E&E's request for relief, dismissing the special action, and entering judgment in accordance with Rule Ariz. R. Civ. P. 54(c). Subsequently, E&E filed this appeal in the Arizona Court of Appeals.

STATEMENT OF FACTS

Petitioner/Appellant E&E made public records requests for communications, including emails, authored by or addressed or copied to University of Arizona Professors Malcolm Hughes and Jonathan Overpeck, spanning a total of 13 years,

from 1999 to 2012. The emails were, in turn, linked to eight other individuals, each of whom is or was then a professor or researcher at another private or public university. E&E's public records requests sought emails that included "prepublication critical analysis of scientific work, unpublished data and analysis, unpublished research and its results, as well as drafts and commentary" (AzBOR's Answering Brief in the Court of Appeals, at 24-25; see also Superior Court ruling, at 3). Over a period of several months, Professors Hughes and Overpeck culled through more than 100,000 pages of email and attachments to identify the emails and other records that were responsive to the requests. The University then provided E&E with many emails (2,000 emails according to E&E), withheld others (1,700+ emails) and provided indexes describing the items withheld. *Petitioner's Opening Brief in the Superior Court*, at 1; *Respondents' Opening Memorandum in the Superior Court*, at 2-3; Superior Court ruling, at 1.

The records requests here are part of E&E's national campaign against climate science. Prior to changing its name to E&E Legal, Petitioner/Appellant was known as American Tradition Institute (ATI). http://eelegal.org/?page_id=1344. The Virginia Supreme Court recently denied E&E's, then-ATI, similar request for records under Virginia's state freedom of information statute. *American Tradition Institute v. University of Virginia*, 287 Va. 330 (2014). Regardless of the outcome of such litigation, E&E vows to "keep

peppering universities around the country with similar requests under state open records laws." *Report on Research Compliance: Group to Request Rehearing in U.Va. Case, Expand Pursuit of Researchers' emails*, http://eelegal.org/?p=2958. In Virginia, Arizona, and additional cases in Texas, E&E has targeted climate scientists with requests for records covering years of internal communications, including thousands of pages of emails and internal deliberative materials. As a result, academic researchers and university administrators are compelled to spend hundreds of hours culling through records to identify items that are appropriate to produce as public records and those that may be withheld under state law. E&E's campaign against climate science then continues with litigation in state court, requiring hundreds more hours expended by faculty and university administrators.[1]

[1] *See*, *Climate science attack group turns sight on Texas professors*, The Institute for Southern Studies (July 19, 2012), *at* http://www.southernstudies.org/2012/07/climate-science-attack-group-turns-sights-on-texas-professors.html; *ATI Files Suit To Compel the University of Arizona To Produce Records Related to So-Called "Hockey Stick" Global Warming Research* (Sept. 9, 2009), *at* http://wattsupwiththat.com/2013/09/09/ati-files-suit-to-compel-the-university-of-arizona-to-produce-records-related-to-so-called-hockey-stick-global-warming-research. ATI also filed requests for e-mails and records from a federal scientist at NASA. *See*, *Who's behind the 'information attacks' on climate scientists*?, The Institute for Southern Studies (Oct. 31, 2011), *at* http://www.southernstudies.org/2011/10/special-investigation-whos-behind-the-information-attacks-on-climate-scientists.html

STANDARD OF REVIEW

Under the Arizona Public Records Law, A.R.S. §39-121, public officers and agencies have discretion "to deny or restrict access" to public records where the officer or agency determines that "the interests of privacy, confidentiality, or the best interests of the state in carrying out its legitimate activities outweigh the general policy of open access." *Carlson v. Pima County*, 141 Ariz. 487, 491 (1984). In the special action in Superior Court, the issue was whether the Respondents' decision to withhold records was "arbitrary and capricious or an abuse of discretion." Rule 3(c), Arizona Rules of Procedure for Special Actions. In the appeal from the Superior Court ruling, this Court reviews *de novo* the legal issue of "[w]hether the denial of access to public records is wrongful…." *Cox Arizona Publications, Inc. v. Collins*, 175 Ariz. 11, 14 (1993) (citing *Arizona Board of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 257 (1991).

SUMMARY OF ARGUMENT

Amicus AAUP fully endorses the Arizona Board of Regents' (AzBOR) obligation to respond appropriately to public records requests, and recognizes that public records laws are critical for keeping public institutions and their employees accountable. While the Arizona Public Records Law creates a presumption in favor of public access, "the law also recognizes that an unlimited right of inspection might lead to substantial and irreparable private or public harm."

Carlson v. Pima County, 141 Ariz. 487, 491 (1984). Public officers and agencies have discretion "to deny or restrict access" to public records where the officer or agency determines that "the interests of privacy, confidentiality, or the best interests of the state in carrying out its legitimate activities outweigh the general policy of open access." *Id.* In the case at bar, the University and AzBOR properly exercised their discretion to deny E&E's request for emails containing "prepublication critical analysis of scientific work, unpublished data and analysis, unpublished research and its results, as well as drafts and commentary." (AzBOR's Answering Brief in the Court of Appeals, at 24-25; see also Superior Court ruling, at 3).[2]

The "common law limitations to open disclosure…are based on important public policy considerations relating to the protection of either the confidentiality of information, privacy of persons or a concern about disclosure detrimental to the best interests of the state." *Carlson v. Pima County*, 141 Ariz. at 490. Thus, a broad range of factors relevant to protections of private persons, public policy, and state interests may be considered in the balancing test under the Public Records Law. In weighing "the interests in privacy, confidentiality, or the best interests of the state," such factors include: the nature of public records; whether public

[2] In addition to upholding the denials of disclosure of these materials, the Superior Court concluded that the AzBOR properly withheld records containing ongoing research and prepublication peer review. Superior Court ruling, at 3.

records requests are unduly burdensome; whether the requests are harassing; and whether the public's need to know is diminish by countervailing considerations.

Applying these factors shows that the University and AzBOR properly exercised their discretion in denying E&E's public records requests for emails containing prepublication communications and other unpublished academic materials. Courts should consider the best interests of the state to maintain a free and vital university system, which depends on the protection of academic freedom to engage in the free and open scientific debate necessary to create high quality academic research. Where the requests seek prepublication communications and other unpublished academic research materials, as in the case at bar, compelled disclosure would have a severe chilling effect on intellectual debate among researchers and scientists. In assessing the importance of academic freedom, the courts may draw upon a wide range of legal and policy sources, including U.S. Supreme Court decisions; other states' interpretations of their public records laws; AAUP policy statements and reports; and University of Arizona policies. These legal and policy standards demonstrate that academic freedom promotes the best interests of state in maintaining excellent and well-functioning universities by enabling faculty to engage freely and fully engage in inquiry and research.

Requiring production of prepublication communications and other unpublished academic materials would severely harm academic freedom. The

Superior Court found that AzBOR presented "an abundance of supporting evidence," in support of its position that compelled production of these documents "would have a chilling effect on the ability and likelihood of professors and scientists engaging in frank exchanges of ideas and information." Superior Court ruling, at 3-4. This frank exchange of ideas, protected by academic freedom, is necessary to advance the vital state interest in a functional university research program.

In the case at bar, the chilling effect on academic freedom is exacerbated by E&E's overly broad and burdensome requests for emails and other materials. E&E's requests span a total of 13 years, from 1999 to 2012, requiring hundreds of hours by professors and other university personnel to cull through more than 100,000 pages of email and attachments to identify the emails that were responsive to the request and to distinguish those that could be properly disclosed and withheld. Such broad and burdensome public records requests place public universities at an additional significant disadvantage in building research programs and recruiting and retaining faculty due to the obstacles created to research collaboration and open communication.

The chilling effect on the exercise of academic freedom is sufficient to demonstrate the private and public harm that would result from compelling disclosure of the emails containing prepublication academic research materials,

unpublished data and analysis, unpublished research and results, drafts and commentary. Additionally, E&E's nationwide anti-climate science campaign, including overly broad and intrusive public records requests, has created harassing and intimidating conditions that interfere with the scientists' ability to engage in academic research.

The Arizona Supreme Court has found that under some circumstances, the state's best interest "is more compelling than [the public's] interest in, or need to know" the contents of requested public records. *ABOR v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 258 (Ariz. 1991). In the case of prepublication communications and other unpublished academic materials, this factor of the "need to know" may be included in the balancing test to consider whether other means are equal or even better in protecting the right to public disclosure and the best interests of the state. The academic profession's peer review process and universities' institutional research integrity systems promote broad public access to research-related information and safeguard the state's interests in high ethical standards of research. These systems ensure the honesty and quality of academic scholarship and diminish the need for disclosure through public records requests.

ARGUMENT

I. IN CONSIDERING REQUESTS FOR ACADEMIC MATERIALS UNDER ARIZONA'S PUBLIC RECORDS LAW, THE PUBLIC'S RIGHT TO INFORMATION MUST BE BALANCED AGAINST THE RISK OF CHILLING EFFECTS ON ACADEMIC FREEDOM POSED BY SUCH REQUESTS.

Amicus AAUP fully endorses the University's and Arizona Board of Regents' (AzBOR) obligation to respond appropriately to public records requests, and recognizes that public records laws are critical for keeping public institutions and their employees accountable. Arizona state courts have recognized that the "presumptive right to inspection" under the Arizona Public Records Law, A.R.S. §39-121, will be outweighed by "some greater State interest in non-disclosure." *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 348 (Ariz. Ct. App. 2001). The common law balancing test determines whether "the interests of privacy, confidentiality, or the best interests of the state in carrying out its legitimate activities outweigh the general policy of open access." *Carlson v. Pima County,* 141 Ariz. at 491. The "best interests of the state," "include[] the overall interests of the government and the people.... The public interest includes consideration of how disclosure would adversely affect the agency's mission." *Phoenix Newspapers*, 201 Ariz. at 348-349. As the Superior Court explained in the proceedings below, "When the release of information would have an important and harmful effect on the duties of a State agency or officer, there is discretion not to

release the requested documents." Superior Court ruling, p. 4, *citing, Arizona Board of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 257-58 (Ariz. 1991).

The "common law limitations to open disclosure…are based on important public policy considerations relating to the protection of either the confidentiality of information, privacy of persons or a concern about disclosure detrimental to the best interests of the state." *Carlson v. Pima County*, 141 Ariz. at 490. Thus, a broad range of factors relevant to protections of private persons, public policy, and state interests may be considered in determining whether the interests in privacy, confidentiality, or the best interests of the state outweigh the general interest in disclosure. One factor is the nature of the records requested. When public records requests target information that implicates principles of academic freedom, courts should balance the public's general right to disclosure against the risks of chilling effects that may result from forcing scholars and institutions to disclose collegial academic communications and internal deliberative materials. Requiring the production of emails containing "prepublication critical analysis of scientific work, unpublished data and analysis, unpublished research and its results, as well as drafts and commentary" (AzBOR's Answering Brief in the Court of Appeals, at 24-25; see also Superior Court ruling, at 3) would have a strong chilling effect on intellectual debate among researchers and scientists.

One of the preeminent interests of the state is the advancement of common good, which is promoted by the research, understanding and knowledge arising from a free and vital university system. See, Section II.A, *infra*. Thus, the best interests of the state include protecting the university's mission to carry out high quality academic research. Academic freedom is essential to this university mission, to enable researchers to engage freely and fully in inquiry and research that may be controversial or even unpopular. Individual researchers and the community of scholars, as a whole, must have academic freedom to create a thriving and ongoing exchange of debate, dispute, and cooperation in research projects and programs. The best interests of the state are reflected in University of Arizona policy that recognizes the importance of academic freedom for faculty to carry out their work: "'Professional and intellectual freedom' shall mean the right and responsibility to exercise judgment within the standards of the postdoctoral scholar's discipline. Professional and intellectual freedom is defined as 'academic freedom' for those employees involved in teaching and/or research." University of Arizona Handbook for Appointed Personnel, http://hr.arizona.edu/book/export/html/1570

Requiring disclosure of the contested records in the case at bar will have a chilling effect on academic freedom that harms academic research, the university's mission and the public interest. As the trial court stated, the AzBOR presented "an

abundance of supporting evidence" for its position that compelled production of these documents "would have a chilling effect on the ability and likelihood of professors and scientists engaging in frank exchanges of ideas and information." Superior Court ruling, at 3-4. The evidence included "an impressive array of scholars, academic administrators, professors, etc., who, by way of affidavits, provide compelling support of [AzBOR] position." *Id.* at 3. Thus, the University and AzBOR properly exercised their discretion to determine that the interests in privacy, confidentiality, and the best interests of the state outweigh the general interest in disclosure.

II. THE HARM TO ACADEMIC FREEDOM, PRIVACY AND THE BEST INTERESTS OF THE STATE OUTWEIGHS E&E'S ASSERTED INTERESTS IN THE REQUESTED RECORDS.

A. The State's Common Law Balancing Test Should Give Significant Weight to the State's Interest in Protecting Academic Freedom and Researchers' Privacy from Burdensome, Intrusive Records Requests.

In considering the state's interests in protecting academic freedom, this Court may draw upon a wide range of legal and policy sources. As discussed more fully below, academic freedom is a "special concern" under the First Amendment to the US Constitution. Further, other states have considered the public interest in academic freedom in interpreting public records laws. Amicus AAUP urges this Court to consider, as well, AAUP policy statements and reports setting standards of academic freedom, which have been widely adopted by universities and other

academic institutions. These legal and policy standards demonstrate that academic freedom is essential for faculty to engage in research free from outside pressures and intrusions. Thus, the best interests of the state in well-functioning and high quality universities depend on academic freedom, which should carry significant weight in applying the balancing test under Arizona's Public Records Law.

The U.S. Supreme Court has recognized that "[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).[3] In *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957), a plurality of the Supreme Court recognized the importance of preserving academic freedom. In *Sweezy* the threat arose from an investigation by the Attorney General of New Hampshire into the activities of a professor, including inquiries into a lecture given by him at the University of New Hampshire. *Id*. at 243-244, 248. The Court initially explained that the concept of academic freedom is grounded in the interests of the state, and of society, in maintaining healthy and vital universities.

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[3] Amicus AAUP is not arguing that the consideration of academic freedom under the Arizona Public Records Law relies directly on the First Amendment. The argument, rather, is that this Court may draw upon the Supreme Court's recognition of academic freedom as essential to the best interests of the state and society as a relevant factor in applying the common balancing test under the Public Records Law. See, *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1276 (7th Cir. 1982), discussed in Section II.B, *infra.*

> 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.

The Supreme Court found that academic freedom was necessary to advance this vital state interest in education and research.

In a prescient concurring opinion, Justices Frankfurter and Harlan expounded on the dangers of unwarranted governmental intrusion into the intellectual life of the university:

> Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. …. For society's good -- if understanding be an essential need of society -- inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. 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…. It matters little whether [governmental intervention] occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor…. It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation."

Id. at 261-263.

The Court has since reiterated the importance of academic freedom for the public good. As the Court explained in *Keyishian v. Board of Regents*, 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." [4]

The AAUP has long emphasized the same concerns for academic freedom, and its grounding in the common good, that have animated the Supreme Court's interpretation of the First Amendment. The AAUP 1915 Declaration of Principles[5] and its subsequent 1940 Statement of Principles on Academic Freedom and Tenure[6] describe the foundational principles of academic freedom, which are essential to the university's mission of serving the public good by promoting free

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[4] *See also*, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995) (stating that the "danger … [of] chilling individual thought and expression" is especially acute in a university setting, which has the "background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition"); *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.").

[5] American Association of University Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, *Appendix* I, AAUP: Policy Documents & Reports 291 (10th ed. 2006) [hereinafter *1915 Declaration*], available at http://www.aaup.org/AAUP/pubsres/policydocs/contents/1915.htm

[6] American Association of University Professors, *1940 Statement of Principles on Academic Freedom & Tenure with 1970 Interpretive Comments*, AAUP: Policy Documents & Reports 3 (10th ed. 2006) [hereinafter *1940 Statement*], available at http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm

inquiry and debate in a democratic society. As the 1940 Statement of Principles on Academic Freedom and Tenure explains:

> Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.
>
> Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth.

1940 Statement, at 8.

AAUP policy standards emphasize that academic freedom protects faculty independence to pursue teaching and research free from outside pressures that seek to control or inhibit their freedom of inquiry. Academic freedom is essential for individual researchers and the community of researchers, including their ability to share, exchange, and test others' research methods and results. Thus, the "best interests of the state" are served by protecting faculty academic freedom in teaching and research on issues, ideas, and theories including those that are controversial, unpopular, and potentially path breaking. As stated in the 1915 Declaration of Principles, "In all…domains of knowledge, the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results. Such freedom is the breath in the nostrils of all scientific activity." *1915 Declaration*, at 295.

The AAUP principles of academic freedom have been widely endorsed and adopted. The AAUP 1940 Statement on Academic Freedom and Tenure has been endorsed by the Association of American Colleges and Universities and, over subsequent decades, by over 200 academic professional organizations and institutions. University mission statements commonly explicitly state their public interest goals. Given the widespread endorsement and use of AAUP standards, Amicus AAUP urges this Court to consider them as relevant policy considerations in applying the common law balancing test under the Arizona Public Records Law.[7]

Academic freedom principles are embedded in the University of Arizona's policies and practices. As noted *supra*, the University Handbook for Appointed Personnel states: "'Professional and intellectual freedom' shall mean the right and responsibility to exercise judgment within the standards of the postdoctoral scholar's discipline. Professional and intellectual freedom is defined as 'academic freedom' for those employees involved in teaching and/or research." [8] In 2009, the University of Arizona Faculty Senate approved a definition of academic freedom, which states, in part: "Academic freedom is one of the primary ideals upon which

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[7] In the case at bar, both parties have cited AAUP principles as relevant to applying the Arizona Public Records Law. *See, Petitioner's Opening Brief in the Superior Court*, at 38; *Respondents' Opening Memorandum in the Superior Court*, at 31; *Respondents/Appellees' Answering Brief in the Court of Appeals*, at 31-32, 56.

[8] http://hr.arizona.edu/book/export/html/1570

the University of Arizona was founded and continues to be a core value. The major premise of academic freedom is that open inquiry and expression by faculty and students is essential to the University's mission." [9] Prior to this action by the Faculty Senate, the University of Arizona Committee on Academic Freedom and Tenure had been guided by the AAUP 1940 Statement of Principles on Academic Freedom and Tenure, which are consistent with the Faculty Senate's adopted formal definition.[10]

The University of Arizona Faculty Senate's definition of academic freedom includes a provision stating: "Academic freedom protects faculty from any and all arbitrary interferences with their ability to carry out their missions in research, teaching, service and outreach." Under some circumstances, public records requests will interfere with faculty ability to carry out their research missions. The AAUP 1996 Report on Access to University Records, addressing issues of public access to university records, recommends the use of a balancing test to deal with such concerns:

> While access confers benefits, it also carries costs and potential dangers, many of which apply with special force to an academic community by virtue of its essential, perhaps unique, mission to search for and disseminate truth by wide-ranging exploration of inchoate ideas and hypotheses, some of which may be seen as

[9] Alexis Blue, *Faculty Senate Defines 'Academic Freedom,"* UA@Work (Sept. 16, 2009), http://uaatwork.arizona.edu/lqp/faculty-senate-defines-academic-freedom
[10] *Id*.

> dangerous by others in the society. Sound policy requires a balancing of the benefits and costs of open access…. Among the interests served by restrictions on access to university documents are…[t]he need to create and preserve a climate of academic freedom in the planning and conduct of research, free from harassment, public and political pressure, or premature disclosure of research in process.

Academe, Vol. 83, No. 1 (Jan. - Feb., 1997), at 45. The AAUP Report advises that balancing in each case should consider "the nature of the document requested, the requester's need to know, and the breadth of disclosure to be made." *Id.* at 46.

B. Requiring Public Access to Academic Researchers' Prepublication Communications, Notes, Drafts, and Other Unpublished Academic Materials Would Result in a Chilling Effect on Academic Freedom and Privacy.

Requiring the production of emails or other materials containing "prepublication critical analysis of scientific work, unpublished data and analysis, unpublished research and its results, as well as drafts and commentary" will have a strong chilling effect on intellectual debate among researchers and scientists. Academics expect that *published* research methods, data, and results will be subject to public disclosure, but exposing preliminary thoughts, hypotheses and deliberations to the public eye would inhibit researchers from speaking freely with colleagues, with no discernible countervailing benefit.

Applying a balancing test similar to the Arizona state court test, a California state appellate court held that prepublication research communications, including notes, working papers, and raw data, were not subject to disclosure under the

California Public Records Act (which was modeled after the federal Freedom of Information Act). *Humane Society of the United States v. Superior Court of Yolo County*, 214 Cal. App. 4th 1233, 155 (Cal. App. 3d 2013). "Weighing the negative impact on the academic research process in this case and the resulting diminution in the quality and quantity of future studies from which the public can benefit, we conclude that the public interests on the nondisclosure side of the balance here clearly outweigh the public interests on the disclosure side." *Id.* at 125.

The Seventh Circuit emphasized "respondents' interest in academic freedom" in refusing to enforce a subpoena seeking disclosure of notes, working papers, and raw data related to ongoing scientific studies. The court concluded, "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 Chemical Co. v. Allen*, 672 F.2d 1262, 1276 (7th Cir. 1982) (*quoting Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring)).

Consistent with the concerns expressed by the courts, the AAUP 1996 Report on Access to University Records emphasizes that determining the limits on public access to records should include "considerations of privacy, academic freedom, and the desirable insulation of the university from outside pressures, as

well as considerations of efficient operation of the educational enterprise." *Academe*, Vol. 83, No. 1, at 47. Of particular relevance to the case at bar, the AAUP Report recommends "a strong or even compelling presumption against access" by outside requesters to university documents "with respect to individual privacy rights; the personal notes and files of teachers and scholars; and proposed and ongoing research, where the dangers of external pressures and publicity can be fatal to the necessary climate of academic freedom." *Id.*

An AAUP 2014 Report on Academic Freedom in Electronic Communications emphasizes such privacy rights against intrusive outside requests for access to electronic communications. The Report warns, "Allowing fleeting, often casual e-mail exchanges among scholars to be opened to inspection by groups bent on political attack implicates both privacy and academic freedom concerns." *Id.* at 13.[11] As the Report explains, protecting privacy in electronic communications is essential to the individual rights of faculty members and more broadly protects "group or associational privacy…important to academic freedom and to ensuring a culture of trust at an institution." *Id.* at 15.

The chilling effects on academic freedom are not speculative. For example, in a study of National Institutes of Health (NIH) grant recipients whose research

[11] http://www.aaup.org/report/academic-freedom-and-electronic-communications-2014

was questioned in congressional hearings, over half of the researchers who responded to the study reported self-censorship conduct. "Over half 'cleansed' grant applications of controversial language, but many also reframed studies, removed research topics from their agendas, and, in a few cases, changed their jobs." Joanna Kempner, *The Chilling Effect: How Do Researchers React to Controversy?*, 5 PLoS Med. 1571, 1576 (2008).[12] Testifying before the House of Representatives Select Committee on Energy Independence and Global Warming, research scientist Dr. Benjamin D. Santer, described the negative effects of being targeted because of his climate science research:

> 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. I would not need to be concerned about the safety of my family.
>
> 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.

Climate Science in the Political Arena, *Hearing Before the H. Select Comm. on Energy Independence and Global Warming*, 111th Cong. 25-27 (2010) (statement of Benjamin D. Santer, research scientist, in the program for Climate Model Diagnosis and Intercomparison at Lawrence Livermore National Labs). S*ee also* Rachel Levinson-Waldman, *Academic Freedom and the Public's Right to Know:*

[12] http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2586361

How to Counter the Chilling Effect of FOIA Requests on Scholarship, American Constitution Society Issue Brief (Sept. 2011), at 5-7 (highlighting chilling impact of broad FOIA requests and disclosure demands).

In contrast to the demonstrable harm to academic freedom and university functions, E&E has offered only speculative reasons for its burdensome and intrusive records request, claiming it needs the materials "to supplement peer review," to participate in "[p]olicy debate," to police adherence to "scientific principles" and ethics, and "for taxpayer scrutiny of government employees." *Petitioner's Opening Brief in the Superior Court*, at 22, 23, 24, 25, 30, 46. Here, the "public's interest in ensuring [academic freedom, privacy, and the quality of its universities] is more compelling than its interest in, or need to know" the contents of Professor Hughes' and Professor Overpeck's emails and internal deliberative research materials. *ABOR v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 258 (Ariz. 1991).[13]

[13] A.R.S. §15-1640(A)(1)(d) also provides an exemption from disclosure of the material requested by Petitioner/Appellant E&E. Any limits placed on this subsection (A) exemption by A.R.S. 15-1640(C) concerning disclosure of information after publication do not apply to E&E's request for records for the reasons discussed in Respondents' Opening Memorandum in the Superior Court, at 35-40 and Respondents/Appellees' Answering Brief in the Court of Appeals, at 48-53. Further, A.R.S. 15-1640(C) does not limit the common law balancing test used to weigh the state's interest in non-disclosure of public records under A.R.S. §39-121.

C. E&E's Public Records Requests for Academic Researchers' Prepublication Communications, Notes, Drafts, and Other Unpublished Academic Research Materials are Unduly Burdensome and Harassing.

The Arizona Supreme Court has held that "[p]ublic records requests that are unduly burdensome or harassing…may be refused based on concerns of privacy, confidentiality, or the best interests of the state." *Lake v. City of Phoenix*, 222 Ariz. 547, 551 (2009). The AAUP 1996 Report on Access to University Records, *supra*, addressing issues of public access to university records echoes these concerns, advising that balancing in each case should include consideration of "the breadth of disclosure to be made." *Academe*, Vol. 83, No. 1 (Jan. - Feb., 1997), at 46. The Report further identifies "interests served by restrictions on access to university documents" as including "[t]he need to create and preserve a climate of academic freedom in the planning and conduct of research, free from harassment, public and political pressure, or premature disclosure of research in process." *Id.*at 45.

As the Superior Court found, AzBOR presented "an abundance of supporting evidence," for its position that compelled production of these documents "would have a chilling effect on the ability and likelihood of professors and scientists engaging in frank exchanges of ideas and information." Superior Court ruling, at 3-4. E&E's requests for emails and other materials are particularly

burdensome due to their overly broad scope, which exacerbates the chilling effect on academic freedom. E&E's requests span a total of 13 years, from 1999 to 2012, requiring hundreds of hours by professors and other university personnel to cull through more than 100,000 pages of email and attachments to identify the emails that were responsive to the request and to distinguish those that could be properly disclosed and withheld.

The chilling effect on the exercise of academic freedom is sufficient to demonstrate the private and public harm that would result from compelling disclosure of the emails containing prepublication academic research materials, unpublished data and analysis, unpublished research and results, drafts and commentary. Additionally, E&E's nationwide anti-climate science campaign, including overly broad and intrusive public records requests, has created harassing and intimidating conditions that interfere with the scientists' ability to engage in academic research. E&E's overly broad and intrusive records requests to faculty in universities around the country constitute a campaign of harassment and intimidation against climate scientists that has severe chilling effects on academic freedom of public university faculty and discourages collaboration between public university researchers and their colleagues in US private universities and in universities internationally. Regardless of the outcome of such litigation, E&E vows to "keep peppering universities around the country with similar requests

under state open records laws." *Report on Research Compliance: Group to Request Rehearing in U.Va. Case, Expand Pursuit of Researchers' emails*, http://eelegal.org/?p=2958.

D. Intrusive Requests for University Records Place Public Universities at a Disadvantage and Harm the State's Interest in Recruiting and Retaining Excellent Scholars in Public Universities.

A vibrant and flourishing academic research program depends on academic freedom to pursue controversial research agendas, freely communicate with research colleagues, and build well-functioning research teams. Overly intrusive public records requests, however, place public universities at a significant disadvantage in building research programs and recruiting and retaining faculty. The possibility of being faced with burdensome, harassing, and intrusive public records requests for internal research notes and emails will discourage open communication among researchers at public universities and between researchers at public and private universities. Private university researchers will be reluctant or unwilling to work on research projects with public university colleagues. The chilling effect on research activities will discourage faculty from seeking, accepting, or staying in positions at public universities.

These potential harms led the Virginia Supreme Court to find a broad statutory exemption for academic research under the state freedom of information law "to protect public universities and colleges from being placed at a competitive

disadvantage relative to private universities and colleges." *American Tradition Institute v. University of Virginia*, 287 Va. 330, 342 (2014). As the court explains, compelling disclosure of academic research creates "a broader notion of competitive disadvantage" that "implicates not only financial injury, but also 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." *Id.*

While the Virginia Supreme Court was interpreting a statutory exemption for academic research, it relied on policy concerns relevant to this Court's application of the common law balancing test under the Arizona Public Records Law. As the Virginia Supreme Court stated, "[W]e do not attribute to the General Assembly an intention to disadvantage the Commonwealth's public universities in comparison to private colleges and universities…." *Id*. This Court could similarly find that the Arizona legislature did not intend to disadvantage its public universities in recruiting and retaining academic researchers.

In weighing the State's interest in recruiting and retaining excellent faculty, this Court can recognize the importance to the State of faculty expertise. The AAUP 1915 Declaration of Principles speaks eloquently of academic freedom as enabling faculty to contribute to the public good of the community:

> [One] function of the modern university is to develop experts for the use of the community. If there is one thing that distinguishes the more

> recent developments of democracy, it is the recognition by legislators of the inherent complexities of economic, social, and political life, and the difficulty of solving problems of technical adjustment without technical knowledge. The recognition of this fact has led to a continually greater demand for the aid of experts in these subjects, to advise both legislators and administrators…. It is obvious that here again the scholar must be absolutely free not only to pursue his investigations but to declare the results of his researches, no matter where they may lead him or to what extent they may come into conflict with accepted opinion.

E. The Peer Review Process and University Ethics Policies Expand Public Access to a Broad Range of Academic Research Materials and Promote Research Integrity.

The Arizona Supreme Court has found that under some circumstances, the state's best interest "is more compelling than [the public's] interest in, or need to know" the contents of requested public records. *ABOR v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 258 (1991). In requests for prepublication communications and other unpublished academic research materials, this factor of the "need to know" may be applied in the balancing test to consider whether other means are equal or even better in protecting the right to public disclosure and the best interests of the state. The academic profession's peer review process and universities' institutional research integrity systems promote broad public access to research-related information and safeguard the state's interests in high ethical standards of research. These systems ensure the honesty and quality of academic scholarship and diminish the need for disclosure through public records requests.

Academic research submitted for publication undergoes extensive peer review to evaluate whether the quality of the research meets the standards of the academic discipline. Publication of research methods, data, and results places a vast amount of research material in the public domain of journals, books, or other publication venues. This provides scholars and the public with access to data needed to test, evaluate, confirm, critique, or contest the validity of the research methods and findings. In holding that the public interest in nondisclosure outweighed the public interest in disclosure of prepublication research communications, the California Court of Appeals relied on information contained in the published research report, which "states its methodology and contains facts from which its conclusions can be tested [and which is] exposed to extensive peer review and public scrutiny that assure objectivity." *Humane Society of the United States v. Superior Court of Yolo County*, 214 Cal. App. 4th 1233, 1268 (Cal. App. 3d 2013). The court concluded, "Here, given the public interest in the quality and quantity of academic research…this alternative to ensuring sound methodology serves to diminish the need for disclosure." *Id.*

Progress in science rests upon the robust give-and-take in the scientific literature, a rigorous process of testing the validity of propositions, data, and conclusions. This peer review—not the forced public disclosure of unpublished data and research or private communications among academics and researchers—is

what ensures the honesty and quality of academic scholarship and is central to the professional norms and ethics of the university. "As colleagues, professors have obligations that derive from common membership in the community of scholars. Professors…respect and defend the free inquiry of associates, even when it leads to findings and conclusions that differ from their own." *AAUP Statement of Professional Ethics* (1966, 1987, 2009).[14] These norms are protected through the peer review process and enforcement of professional standards and ethics within each university.

In its argument to the trial court, E&E incorrectly asserted that the AAUP Statement of Professional Ethics supports its requests for collegial academic emails and internal deliberative materials. *See, Petitioner's Opening Brief in the Superior Court*, at 38; *Petitioner's Reply Brief in the Superior Court*, at 26-27. To the contrary, the AAUP Statement of Professional Ethics makes clear that professional ethics are best protected through enforcement within each university. "In the academic profession the individual institution of higher learning provides this assurance [of the integrity of members of the profession] and so should normally handle questions concerning propriety of conduct within its own framework by reference to a faculty group." *Id.* The Statement goes on to provide additional routes for enforcement of ethical standards by the academic profession, itself,

[14] http://www.aaup.org/report/statement-professional-ethics

stating that the AAUP "stands ready… to inquire into complaints when local consideration is impossible or inappropriate." *Id.* *See also, Ony, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 497 (2d Cir. 2013) (finding that "courts are ill-equipped to undertake to referee such controversies [about novel areas of scientific research]" and that "the trial of ideas [should] play[] out in the pages of peer-reviewed journals, and the scientific public sits as the jury").

University of Arizona policy demonstrates strong institutional commitment to ethics standards, with robust university requirements for disclosure, review, and management of actual or potential conflicts of interests[15] and extensive processes for investigating allegations of research misconduct.[16] These systems provide highly effective policies and procedures to protect research quality and the integrity of the research process. The existence of these institutional systems that protect and promote research quality and integrity should be considered in weighing the interests for and against public disclosure, particularly given the speculative nature of E&E's claims that it needs the records "to supplement peer review" and to police adherence to "scientific principles" and ethics. The

[15] University of Arizona Office for the Responsible Conduct of Research, < https://www.orcr.arizona.edu/ >; "Individual Conflict of Interest in Research Policy," <https://orcr.arizona.edu/coi/individualcoi>

[16] University of Arizona, "Policy and Procedures for Investigations of Misconduct in Scholarly, Creative, and Research Activities," http://hr.arizona.edu/policy/appointed-personnel/2.13.09

University properly exercised its discretion to determine that the interests in protecting academic freedom and the best interests of the state outweigh the general interest in disclosure.

CONCLUSION

For the foregoing reasons, Amicus AAUP respectfully requests that this Court find that Respondents/Appellees' decision to withhold records was not "arbitrary and capricious or an abuse of discretion."

RESPECTFULLY SUBMITTED this 26th day of October, 2015.

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