IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 130934

THE AMERICAN TRADITION INSTITUTE AND THE HONORABLE DELEGATE ROBERT MARSHALL,

Appellants,

v.

RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA AND MICHAEL E. MANN,

Appellees.

BRIEF FOR AMICI CURIAE THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND UNION OF CONCERNED SCIENTISTS IN SUPPORT OF APPELLEES

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INTEREST OF AMICI 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 Virginia 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 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). Since 1987, AAUP has also addressed the threat to academic freedom posed by overly

broad requests made to public colleges and universities under freedom-of-information laws.

The Union of Concerned Scientists (UCS) is the leading U.S. non-profit organization dedicated to the use of science to foster a healthy environment and a safe world. UCS combines independent scientific research with citizen action in order 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.

Amici have an interest in ensuring both that the public's right to obtain certain information is properly balanced against professors' and other scholars' First Amendment right to academic freedom, and that freedom-of-information laws are not misused in order to chill academic freedom.[1]

STATEMENT OF THE CASE

On January 6, 2011, appellants the American Tradition Institute and the Honorable Robert Marshall (hereafter referred to collectively as ATI) submitted a request under the Freedom of Information Act, Va. Code § 2.2-3700 *et seq.* (the Act or FOIA) seeking to compel appellee the Rector and Visitors of University of Virginia (the University) to produce certain materials

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[1] The written consent of both parties accompanies this brief. *See* Va. S. Ct. R. 5:30.

that appellee Dr. Michael Mann, a former University of Virginia professor and scientist who studies climate change, "produced and/or received while working for the University of Virginia and otherwise while using its facilities and resources." Request at 1. In response to the request, the University furnished some responsive records but declined to produce others, emphasizing among other reasons that providing the requested records would chill academic inquiry and interfere with academic debate.

On May 16, 2011, ATI filed a verified petition for mandamus and injunctive relief with the circuit court seeking, among other things, an order requiring the University to release the requested documents. The circuit court denied the petition, holding that all of the records sought by ATI were lawfully withheld from disclosure under FOIA. The court found that most of the records were exempt under Code § 2.2-3705.4(4), which covers:

> Data, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institution's financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such data, records or information has not been publicly released, published, copyrighted or patented.

The court recognized that this exemption stemmed from the concept of academic freedom and the interest in protecting research. Documents

involving preliminary research were worthy of protection, the court explained, because they involve the "churn of intellectual debate" and the frequent review and re-review of data and information that is typical during the early research process.

On September 23, 2013, this Court granted ATI's petition for appeal.

STATEMENT OF FACTS

Dr. Mann, now on the faculty of The Pennsylvania State University, is best known as the climate scientist who in 1998 and 1999 co-developed a "hockey stick" model graph that showed a slight cooling trend from 1,000 A.D. onward, with global temperatures rising in the twentieth century.

ATI's FOIA request—which is almost identical to a civil investigative demand served by the Virginia Attorney General that was set aside—seeks an exceedingly broad range of documents relating to Dr. Mann's academic work.[2] The request seeks (1) "all documents, drafts, things or data ...generated as a result of any activities conducted pursuant to the Grants," request 5 at 10; (2) "all computer algorithms, programs, source code or the like created or edited by Dr. Michael Mann ... from January 1,

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[2] This Court rejected the Attorney General's efforts to obtain this information, holding that the University is not a "person" within the meaning of the Fraud Against Taxpayers Act and thus does not come within the purview of the Attorney General's subpoena power under that statute. *See Cuccinelli v. Rector & Visitors of Univ. of Va.*, 283 Va. 420, 432 (2012).

1999, to the present" used in Dr. Mann's "day to day research or to produce any work product or result," request 9 at 10-11; (3) "[a]ny data, information or databases, structured or unstructured information, source code and formulas ... that was used in any way in connection with the application for or as a result of any of the Grants," request 10 at 11; and (4) Dr. Mann's exchanges with other scientists, including 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; and any documents that refer to any of the 39 named individuals, requests 1, 2, and 3 at 7-9. These requests, moreover, are not limited to Dr. Mann's grants or his work while at the University.

Approximately 32,269 e-mail messages and 1,793 additional documents were identified as potentially responsive to the request. *See* Ex. 1 to Memo. in Opp. to Verified Pet. (May 24, 2011).

ATI's verified petition explains that it seeks documents and e-mails associated with Dr. Mann's academic work on climate change, and asserts that that work has been influential. The petition notes (¶ 58) that Dr. Mann co-authored two articles published in 1998 and 1999—prior to his arrival at the University—that "gained prominence in the 'global warming' and related policy communities." According to ATI, "[t]hese publications revised what

had previously been accepted as the historical temperature record of the past approximately 1,000 years, ... and were elevated by groups like the United Nations Intergovernmental Panel on Climate Change (IPCC) in its 2001 'Third Assessment Report.'" *Id.* ¶ 59. According to ATI, Dr. Mann's published works "have driven local, national and international policy decisions." Reflecting an ideological perspective opposed to those policy decisions, ATI contends that they have "measurably increased the cost of living without any return on the quality of life." *Id.* ¶ 60.

Consistent with that point of view, and in an effort to justify the broad scope of the request, ATI asserts that compelling production "will open to public inspection the workings of a government employee, including the methods and means used to prepare scientific papers and reports that have been strongly criticized for technical errors." Pet. ¶ 63.

ATI has filed five similar requests targeting researchers at public universities, four in Texas and one in Arizona. *Climate science attack group turns sight on Texas professors*, The Institute for Southern Studies (July 19, 2012);[3] *ATI Files Suit To Compel the University of Arizona To Produce Records Related to So-Called "Hockey Stick" Global Warming*

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[3] *Available at* http://www.southernstudies.org/2012/07/climate-science-attack-group-turns-sights-on-texas-professors.html.

Research (Sept. 10, 2013).[4] 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).[5]

STANDARD OF REVIEW

The circuit court's interpretation of FOIA is reviewed *de novo*. *See Hill v. Fairfax Cnty. Sch. Bd.*, 284 Va. 306, 313 (2012). Its findings of fact "can be overturned only if plainly wrong or without support in the evidence." *Id.*

ARGUMENT

I. JUDICIAL REVIEW OF FOIA REQUESTS SHOULD INCLUDE CONSIDERATION OF THE FIRST AMENDMENT'S PROTECTION OF ACADEMIC FREEDOM

The circuit court correctly concluded here that the plain text of Code § 2.2-3705.4(4) covers most of the documents in ATI's request.[6] Indeed, only a severely narrow (if not flatly atextual) reading of this provision could

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[4] *Available at* http://eelegal.org/?p=1837.

[5] *Available at* http://www.southernstudies.org/2011/10/special-investigation-whos-behind-the-information-attacks-on-climate-scientists.html.

[6] Amici also submit that the circuit court correctly awarded costs to the University for the extensive search and review effort undertaken in response to ATI's broad request.

take the requested documents outside its scope. There is no basis to adopt such a reading. To the contrary, the natural reading given by the court below is required by the First Amendment to the U.S. Constitution.

Courts in the Commonwealth and elsewhere have long made clear that the First Amendment's protections encompass academic freedom. That does not mean that academic institutions or their faculty and staff are immune or exempt from responding to FOIA requests. But when FOIA requests target information that implicates principles of academic freedom, courts must balance the public's right to disclosure of such information against the significant chilling effects that will result from forcing scholars and institutions into excessive disclosure of internal deliberative materials.

A. The First Amendment Protects Academic Freedom And Scholarly Research From Undue Intrusion

"Academic 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). Starting in the late 1950s, in response to threatened incursions by state legislatures and attorneys general into the operations of universities, the U.S. Supreme Court accorded special attention to academic freedom, including it within the free speech protections of the First Amendment. *See Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (plurality opinion).

In *Sweezy*, a professor at the University of New Hampshire was interrogated by that state's Attorney General about his classroom lectures and political affiliations. *See* 354 U.S. at 240. After refusing to answer specific questions before a judge, Professor Sweezy was found in contempt and incarcerated. *Id.* at 244-245. A plurality of the Supreme Court held that Professor Sweezy's "liberties in the areas of academic freedom and political expression" had been invaded and warned that these are areas into which "government should be extremely reticent to tread." *Id.* at 250. Recognizing the importance of preserving academic freedom from undue intrusion, the plurality stated, in language highly relevant here, that:

> 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.

Id.; *see also id.* at 262 (Frankfurter, J., concurring) ("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."). The Court has reiterated these points many times since.[7]

The Commonwealth's courts have recognized these same principles. In one case, for example, a circuit court described academic freedom as "basic to our society." *Corr v. Mazur*, No. LL-3250-4, 1988 WL 619395, at *2 (Va. Cir. Ct. Nov. 22, 1988); *see also 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). The Fourth Circuit has likewise emphasized the First Amendment protections afforded to scholarship. *See Adams v. Trustees of Univ. of N.C.-Wilmington*, 640 F.3d 550, 557, 561-564 (4th Cir. 2011) (noting that speech involving scholarship and

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[7] *See Keyishian,* 385 U.S. at 603 ("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"); *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" was 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."); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

teaching implicated First Amendment protection afforded to academic freedom); *Neutron Inc. v. American Ass'n of Electrodiagnostic Medicine*, 48 F. App'x 42, 44 (4th Cir. 2002) (finding important, in a case involving the publication of an unfavorable product review in a medical journal, that "chilling the speech of the [appellee] in this instance would likely prevent all debate about such subjects from entering into the marketplace").

Indeed, as discussed at the outset, the principles of academic freedom are embodied in FOIA itself, which expressly exempts from disclosure a great deal of information related to scientific and educational research. *See* Va. Code Ann. § 2.2-3705.4(4), *quoted supra* p.3. The circuit court here correctly found that this exemption is grounded in the interest of protecting academic freedom and non-public scholarly research from premature disclosure.[8]

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[8] This exemption also makes Virginia a "Research Encouraging" state. *See* Christopher S. Reed, *Stuck in the Sunshine: The Implications of Public Records Statutes on State University Research and Technology Transfer* 8, 11 (2004), *available at* http://static.squarespace.com/static/51ffb089e4b0bfd6927d1e23/t/5282e777e4b05ddf097868ca/1384310647194/reed-sunshine.pdf (as of 2004, eighteen states, including Virginia, had FOIA statutes protecting academic work product from disclosure).

B. In Considering FOIA Requests For Academic Materials, The Public's Right To Information Must Be Balanced Against The Risk Of Chilling Effects Posed By Such Requests

Amici fully endorse the University's obligation to respond appropriately to public-records requests, and recognize that freedom-of-information laws are critical for keeping public institutions and their employees accountable. But the public's right to information—just like a civil litigant's right to discover evidence or the government's right to investigate and prosecute crime—must be balanced against other important interests, including the constitutional interest, discussed in the previous section, in preserving scientists' ability to freely conduct research and correspond with other researchers in a quest for new discoveries and understanding.

Such a balancing approach is nothing new; it is often taken by courts when considering subpoenas targeted to academic research and debate. 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 important First Amendment values are at stake" and recognizing that "compelling the disclosure of ... research materials ... denigrat[es] a fundamental First Amendment value," the court of appeals

explained 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, 716-717.

Similarly, in *Dow Chemical Co. v. Allen*, 672 F.2d 1262 (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 studies, *see id.* at 1278-1279. The court of appeals emphasized that "respondents' interest in academic freedom may properly figure into the legal calculation of whether forced disclosure would be reasonable" and that when a subpoena intrudes into "that sphere of university life," the "interests of government must be strong and the extent of intrusion carefully limited." *Id.* at 1274-1275, 1276-1277. Other courts have undertaken similar balancing. *See Humane Society of the United States v. Superior Court of Yolo County*, 155 Cal. Rptr. 3d 93, 118 (Cal. Ct. App. 2013) (finding that the "chilling effect disclosing pre-publication research communications could have on academic research" outweighed the public interest in disclosure).[9]

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[9] *See also In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liability Litig.*, 249 F.R.D. 8, 14 (D. Mass. 2008) (applying balancing test and explaining, in holding publisher entitled to a protective order against

The same balancing approach has been applied in the FOIA context. For example, in *The Humane Society of the United States v. Superior Court of Yolo County*, 155 Cal. Rptr. 3d 93 (Cal Ct. App. 2013), the court held that pre-publication 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), *see id.* at 110, 127. The court reached this conclusion by weighing the impact that disclosure would have on academic research against the public's interest in the communications. *See id.* at 118-123. Similarly, in *Osborn v. Board of Regents of Univ. of Wis. Sys.*, 647 N.W.2d

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subpoena, that disclosure of peer review comments would be harmful to "scholarly missions, and by extension harmful to the medical and scientific communities, and to the public interest"); *accord In re R.J. Reynolds Tobacco Co.*, 518 N.Y.S.2d 729, 732 (N.Y. Sup. Ct. 1987); *Eisen v. Regents of Univ. of Cal.*, 269 Cal. App. 2d 696, 706 (Cal. Ct. App. 1969); *Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154, 1169 (W.D. Wash. 2010); *Lubin v. Agora, Inc.*, 882 A.2d 833, 842 (Md. 2005); *In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570, 573 (W.D. Wis. 2007); *SEC v. Hirsch Org., Inc.*, No. M-18-304, 1982 WL 1343, at *1 (S.D.N.Y. Oct. 25, 1982).

Indeed, courts have held that First Amendment protections are to be weighed in the balance even in the context of a criminal investigation. *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' " (citation omitted)); *Branzburg v. Hayes*, 408 U.S. 665, 724 (1972) (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.").

158 (Wis. 2002), the court, though ultimately holding that the relevant documents had to be released, observed that "[t]he right to inspect ... is not absolute" and that the custodian must "weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection," *id.* at 166 (internal quotation marks omitted); *see also Herald Co., Inc. v. East Mich. Univ. Bd. of Regents*, 693 N.W. 2d 850, 860 (Mich. Ct. App. 2005) ("[T]he goal of both the FOIA and its exemptions is good government, not disclosure for disclosure's sake.").

Courts have similarly applied FOIA exemptions outside the academic context to shield draft documents and preliminary proposals. For example, in *City of Virginia Beach v. U.S. Department of Commerce*, 995 F.2d 1247 (4th Cir. 1993), the federal government sought to withhold documents under exemption 5 of FOIA, also known as the deliberative-process privilege. That exemption permits an agency to withhold "'inter-agency or intra-agency memorand[a] which would not be available by law to a party other than an agency in litigation with the agency.'" *Id.* at 1251 (quoting 5 U.S.C. § 552(b)(5)). The exemption protects "recommendations, draft documents, proposals, suggestions, and other subjective documents" that reflect the writer's personal opinions rather than the broader policy of the

agency. *Id.* at 1253. In holding that several of the documents were protected, the Fourth Circuit balanced the city's interest in obtaining the documents against the danger of disclosure. The court recognized that disclosure would have a "chilling effect" if "officials [were] to be judged not on the basis of their final decisions, but for matters they considered before making up their minds." *Id.* (internal quotation marks omitted); *see also National Labor Relations Bd. v. Sears, Roebuck & Co.,* 421 U.S. 132, 159 (1975).

This Court itself has taken an analogous balancing approach in connection with other First Amendment interests, such as the reporter's privilege. In *Brown v. Commonwealth*, 214 Va. 755 (1974), the 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 confront the prosecution's witnesses, *id.* at 757-758. This 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. Am. 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)).

As courts have recognized, the burden on First Amendment interests that FOIA requests create is particularly problematic when the requests are not narrowly tailored. 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 [a doctor] 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 (La. Ct. App. 1998), the court affirmed the trial court's rejection of a subpoena seeking production of "all raw data including computer tapes and/or disks and supporting documentation" in connection with research relating to causes of cancer, *id.* at 666. The appellate court recognized that

such "[b]lanket subpoenas ... may deter scientists from engaging in research in particular fields." *Id.* at 668.

The First Amendment interests just discussed counsel in favor of a broad construction of FOIA's exception for academic research and scholarship—an exception that covers most, if not all, of the materials at issue here. *See* Va. Code § 2.2-3705.4(4). The General Assembly has demonstrated a clear desire to protect academic freedom by excluding certain "educational records and certain records of educational institutions" from FOIA's reach. To the extent this Court concludes that Dr. Mann's correspondence with scientists concerning academic research and debate are "public records" that are not otherwise protected by exclusions to FOIA, § 2.2-3705.4(4) should be read broadly to cover that correspondence, thereby avoiding the constitutional questions that forced disclosure under FOIA would raise. *Cf. Clark v. Martinez*, 543 U.S. 371, 380-381 (2005) (interpreting statute to avoid constitutional questions).[10]

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[10] Reading FOIA to protect the types of materials sought in the request, including correspondence concerning scientific research, is also consistent with a federal regulation that excludes similar materials from disclosure by certain recipients of federal grants. *See* 64 Fed. Reg. 43,786, 43,787 (Aug. 11, 1999). In finalizing this exclusion, the Office of Management and Budget recognized that:

> As in many other fields of endeavor, scientists need a private setting where they are free to deliberate over, develop, and pursue alternative approaches. When a scientist completes

II. THE NEED FOR PUBLIC DISCLOSURE HERE IS OUTWEIGHED BY THE SIGNIFICANT CHILL ON ACADEMIC FREEDOM THAT DISCLOSURE OF THE REQUESTED MATERIALS WOULD HAVE

ATI's sweeping request, if allowed, would have a severe chilling effect on scientists and other scholars and researchers at public institutions of higher learning throughout the Commonwealth (and perhaps beyond). Put simply, Dr. Mann is a scientist and an academic, not a policy maker. And his unpublished research and internal communications with scientists are not part of any policy making function. If ATI is interested in how Dr. Mann's scholarship affects policy, it should direct FOIA requests to the policy makers.[11]

> research, he or she publishes the results for the scrutiny of other scientists and the community at large. In light of this traditional scientific process, OMB does not construe the statute as requiring scientists to make research data publicly available while the research is still ongoing, because that would force scientists to "operate in fishbowl" and to release information prematurely.

Id.

[11] This is not to say that faculty members at public colleges and universities are outside the purview of FOIA laws. But they are manifestly different from other public employees. "Faculty members are hired not to pursue a particular governmental agenda, but instead ... to engage in creative and innovative scholarship, research and teaching." Rachel Levinson-Waldman, *Academic Freedom and the Public's Right to Know*, ACS Issue Brief, at 19 (2011); *see also Garcetti v. Ceballos*, 547 U.S. 410, 437 (2006) (Souter, J., dissenting) ("Some public employees are hired to 'promote a particular policy' by broadcasting a particular message set by

As the circuit court here correctly noted, progress in science rests upon the "churn of intellectual debate," i.e., the robust give-and-take in the scientific literature, a rigorous process testing the validity of propositions, data, and conclusions. Many researchers, including ones who have critically examined aspects of Dr. Mann's work, have weighed in on the scholarly debate. 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. *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."); *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

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the government, but not everyone working for the government, after all, is hired to speak from a government manifesto.").

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").[12]

Requiring the production of correspondence with other academics will have a particularly strong chilling effect on intellectual debate among researchers and scientists. Academics expect that *published* research will be subject to public disclosure, but the documents that ATI seeks would include initial thoughts, suspicions, and hypotheses. Exposing such preliminary thoughts and deliberations to the public eye would inhibit researchers from speaking freely with colleagues, with no discernible countervailing benefit—a concern emphasized by the Seventh Circuit in the context of a subpoena seeking disclosure of scientific research:

> [E]nforcement of the subpoenas would leave the 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

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[12] Analogous principles arise in defamation suits based on controversial scientific statements. For example, in *Arthur v. Offit*, No. 09-1398, 2010 WL 883745 (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," *id.* at *4 The court also noted that "[c]ourts have a justifiable reticence about venturing into the thicket of scientific debate." *Id.* at *6. Similarly, the Second Circuit recently affirmed the dismissal of a defamation suit involving scientific statements published in a journal, explaining that in a "sufficiently novel area of research, propositions of empirical 'fact' advanced in the literature may be highly controversial and subject to rigorous debate," thereby making it difficult for a court to determine whether a statement was false. *Ony*, 720 F.3d at 497.

> 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)).[13]

These chilling effects are not speculative. One study, for example, found that over half of National Institutes of Health grant recipients whose research was questioned in congressional hearings subsequently engaged in self-censorship. *See* Joanna Kempner, *The Chilling Effect: How Do Researchers React to Controversy?*, 5 PLoS Med. 1571 (2008).[14] In particular, researchers "reframed studies, removed research topics from their agendas, and, in a few cases, changed their jobs." *Id.* at 1576; *see also Climate Science in the Political Arena, Hearing Before the H. Select*

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[13] The need to protect non-final work product, and concomitant deliberations, is one that is surely understandable to courts: Judges obviously expect that their issued opinions will be available to the public and frequently the subject of vigorous debate. But they surely do not expect that non-final drafts of their opinions will similarly be available, or that their communications with their law clerks or even other judges will be. *Cf. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) (noting "the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news").

[14] *Available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2586361.

Comm. on Energy Independence and Global Warming, 111th Cong. 25-27 (2010) (statement of Benjamin D. Santer, research scientist, Lawrence Livermore Nat'l Labs.) ("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."); Levinson-Waldman, *supra* n.10, at 5-7 (highlighting chilling impact of broad FOIA requests and disclosure demands).

ATI's effort to justify its intrusion into academic freedom by suggesting that Dr. Mann's research contains errors (Pet. ¶ 63) should be rejected. Dr. Mann and his colleagues long ago publicly disclosed their data and methods, and any errors they might have made do not constitute wrongdoing that warrant public disclosure. *See Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992) (upholding summary judgment for defendants and distinguishing between "wrongdoing" and "scientific errors"); *United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 734 (4th Cir. 2010) (distinguishing 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").[15]

To be clear, amici do not contend that ATI is barred from making any FOIA request directed to academic research materials. But ATI wishes to review years of Dr. Mann's research and scholarly interactions with other scientists not because there is any justified suspicion of nefarious activities, but because ATI "'hope[s] that something will turn up.'" *In re Grand Jury Subpoena*, 829 F.2d 1291, 1298 (4th Cir. 1987) (quoting *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 305 (1924)). The circuit court properly rejected such a fishing expedition, recognizing that it would have the strong potential to "direct the content of university discourse toward or away from particular subjects or points of view," *Univ. of Pa.*, 493 U.S. at 198, and would have a significant chilling effect on scientific and academic research

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[15] In any event, ATI's claims of scientific misconduct by Dr. Mann (and others) have been rebutted by several independent investigations, including independent university commissions in the United Kingdom and the U.S. National Academy of Sciences. One report, by the U.S. Environmental Protection Agency, concluded that there was no merit to the critics' claims, which "routinely misunderstood the scientific issues," reached "faulty scientific conclusions," "resorted to hyperbole," and "often cherry-pick language that creates the suggestion or appearance of impropriety, without looking deeper into the issues." *Scientists' 'Climategate' e-mails 'just discussions,'* BBC News Essex (Aug. 6, 2010), *available at* http://www.bbc.co.uk/news/uk-england-essex-10899538.

and debate, because "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust." *Sweezy*, 354 U.S. at 250 (plurality).

CONCLUSION

The circuit court's order should be affirmed.

Dated: December 13, 2013

Respectfully submitted,

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CERTIFICATE

Pursuant to Va. Sup. Ct. Rules 5:26, 5:28 & 5:30, I hereby certify that on December 13, 2013:

Fifteen printed copies of this brief have been transmitted by express mail and one electronic copy via electronic mail, for filing in the office of the Clerk of this Court.

This Brief for Amici Curiae in Support of Appellees complies with Rule 5:26 and the portion subject to Rule 5:26(b) does not exceed 50 pages.

By Agreement with counsel for the appellants and appellees, named below, the number of copies of this brief set forth below have been mailed to them:

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December 13, 2013

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ADDENDUM

WRITTEN CONSENT OF ALL COUNSEL

Pursuant to Va. Sup. Ct. Rule 5:30(a)(2)

The Free Market
Environmental Law Clinic

November 18, 2013

Hon. Paatricia L. Harrington, Clerk
Supreme Court of Virginia
P.O. Box 1315
100 North Ninth Street, 5th Floor
Richmond, VA 23219-1315

RE: The American Tradition Institute, et. al v. The Rector and Visitors of the University of Virginia, et al. – Record No. 130934

Dear Ms. Harrington:

All parties to the above referenced matter have received requests by multiple parties to allow them to file *amicus* briefs. The parties have conferred and agreed that no party would oppose an *amicus* brief request. I have so informed each organization seeking an allowance to so file. This letter confirms Appellants' position on the matter.

Sincerely,

David W. Schnare
Counsel for Appellants

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UNIVERSITY of VIRGINIA
OFFICE of the GENERAL COUNSEL

December 11, 2013

Via Electronic Mail

Hon. Patricia L. Harrington, Clerk
Supreme Court of Virginia
P.O. Box 1315
100 North Ninth Street, 5th Floor
Richmond, VA 23219-1315

RE: The American Tradition Institute and Robert Marshall v. The Rector and Visitors of the University of Virginia; Michael E. Mann
Record No. 130934

Dear Ms. Harrington:

Pursuant to Rule 5:30(b)(2), this will confirm that counsel for the Appellees, The Rector and Visitors of the University of Virginia and Dr. Michael Mann, consent to the filing of *amicus* briefs in this matter.

Thank you very much.

Sincerely,

R. C. Kast

Richard C. Kast
Associate General Counsel and
Special Assistant Attorney General

Enclosures

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