

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE

Defendant.

Case No. 1:15-cv-02088-CRC

**BRIEF OF CLIMATE SCIENCE LEGAL DEFENSE FUND, AMERICAN
METEOROLOGICAL SOCIETY, AND UNION OF CONCERNED SCIENTISTS
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT**

Ian Fein (Cal. Bar No. 281394)
ORRICK, HERRINGTON &
SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700

Kelsi Brown Corkran
(D.C. Bar No. 501157)
Counsel of Record
Benjamin Chagnon (D.C. Bar No. 1044746)
Shani S. Harmon (D.C. Bar No. 1020893)
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400
kcorkran@orrick.com

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

I, Kelsi Brown Corkran, counsel of record for *Amici Curiae* Climate Science Legal Defense Fund (CSLDF), American Meteorological Society (AMS), and Union of Concerned Scientists (UCS), certify that, to the best of my knowledge and belief, amici CSLDF, AMS, and UCS have no parent companies, subsidiaries, or affiliates with any outstanding securities in the hands of the public. Furthermore, CSLDF, AMS, and UCS are organized under Section 501(c)(3) of the Internal Revenue Code, and no publicly held company has a 10% or greater ownership interest in the organizations. These representations are made in order that judges of this Court may determine the need for recusal.

/s/ Kelsi Brown Corkran
Kelsi Brown Corkran
Counsel of Record for Amici Curiae

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI.....	1
INTRODUCTION	2
ARGUMENT	4
I. NOAA Has Withheld Only Privileged Correspondence And Preliminary Drafts Of Its Climate Science Paper	4
A. NOAA Publicly Released The Data And Methodology Behind Its Paper	4
B. Representative Smith Sought Privileged Communications From NOAA.....	6
C. Judicial Watch Requested The Same Privileged Materials Via FOIA	8
II. Public Records Laws Are Increasingly Being Misused To Pursue Privileged Correspondence And Research Materials Like Those At Issue Here.....	9
III. The Deliberative Process Privilege Appropriately Protects The Confidentiality Of Government Scientists’ Correspondence And Drafts.....	12
A. Protecting Drafts, Correspondence, And Peer Review Materials Allows An Uninhibited Exchange Of Ideas That Is Critical To The Scientific Process	13
B. Protecting Such Materials From Disclosure Also Helps Avoid Public Confusion.....	18
C. Protecting Such Materials Does Not Undermine Transparency	21
CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Am. Chem. Council, Inc. v. U.S. Dep’t of Health & Human Servs.</i> , 922 F. Supp. 2d 56 (D.D.C. 2013).....	22
* <i>Am Tradition Inst. v. Rector & Visitors of Univ. of Va.</i> , 756 S.E.2d 435 (Va. 2014).....	11, 16, 17
* <i>Chem. Mfrs. Ass’n v. Consumer Prod. Safety Comm’n</i> , 600 F. Supp. 114 (D.D.C. 1984).....	13, 14, 15, 22
<i>Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Homeland Sec.</i> , 648 F. Supp. 2d 152 (D.D.C. 2009).....	14
<i>Cleary, Gottlieb, Steen & Hamilton v. Dep’t of Health & Human Servs.</i> , 844 F. Supp. 770 (D.D.C. 1993).....	13, 18
<i>Coastal States Gas Corp. v. Dep’t of Energy</i> , 617 F.2d 854 (D.C. Cir. 1980).....	14
<i>Competitive Enter. Inst. v. Office of Sci. & Tech. Policy</i> , 161 F. Supp. 3d 120 (D.D.C. 2016).....	19
<i>Cuccinelli v. Rector & Visitors of Univ. of Va.</i> , 722 S.E.2d 626 (Va. 2012).....	10
<i>Dep’t of Interior v. Klamath Water Users Protective Ass’n</i> , 532 U.S. 1 (2001).....	14, 16
<i>Dow Jones & Co., Inc. v. Dep’t of Justice</i> , 917 F.2d 571 (D.C. Cir. 1990).....	16
<i>EPA v. Mink</i> , 410 U.S. 73 (1973).....	12
* <i>Formaldehyde Inst. v. Dep’t of Health and Human Servs.</i> , 889 F.2d 1118 (D.C. Cir. 1989).....	13, 15, 16, 17
<i>FPL Grp., Inc. v. IRS</i> , 698 F. Supp. 2d 66 (D.D.C. 2010).....	19
<i>Goodrich Corp. v. EPA</i> , 593 F. Supp. 2d 184 (D.D.C. 2009).....	13

**Highland Mining Co. v. W. Va. Univ. Sch. of Med.*,
774 S.E.2d 36 (W. Va. 2015).....11, 12, 13

**Hooker v. U.S. Dep’t of Health & Human Servs.*,
887 F. Supp. 2d 40 (D.D.C. 2012).....13, 16, 19

Horsehead Indus. v. EPA,
No. 94-1299, slip op. (D.D.C. Oct. 1, 1996).....14

Humane Soc’y v. Super. Ct. of Yolo Cnty.,
155 Cal. Rptr. 3d 93 (Cal. Ct. App. 2013).....14, 20

Judicial Watch, Inc. v. U.S. Dep’t of Justice,
306 F. Supp. 2d 58 (D.D.C. 2004).....19

Montrose Chemical Corp. v. Train,
491 F.2d 63 (D.C. Cir. 1974).....13, 14

NLRB v. Sears, Roebuck & Co.,
421 U.S. 132 (1975).....13, 14

Physicians Comm. for Responsible Med. v. Nat’l Insts. of Health,
326 F. Supp. 2d 19 (D.D.C. 2004).....23

Pies v. U.S. IRS,
668 F.2d 1350 (D.C. Cir. 1981).....19

Russell v. Dep’t of the Air Force,
682 F.2d 1045 (D.C. Cir. 1982).....12, 18

Sw. Ctr. for Biological Diversity v. USDA,
170 F. Supp. 2d 931 (D. Ariz. 2000).....22

ViroPharma Inc. v. Dep’t of Health & Human Servs.,
839 F. Supp. 2d 184 (D.D.C. 2012).....13

Wash. Research Project, Inc. v. Dep’t of Health, Educ. & Welfare,
504 F.2d 238 (D.C. Cir. 1974).....16

Weinstein v. U.S. Dep’t of Health & Human Servs.,
977 F. Supp. 41 (D.D.C. 1997).....13

Wolfe v. Dep’t of Health & Human Servs.,
839 F.2d 768 (D.C. Cir. 1988).....12, 14

Statutes

5 U.S.C. § 552(b)(5)2

5 U.S.C. § 552(b)(6)22

Regulations

*OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, 64 Fed. Reg. 54,926 (Oct. 8, 1999)22

Legislative Materials

Climate Science in the Political Arena: Hearing Before the H. Select Comm. on Energy Independence and Global Warming, 111th Cong. (2010)18

Other Authorities

Bala Rajaratnam et al., *Debunking the Climate Hiatus*, 133 Climatic Change 129 (Nov. 2015)24

Debunking Misinformation About Stolen Climate Emails In The “Climategate” Manufactured Controversy, Union of Concerned Scientists20, 21

Dianna G. Goldenson, *FOIA Exemption Five: Will It Protect Government Scientists From Unfair Intrusion?*, 29 B.C. Env'tl. Aff. L. Rev. 311 (2002)17

Donald Trump’s New York Times Interview: Full Transcript, N.Y. Times (Nov. 23, 2016)21

Editorial, *Closing the Climategate*, 468 Nature 345 (Nov. 18, 2010)21

Editorial, *Harassing Climate-Change Researchers*, Wash. Post, May 29, 201110

Jeff Tollefson, *US Science Agency Refuses Request for Climate Records*, Nature, Oct. 28, 20156

Jess Henig, *Some ‘Climategate’ Conclusions*, FactCheck.Org, Apr. 15, 201021

John C. Fyfe et al., *Making Sense of the Early-2000s Warming Slowdown*, 6 Nature Climate Change 224 (Feb. 2016)24

Justin Gillis & John Schwartz, *Deeper Ties to Corporate Cash for Doubtful Climate Researcher*, N.Y. Times, Feb. 21, 201523

Lamar Smith, *Letter to the Editor*, N.Y. Times, Dec. 9, 20156

Michael E. Mann et al., *Northern Hemisphere Temperatures During the Past Millenium: Inferences, Uncertainties, and Limitations*, 26 Geophysical Res. Letters 759 (1999)10

Michael Halpern & Michael Mann, Editorial, *Transparency Versus Harassment*,
 348 Sci. 479 (May 1, 2015)12

*Michael Halpern, *Freedom to Bully: How Laws Intended to Free Information Are
 Used to Harass Researchers*, Ctr. for Sci. & Democracy,
 Union of Concerned Scientists (Feb. 2015).....9, 11, 20

*Myths vs. Facts: Denial of Petitions for Reconsideration of the Endangerment and
 Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the
 Clean Air Act*, U.S. Env'tl. Prot. Agency.....20, 21

Press Release, Judicial Watch, *Judicial Watch Sues for Documents Withheld From
 Congress in New Climate Data Scandal* (Dec. 22, 2015).....8

Rachel Levinson-Waldman, *Academic Freedom and the Public's Right to Know: How
 to Counter the Chilling Effect of FOIA Requests on Scholarship*,
 Am. Constitution Soc'y (Sept. 2011).....9

Susan Joy Hassol, *Improving How Scientists Communicate About Climate Change*,
 89 Eos 106, 106 (Mar. 2008)20

Thomas Karl et al., *Possible Artifacts of Data Biases in the Recent Global Surface
 Warming Hiatus*, 348 Sci. 1469 (June 26, 2015).....4

Zeke Hausfather et al., *Assessing Recent Warming Using Instrumentally Homogenous
 Sea Surface Temperature Records*, 3 Sci. Advances (Jan. 2017).....24

INTEREST OF AMICI¹

Amici are nonprofit organizations committed to ensuring robust, independent scientific research into vitally important but politically charged subjects like climate change. Such research can occur only where scientists feel free to explore new ideas and provide candid feedback to each other without fear that their confidential exchanges or preliminary drafts will later be subject to indiscriminate public disclosure. Amici are thus deeply concerned about attempts, like those in this case, to obtain scientists' confidential correspondence and drafts. Amici have an interest in ensuring that public records laws are applied in a manner that appropriately protects the privileged, deliberative records of government scientists and the colleagues with whom they collaborate.

Climate Science Legal Defense Fund (CSLDF) was founded in 2011 in response to the increasing incidence of legal attacks against climate scientists. Its mission is to protect the scientific endeavor in general—and climate science and climate scientists in particular—from assaults being launched through the legal system, including intrusive public records requests.

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

¹ Amici CSLDF, AMS, and UCS state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Union of Concerned Scientists (UCS) was founded in 1969 and is supported by an alliance of 500,000 citizens and scientists dedicated to using science to foster a healthy environment and safe world. UCS combines independent scientific research and citizen action to develop innovative and practical solutions to pressing environmental and security problems like climate change. UCS believes that a crucial ingredient in achieving these goals is maintaining research institutions within the federal government that foster an environment of independent and rigorous scientific inquiry free from political interference.

INTRODUCTION

The efforts to obtain government scientists' privileged materials in this case are, unfortunately, all too familiar. Over the last decade, groups across the political spectrum have attempted to discredit scientific studies they dislike not by contesting the validity of the underlying data or methodology, or by showing that the studies' results cannot be reproduced (which is how the scientific process traditionally works), but rather by seeking to use the scientists' emails and preliminary drafts against them. This strategy has been a particularly common tactic of those who dispute the scientific consensus on climate change.

Whatever one's reasons for seeking such materials, however, these types of records are generally protected from disclosure by the deliberative process privilege—as courts have repeatedly recognized in cases similar to this one. Government scientists' correspondence, preliminary drafts, and peer review materials are quintessential deliberative, pre-decisional records safeguarded by Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5). Maintaining the confidentiality of such records is necessary for the reasons that Congress codified the deliberative process privilege in that exemption: Quality government science (on which both policymakers and the general public rely) depends on an uninhibited exchange of ideas among scientists, and the unintended release of their correspondence and

preliminary drafts would likely result in public confusion.

Indeed, the policy concerns animating the deliberative process privilege are directly implicated in this very case. Numerous scientific organizations (including some of the present amici) specifically warned of the dangerous chilling effects that would result if the materials withheld by the National Oceanographic and Atmospheric Administration (NOAA) in this case were ordered released pursuant to an earlier congressional subpoena. These same effects would occur if the materials were released pursuant to FOIA instead. Ordering their release would harm (or halt altogether) government scientists' ability to collaborate with colleagues, damage the government's ability to recruit or retain top scientists, and deter critically important research into politically charged fields like climate change.

Moreover, releasing such materials is entirely unnecessary to ensure transparency in government science. The scientific method itself promotes transparency by, for example, requiring that research undergo rigorous peer review before publication and that its underlying data and methodology generally be made available to the public. NOAA scientists faithfully followed these practices here, and even took additional measures to ensure transparency by volunteering to answer questions directly from congressional critics. These steps allowed others to test the reliability of their research, and to disagree with their findings where testing suggested a different result. That is the way science works—and how it has already worked in this case, without compelled disclosure of the scientists' deliberative records.

Accordingly, the Court should enter summary judgment for the government and reject Plaintiff's attempt to obtain these scientists' confidential correspondence and preliminary drafts.

ARGUMENT

I. NOAA Has Withheld Only Privileged Correspondence And Preliminary Drafts Of Its Climate Science Paper.

A. NOAA Publicly Released The Data And Methodology Behind Its Paper.

The FOIA request at issue in this case centers around a June 2015 paper that NOAA scientists published in the prominent, peer-reviewed journal *Science*. See Thomas Karl et al., *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus*, 348 *Sci.* 1469 (June 26, 2015) (“Hiatus Paper” or “Paper”). The Paper addressed (and refuted) earlier claims about a so-called “hiatus” in global warming—i.e., the notion that the rate of global warming slowed in the 21st century as compared to the second half of the 20th century.

As explained in the government’s motion and accompanying declarations, NOAA scientists in 2014 developed an idea to reexamine the alleged “hiatus” in light of two recent developments: NOAA had made certain improvements to its dataset of sea surface temperatures, and 2013 and 2014 were two of the five warmest years on record. See Def.’s Mot. for Summ. J. (“MSJ”) at 1-3, ECF No. 16; Decl. of Mark Graff (“Graff Decl.”) ¶ 10, ECF No. 16-1. When researchers accounted for those developments, they found that global temperatures in the last 15 years rose as fast or faster than they did during the latter half of the 20th century. In other words, any slowdown in warming that could be described as a “hiatus” had largely disappeared.

The Hiatus Paper attracted significant attention—in part because those who dispute the scientific consensus on climate change had previously seized upon the alleged “hiatus” as a reason to oppose restrictions on greenhouse gas emissions. One such contrarian was Representative Lamar Smith, a Republican from Texas who chairs the House Committee on Science, Space, and Technology. Over the course of several months, Smith sent increasingly invasive record requests to NOAA in an effort to undermine the Paper’s credibility.

At first, Smith’s inquiry focused on obtaining the data and methodology underlying the Paper.² NOAA fully cooperated with these requests. The agency pointed Smith to the websites where—consistent with standard scientific practice—all of the underlying data and methodologies had already been made available to the public.³ NOAA also directed Smith to other publicly available datasets and peer-reviewed papers relevant to the methods it had used.⁴ And at NOAA’s own suggestion, several authors of the Paper traveled to Washington D.C. on two separate occasions to answer, in person, any questions that Smith’s committee had about the Paper.⁵ NOAA also offered to make some of its top scientists available for additional transcribed interviews with committee staff.⁶

As NOAA explained, it had made its data and methodology “available to the Committee, the public, and the scientific community”; accordingly, if anyone “doubt[ed] the integrity of the study, [they] ha[d] the tools [they] need[ed] to commission a competing scientific assessment.”⁷

² See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm’r, NOAA (July 14, 2015), <http://tinyurl.com/gqotymh> (requesting “[a]ll data related to [the NOAA] study and the updated global datasets, including the methods of analysis used to adjust the data.”).

³ See Letter from Robert Moller, Acting Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Aug. 20, 2015), <http://tinyurl.com/j8hjjlx>.

⁴ See, e.g., Letter from Coby Dolan, Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 2, 2015), <http://tinyurl.com/zc3w8eg>; Letter from Coby Dolan, Director of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Dec. 15, 2015), <http://tinyurl.com/h49e2wp>.

⁵ See Letter from Coby Dolan, Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 27, 2015), <http://tinyurl.com/gumxt9t>.

⁶ See Letter from Kathryn Sullivan, Adm’r, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 20, 2015), <http://tinyurl.com/h55yhqw>.

⁷ *Id.*

B. Representative Smith Sought Privileged Communications From NOAA.

Representative Smith then shifted his focus to allegations that the Paper was politically motivated. He subpoenaed the NOAA scientists' internal, deliberative communications related to the Paper.⁸ Smith acknowledged that "NOAA has provided in-person briefings, publicly available data related to the [Hiatus] study, and has agreed to make several witnesses available for voluntary interviews."⁹ He further demanded, however, "the production of e-mails and other communications sent and received by NOAA officials."¹⁰ Smith attempted to justify this extraordinary subpoena by alleging in public statements that NOAA "altered the data to get the results they needed to advance this administration's extreme climate change agenda."¹¹

NOAA declined to provide the privileged correspondence. The agency explained that protecting "the confidentiality of these communications among scientists is essential to frank discourse" and consistent with "long-standing practice in the scientific community."¹²

Other scientists supported NOAA's decision, and criticized as dangerous and improper Smith's inquiry into their colleagues' confidential correspondence. Eight major professional

⁸ See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm'r, NOAA (Oct. 13, 2015), <http://tinyurl.com/h9g4rty>.

⁹ See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Penny Pritzker, Sec'y, Dep't of Commerce (Dec. 1, 2015), <http://tinyurl.com/h8exxdj>.

¹⁰ *Id.*; see also Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm'r, NOAA (Feb. 22, 2016), <http://tinyurl.com/z2ce6ul>.

¹¹ Jeff Tollefson, *US Science Agency Refuses Request for Climate Records*, Nature, Oct. 28, 2015, <http://tinyurl.com/hul3jzr>; see also Lamar Smith, *Letter to the Editor*, N.Y. Times, Dec. 9, 2015, <http://tinyurl.com/zm3nkmr> (characterizing the "motivations behind [the Hiatus] study" as "clearly suspect"); Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, and Tech., to Penny Pritzker, Sec'y, Dep't of Commerce (Nov. 18, 2015), <http://tinyurl.com/jrrbefm> (alleging the Paper was "prematurely rushed to publication ... to fit the Administration's aggressive climate agenda").

¹² Tollefson, *US Science Agency Refuses Request*, *supra* note 11.

scientific organizations (including amici AMS) wrote: “These broad inquiries threaten to inhibit the free exchange of ideas across scientific disciplines not only for NOAA, but for other government experts and the academic and industry scientists with whom they collaborate.”¹³ They explained that breaking the confidentiality of such communications would cause a dangerous “chilling effect” on government scientists and, in particular, their willingness to conduct research on politically charged topics like climate change.¹⁴ Nearly 600 scientists made a similar point in a letter praising NOAA for standing up to Smith’s “bullying tactics.”¹⁵ And nearly two dozen former NOAA scientists also weighed in: “We know firsthand that scientists need intellectual space to debate new ideas and give each other confidential feedback without worrying that an individual comment will be subject to public scrutiny at a later date.”¹⁶ They warned that releasing the scientists’ privileged emails would “significantly damage NOAA’s ability to conduct science.”¹⁷

Smith’s subpoena came under political fire as well. Representative Eddie Bernice

¹³ Letter from Am. Ass’n for the Advancement of Sci. (AAAS) et al., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 24, 2015), <http://tinyurl.com/zdpwrdrn>.

¹⁴ *Id.*; accord Letter from Am. Meteorological Soc’y (AMS) to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 4, 2015), <http://tinyurl.com/h9fze9l> (“The demand for internal communications ... imposes a chilling effect on future communication among scientists” and “can be viewed as a form of intimidation that could deter scientists from freely carrying out research on important national challenges.”); Letter from Union of Concerned Scientists (UCS) to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Feb. 26, 2016), <http://tinyurl.com/jb7ucua> (the “demands have a chilling effect by deterring federal scientists from freely carrying out their research regardless of the political or policy implications”).

¹⁵ Letter from Dr. Guy Almes, Dir., Acad. for Advanced Telecomm. & Learning Techs., et al., to Kathryn Sullivan, Adm’r, NOAA (Dec. 7, 2015), <http://tinyurl.com/zwoztdy> (explaining that releasing the NOAA scientists’ correspondence “can create a chilling effect on both federal scientists and any other scientist with whom they collaborate or correspond”).

¹⁶ Letter from Dr. Susan Avery, President, Woods Hole Oceanographic Inst., et al., to Kathryn Sullivan, Adm’r, NOAA (Dec. 7, 2015), <http://tinyurl.com/gp5lorh>.

¹⁷ *Id.*

Johnson, the ranking Democrat on the House Science Committee, criticized Smith's subpoena as a mere "fishing expedition." "[O]btaining all of the data and methods used in this study seemingly was not enough for the Majority. You also demanded internal communications by NOAA scientists regarding their scientific research," she wrote in a letter to Smith, adding that she "cannot help but note that your requests in this case echo the tactics" of other climate change contrarians "who frequently submit similar FOIA requests of climate scientists in both federal government and in state universities."¹⁸ Johnson lamented that Smith's "entire effort smacks of the discredited tactics used by climate change denial groups (oftentimes funded by the fossil fuel industry) to sway public opinion based on misinformation, innuendo, and falsehoods."¹⁹

C. Judicial Watch Requested The Same Privileged Materials Via FOIA.

While NOAA was responding to Smith's inquiries, Judicial Watch submitted a FOIA request that expressly referenced Smith's subpoena and sought many of the same privileged materials. *See* Ex. A to Answer, ECF No. 8-1. Indeed, Judicial Watch asserted in a press release that this lawsuit seeks "the same documents unsuccessfully subpoenaed by [the] House committee."²⁰ The organization also announced its belief that the "Obama administration put politics before science to advance global warming alarmism," and trumpeted its previous attempts to use FOIA to pursue "alleged data manipulation by global warming advocates."²¹

¹⁸ Letter from Eddie Bernice Johnson, Ranking Member, H. Comm. on Sci., Space, & Tech., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 23, 2015), <http://tinyurl.com/qd5psrd>.

¹⁹ Letter from Eddie Bernice Johnson, Ranking Member, H. Comm. on Sci., Space, & Tech., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 19, 2015), <http://tinyurl.com/z4dmwue>.

²⁰ Press Release, Judicial Watch, Judicial Watch Sues for Documents Withheld From Congress in New Climate Data Scandal (Dec. 22, 2015), <http://tinyurl.com/o9vk22d>.

²¹ *Id.*

NOAA released hundreds of pages of documents in response to the FOIA request. *See* Graff Decl. ¶¶ 29-31. The agency properly withheld, however, three general categories of records—internal correspondence, unfinished drafts of the Hiatus Paper, and peer review materials—that, as explained below, are the types of deliberative, predecisional records appropriately protected from release under FOIA Exemption 5. *See also* Def.’s MSJ at 8-20.

II. Public Records Laws Are Increasingly Being Misused To Pursue Privileged Correspondence And Research Materials Like Those At Issue Here.

As Representative Johnson observed (and Judicial Watch’s own press release reveals), the attempts to obtain the NOAA scientists’ privileged records in this case are unfortunately familiar. Over the past decade, organizations across the political spectrum have increasingly used public records laws to attack research findings (or even fields of study) that they dislike.²² As in this case, the records requests typically do not seek the data, methodology, or funding sources of completed studies. Rather, the requests seek privileged prepublication materials—such as preliminary drafts, private critiques from other scientists, and even researchers’ personal documents and correspondence.²³ These types of materials, however, are traditionally protected as confidential to ensure that scientists can raise new ideas and engage in robust debate without fear that their deliberations will later be publicized or taken out of context. *See* Decl. of Dr. Richard Spinrad ¶¶ 14-24, ECF No. 16-4 (hereinafter “Spinrad Decl.”).

The increasing frequency of these sorts of public records requests underscores the importance of protecting scientists’ deliberative materials from improper disclosure. As

²² *See, e.g.,* Michael Halpern, *Freedom to Bully: How Laws Intended to Free Information Are Used to Harass Researchers*, Ctr. for Sci. & Democracy, Union of Concerned Scientists (Feb. 2015), <http://tinyurl.com/hjzyq6g>; Rachel Levinson-Waldman, *Academic Freedom and the Public’s Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship at 1-5*, Am. Constitution Soc’y (Sept. 2011), <http://tinyurl.com/h87kevm>.

²³ *See* Halpern, *Freedom to Bully*, *supra* note 22, at 2.

explained in greater detail below (at 12-21), releasing such materials could stifle important research, confuse the public, and harm the government’s ability to collaborate with outside scientists and recruit or retain top talent. *See* Spinrad Decl. ¶¶ 22-26. These potentially damaging effects are exacerbated in the field of climate science, which—because of its political salience—is particularly vulnerable to partisan attacks and concerted efforts to confuse the public. *See, e.g., id.* ¶¶ 23, 25 (noting that, in the climate science context, “the potential for a chilling effect is particularly high” and “the risks of misinterpretation or confusion” are “elevated”).

In fact, the attempts to obtain the NOAA scientists’ privileged materials in this case are disturbingly similar to earlier efforts to obtain confidential records from climate scientist Dr. Michael Mann, who, by virtue of his position at a public university, was also the subject of intrusive public records requests.²⁴ Dr. Mann became a chief target of climate change contrarians because he was one of the authors of a seminal paper depicting the so-called “hockey stick” curve, which showed a spike in global temperature over the past century and a half.²⁵

As in this case, Dr. Mann’s emails were initially the subject of a failed civil subpoena by a political figure. Virginia Attorney General Ken Cuccinelli tried, unsuccessfully, to subpoena all of Dr. Mann’s personal emails with more than thirty other scientists during his tenure at the University of Virginia. *See Cuccinelli v. Rector & Visitors of Univ. of Va.*, 722 S.E.2d 626 (Va. 2012) (holding that the Attorney General lacked authority to make the demands). But also like

²⁴ Representative Johnson made this same connection between the present case and the Dr. Mann dispute, describing both as “invasive fishing expeditions in search of a pretext to discredit” climate scientists. Johnson Oct. 23 Letter, *supra* note 18 (quoting Editorial, *Harassing Climate-Change Researchers*, Wash. Post, May 29, 2011, <http://tinyurl.com/zg8p75o>).

²⁵ *See* Michael E. Mann et al., *Northern Hemisphere Temperatures During the Past Millenium: Inferences, Uncertainties, and Limitations*, 26 *Geophysical Res. Letters* 759 (1999).

here, another organization that frequently files public records requests, the American Tradition Institute²⁶, then stepped in and tried to obtain the privileged records via that method instead.

The Virginia Supreme Court unanimously rejected the attempt to obtain Dr. Mann’s emails in an opinion that strongly affirmed the importance of protecting the confidentiality of scientists’ correspondence. *See Am Tradition Inst. (“ATI”) v. Rector & Visitors of Univ. of Va.*, 756 S.E.2d 435, 442 (Va. 2014). The state high court quoted at length an affidavit from the University Provost explaining that “compelled disclosure of [scientists’] unpublished thoughts ... and personal scholarly communications would mean a fundamental disruption of the norms and expectations which have enabled research to flourish.” *Id.*

Although the *ATI* case involved a state-law exemption for public records at institutions of higher education, the same rationales extend to protecting such records under the deliberative process privilege of FOIA Exemption 5. Indeed, the West Virginia Supreme Court later relied on the *ATI* opinion (and the declaration quoted above) in applying this Court’s federal deliberative process precedent to its own state analogue. *See Highland Mining Co. v. W. Va. Univ. Sch. of Med.*, 774 S.E.2d 36, 53-54 (W. Va. 2015) (“The same reasoning applies with equal force here.”). The court in *Highland Mining* rejected a coal company’s attempt to use a public records statute to discredit a public university scientist who had published articles linking the environmental impacts of surface coal mining with health problems of local residents. *See id.* at 43. The court upheld the university’s decision to withhold the same kinds of materials at issue in this case—i.e., “drafts, data compilations and analyses, proposed edits, e-mails and other communications, and peer review comments and responses relate[d] to the planning, preparation

²⁶ The American Tradition Institute, now known as the Energy and Environmental Legal Institute, has filed similar public records requests regarding the work of scientists in many other states as well. *See Halpern, Freedom to Bully, supra* note 22, at 6.

and editing necessary to produce a final published article”—on the ground that they would improperly reveal the scientist’s deliberative process. *See id.* at 52-53.

Dr. Mann referenced the *Highland Mining* case—and his own experience in *ATI*—in an editorial that he co-authored warning about the potential abuse of public records laws in cases like this. Groups “across the political spectrum” are increasingly requesting “not only records of discussions about the strengths and weaknesses of work, but also preliminary paper drafts and private constructive criticisms from colleagues,” Dr. Mann warned, noting that “[t]hese requests can attack and intimidate [scientists], threatening their reputations, chilling their speech, disrupting their research, discouraging them from tackling contentious topics, and ultimately confusing the public.”²⁷ Presciently, Dr. Mann’s editorial appeared in the journal *Science* just weeks before the NOAA scientists’ Hiatus Paper.

III. The Deliberative Process Privilege Appropriately Protects The Confidentiality Of Government Scientists’ Correspondence And Drafts.

In enacting FOIA, Congress recognized that certain government records should appropriately be withheld from public disclosure. *See EPA v. Mink*, 410 U.S. 73, 80 (1973). Exemption 5 of FOIA codified, among other things, the common law “deliberative process privilege,” which safeguards from disclosure materials that reveal “the decisionmaking processes of government agencies.” *Wolfe v. Dep’t of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc). The privilege is designed to improve the quality of agency decisions by promoting the uninhibited exchange of ideas, and also to prevent the public confusion that could result from releasing documents that do not represent the government’s final word on a given matter. *See Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

²⁷ Michael Halpern & Michael Mann, Editorial, *Transparency Versus Harassment*, 348 *Sci.* 479 (May 1, 2015), <http://tinyurl.com/jumo5nc>.

Consistent with these policies, courts have regularly protected deliberative, predecisional scientific materials like those at issue in this case. *See, e.g., Formaldehyde Inst. v. Dep't of Health and Human Servs.*, 889 F.2d 1118, 1124-25 (D.C. Cir. 1989) (peer review comments); *Hooker v. U.S. Dep't of Health & Human Servs.*, 887 F. Supp. 2d 40, 57-59 (D.D.C. 2012) (internal email communications, edits to draft manuscript, and peer review comments); *ViroPharma Inc. v. Dep't of Health & Human Servs.*, 839 F. Supp. 2d 184, 192-94 (D.D.C. 2012) (draft scientific documents and internal review documents); *Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184, 189 (D.D.C. 2009) (draft scientific model that calibrated raw data); *Weinstein v. U.S. Dep't of Health & Human Servs.*, 977 F. Supp. 41 (D.D.C. 1997) (peer review materials); *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health & Human Servs.*, 844 F. Supp. 770, 782-83 (D.D.C. 1993) (draft manuscript and software program designed to manipulate raw data); *Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 115 (D.D.C. 1984) (draft reports); *Highland Mining*, 774 S.E.2d at 48-54 (drafts, data compilations and analyses, proposed edits, emails, and other communications related to research articles). The same policy concerns and reasoning discussed in these cases support the government's position here.

A. Protecting Drafts, Correspondence, And Peer Review Materials Allows An Uninhibited Exchange Of Ideas That Is Critical To The Scientific Process.

The deliberative process privilege recognizes that “free and uninhibited exchange and communication of opinions, ideas, and points of view” is necessary to the “wise functioning” of government. *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 n.31 (D.C. Cir. 1974). Such uninhibited communication is impossible, however, if government employees fear public disclosure of their preliminary thoughts and ideas. “[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances ... to the detriment of the decisionmaking process.” *NLRB v. Sears, Roebuck &*

Co., 421 U.S. 132, 150-51 (1975). Government employees “will not communicate candidly ... if each remark is a potential item of discovery and front page news.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001). In other words, “the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.” *Wolfe*, 839 F.2d at 773.

Accordingly, the deliberative process privilege “prevent[s] injury to the quality of agency decisions,” *Sears*, 421 U.S. at 151, by removing the “threat of cross-examination in a public tribunal,” *Montrose*, 491 F.2d at 68 n.31. The privilege ensures that government employees “feel free to provide ... their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

The work of government scientists is particularly dependent on uninhibited exchanges, and no less susceptible to the chilling effect of threatened public disclosure. This court has thus long recognized that the deliberative process privilege protects preliminary scientific drafts and correspondence because disclosure would “discourage the intellectual risk-taking so essential to technical progress.” *Chem. Mfrs*, 600 F. Supp. at 118. The “give and take of science,” UCS Letter, *supra* note 14, is the same “give-and-take of the consultative process” that Congress sought to safeguard in Exemption 5, *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Homeland Sec.*, 648 F. Supp. 2d 152, 163 (D.D.C. 2009); *see also Horsehead Indus. v. EPA*, No. 94-1299, slip op. at 15-20 (D.D.C. Oct. 1, 1996) (government scientists’ “frank exchanges of view regarding [their research] reside near the core of an agency’s deliberative process”).

Uninhibited exploration and discussion is fundamental to the scientific process. Research projects typically begin with “only rough ideas ... that are not yet fully formed.” Spinrad Decl.

¶ 14; *see also Humane Soc’y v. Super. Ct. of Yolo Cnty.*, 155 Cal. Rptr. 3d 93, 113 (Cal. Ct. App. 2013) (scientific research involves “trying new ideas, investigating lines of thinking that do not work out, suggesting ideas that turn out to be wrong”). Further, scientists do not pursue their research in isolation; they develop and refine hypotheses “through exchanges and candid debates with peers inside and outside the federal government.” Spinrad Decl. ¶ 14; *see also Chem. Mfrs.*, 600 F. Supp. at 118 (scientists “discuss hypotheses which have not matured” and “can be effectively shared only with peers in regular and confidential communication”). These exchanges take the form of informal email correspondence and formal peer review—both of which are “critical to developing and releasing scientific information of the highest possible quality.” Spinrad Decl. ¶ 15.

These important exchanges can only take place, however, if scientists are given the “intellectual space to debate new ideas and give each other confidential feedback without worrying that an individual comment will be subject to public scrutiny at a later date.” Avery et al. Letter, *supra* note 16. Accordingly, there is a “well-established presumption” within the scientific community that such exchanges “are not intended to be, and will not be, shared with a wider audience.” Spinrad Decl. ¶ 20. Indeed, peer reviewers are often expressly instructed to treat the draft as privileged and confidential, as they were in this case. *See* Graff Decl. ¶¶ 17-20. “Confidentiality is essential to ensuring the participants are free to propose new ideas or explanations without fear of misinterpretation or being taken out of context.” Spinrad Decl. ¶ 20.

The preliminary work of the NOAA scientists at issue in this case thus fall comfortably within the class of materials protected by the deliberative process privilege. Requiring the disclosure of scientists’ communications, drafts, and peer review materials would have an “obvious chilling effect” on the candid, informal exchanges and debates that are crucial to the

scientific method. *Chem. Mfrs*, 600 F. Supp. at 118; *see also Formaldehyde Inst.*, 889 F.2d at 1124-25 (deeming it “indisputable,” based on scientists’ affidavits, that “release of reviewers’ editorial comments would ... have a chilling effect on ... the candor of potential reviewers of government-submitted articles”). Absent a robust “exchange of scientific understanding” among government scientists and their colleagues, “the pace of scientific progress would slow.” Spinrad Decl. ¶ 21; *see also ATI*, 756 S.E.2d at 442 (“compelled disclosure of [scientists’] unpublished thoughts, data, and personal scholarly communications would mean a fundamental disruption of the norms and expectations which have enabled research to flourish”). Such a slowdown would deprive policymakers—as well as the general public—of important information that helps guide their own decisions. *See AAAS et al. Letter*, *supra* note 13.

For many of the same reasons, the contributions of outside scientists—through both informal correspondence and formal peer review—are also generally protected by the deliberative process privilege. *See, e.g., Wash. Research Project, Inc. v. Dep’t of Health, Educ. & Welfare*, 504 F.2d 238, 249-50 (D.C. Cir. 1974) (protecting reports prepared by outside consultant peer review panels); *Formaldehyde Inst.*, 889 F.2d at 1122-25 (external peer review comments); *Hooker*, 887 F. Supp. 2d at 54-55 (correspondence with external coauthor). Peer review comments from outside scientists can “play[] essentially the same part in an agency’s process of deliberation” as would comments from other government scientists. *Klamath Water Users*, 532 U.S. at 10; *see also Dow Jones & Co., Inc. v. Dep’t of Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990) (“Exemption 5 permits an agency to protect the confidentiality of communications from outside the agency so long as those communications are part and parcel of the agency’s deliberative process.”) (emphasis omitted). Indeed, because experts specializing in a given area are spread out among various institutions, the exchange and debate necessary to the

scientific process may effectively require participation by scientists outside the federal government. *See* Spinrad Decl. ¶¶ 16-18; *see also Formaldehyde Inst.*, 889 F.2d at 1122 (when government scientists “encounter problems outside their ken” it is “preferable that they enlist the help of outside experts skilled at unraveling their knotty complexities”).

If correspondence with outside scientists were not protected by Exemption 5, those scientists might alter their comments or simply refuse to collaborate with their government counterparts. *See Formaldehyde Inst.*, 889 F.2d at 1125 (disclosure of reviewers’ comments “would very likely have a chilling effect on either the candor of potential reviewers of government-submitted articles or on the ability of the government to have its work considered for review at all”); Spinrad Decl. ¶ 24 (“If an outside scientist believed that their communications with federal scientists may become public, he or she may change the way they engage with federal colleagues in a way that slows the exchange of ideas, or they may choose not to engage in this type of valuable, informal peer review at all.”); Avery et al. Letter, *supra* note 16 (releasing correspondence will “mak[e] it more difficult for NOAA scientists to collaborate with peers in academia and the private sector”); *see also ATI*, 756 S.E.2d at 442 (similar).

Similarly, compelled disclosure would also make it more difficult for the government to recruit or retain top scientists, who would likely enjoy the benefits of confidentiality in private industry or academia and thus refuse to work where public records laws “render their communications involuntarily public.” *ATI*, 756 S.E.2d at 442; *see also AAAS et al. Letter*, *supra* note 13 (releasing NOAA scientists’ emails will inhibit agencies’ ability “to attract world-class scientific talent”). “Such a loss of technical expertise in federal agencies would then greatly harm the quality of agency decisions regarding scientific issues.” Dianna G. Goldenson, *FOIA Exemption Five: Will It Protect Government Scientists From Unfair Intrusion?*, 29 B.C.

Envtl. Aff. L. Rev. 311, 314 (2002) (arguing that the deliberative process privilege should protect government scientists from unfair intrusion into scientific research).

As mentioned above (at 10), these concerns about a chilling effect are heightened in the particular context of climate science, where scientific developments “typically generate a high level of interest or controversy.” Spinrad Decl. ¶ 23; *see also Climate Science in the Political Arena: Hearing Before the H. Select Comm. on Energy Independence and Global Warming*, 111th Cong. 25-27 (2010) (testimony of Dr. Ben Santer, Department of Energy climate scientist: “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.”).

Indeed, these concerns are front and center in this very case. The letters opposing Smith’s subpoena all warned of the chilling effects that would occur if the NOAA scientists’ deliberative materials were ordered disclosed. Requiring disclosure of scientists’ deliberative materials—whether via subpoena or FOIA—“could deter scientists from freely carrying out research on important national challenges” like climate change. AMS Letter, *supra* note 14.²⁸

B. Protecting Such Materials From Disclosure Also Helps Avoid Public Confusion.

Protecting preliminary, deliberative scientific materials also avoids “premature disclosure of ongoing discussions that might confuse the public.” *Cleary, Gottlieb*, 844 F. Supp. at 782; *see*

²⁸ *See also, e.g.*, AAAS et al. Letter, *supra* note 13 (compelled disclosure would “have a chilling effect on the willingness of government scientists to conduct research that intersects with policy-relevant scientific questions”); UCS Letter, *supra* note 14 (compelled disclosure creates a “chilling effect by deterring federal scientists from freely carrying out their research regardless of the political or policy implications”); Almes et al. Letter, *supra* note 15 (compelled disclosure “can create a chilling effect on both federal scientists and any other scientist with whom they collaborate or correspond”).

also Russell, 682 F.2d at 1048.

Scientists frequently pursue initial ideas and preliminary hypotheses in email exchanges and early drafts of a study only to abandon them later. Withholding of non-final drafts is thus appropriate because the public “could mistakenly interpret the views within a draft as the [final] views of the agency.” *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 161 F. Supp. 3d 120, 129 (D.D.C. 2016); *see also Hooker*, 887 F. Supp. 2d at 58-59 (affirming agency’s decision to withhold drafts of scientific manuscript). The same is true for the NOAA scientists’ confidential correspondence: Release of these internal deliberations could “confuse the public by disclosing tentative rationales not ultimately published” in the final Paper. *FPL Grp., Inc. v. IRS*, 698 F. Supp. 2d 66, 83 (D.D.C. 2010); *see also Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 306 F. Supp. 2d 58, 72 (D.D.C. 2004) (describing internal email as “exactly the kind of internal predecisional discussion that, if revealed, might confuse the public”). So too might the public latch onto early, candid critiques by reviewers, even if the authors subsequently bolstered their conclusions to address and assuage the reviewers’ concerns. “There is no real public interest in such documents save perhaps for satisfying public curiosity.” *Pies v. U.S. IRS*, 668 F.2d 1350, 1353 (D.C. Cir. 1981) (“Such documents, if released, may actually mislead the public.”).

The risk of public confusion is particularly acute when it comes to prepublication scientific correspondence. Scientists familiar with a particular subject matter will often communicate with each other using “shorthand and informal language in sharing ideas that are actually highly technical and complex.” Spinrad Decl. ¶ 25. “While use of informal or shorthand language is useful and appropriate to expedite discussions among peers, more formal explanations and, in many cases, caveats, would be necessary for products that are intended to be shared with a public audience.” *Id.* Moreover, “[s]cientists use many words that mean

something very different to much of the public.”²⁹ And their informal shorthand, in particular, is often “interpreted in a vastly different manner by the lay public.” Spinrad Decl. ¶ 25; *see also Humane Soc’y*, 155 Cal. Rptr. 3d at 113-14 (“researchers communicate informally, often in jargon or shorthand, ... [in] ways open to misinterpretation”). Beyond scientists’ use of jargon and shorthand, they also often use especially blunt or harsh language in critiquing each other’s work. *See, e.g.*, Halpern, *Freedom to Bully*, *supra* note 22, at 4 (“candid discussion[] among researchers ... does not cast doubt on the strengths of [the ultimate] conclusions; rather, it constitutes the typically unvarnished, yet rigorous, deliberative process by which scientists test and refine their conclusions”). Releasing scientists’ peer review materials or email exchanges can thus easily confuse the public, especially if they are taken out of context.

Indeed, this is precisely what occurred in the so-called “Climategate” manufactured controversy of 2009, when a hacker stole thousands of emails from the University of East Anglia’s Climate Research Unit. The emails were used to confuse the public by generating “media coverage ... based on email statements quoted out of context.”³⁰ For example, opponents of greenhouse gas regulations highlighted an exchange where one scientist referred to using a “trick.” The “trick,” however, was actually just a scientific technique—i.e., a “trick of the trade”—which had been publicly disclosed in a published, peer-reviewed journal article.³¹ Numerous investigations found that nothing in the hacked emails actually called into question

²⁹ Susan Joy Hassol, *Improving How Scientists Communicate About Climate Change*, 89 *Eos* 106, 106 (Mar. 2008), <http://tinyurl.com/hkjas9g> (collecting examples).

³⁰ *Myths vs. Facts: Denial of Petitions for Reconsideration of the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, U.S. Env’tl. Prot. Agency, <http://tinyurl.com/j3xgnrf> (last visited Jan. 27, 2017).

³¹ *See, e.g., Debunking Misinformation About Stolen Climate Emails In The “Climategate” Manufactured Controversy*, Union of Concerned Scientists, <http://tinyurl.com/zto92to> (last visited Jan. 27, 2017).

the underlying climate data and research.³² Public confusion from the incident, however, still persists today. Indeed, the emails are, apparently, a reason why the new President of the United States says he questions the science behind climate change.³³

The deliberative process privilege protects government scientists' correspondence and non-final drafts from becoming part of a similar misinformation campaign in the future.

C. Protecting Such Materials Does Not Undermine Transparency.

Notwithstanding the need to protect their deliberative preliminary materials from public disclosure, scientists do not seek to isolate their actual work from public vetting. Rather, consistent with standard scientific practice, they typically embrace transparency by publishing their research in peer-reviewed journals and making their data and methodologies available via public databases. *See* AMS Letter, *supra* note 14 (“reporting on research results fully and transparently through the peer-reviewed literature and providing the capability for other scientists to replicate that research ... is a fundamental foundation of the scientific process”). The proper way to test a scientific paper is not by sifting through email correspondence and non-final drafts. Instead, the public can test the accuracy of government science—without threatening the deliberative process—by independently evaluating and vetting the final results. *See, e.g.,* AAAS et al. Letter, *supra* note 13 (“part of the purpose of placing research into the

³² *See, e.g., id.* (collecting investigations); *Myths vs. Facts*, *supra* note 30; Jess Henig, *Some ‘Climategate’ Conclusions*, FactCheck.Org, Apr. 15, 2010, <http://tinyurl.com/28qfqwr>; Editorial, *Closing the Climategate*, 468 *Nature* 345 (Nov. 18, 2010), <http://tinyurl.com/gnl2l3y> (although some hacked emails exhibited “bravado” and “rudeness,” such “robust exchanges were typical in science” and reflective of the sometimes “bruising process” of peer review).

³³ *See, e.g., Donald Trump’s New York Times Interview: Full Transcript*, N.Y. Times (Nov. 23, 2016), <http://tinyurl.com/j3on4f3> (“[Climate change is] a very complex subject. I’m not sure anybody is ever going to really know. ... [T]hey say they have science on one side but then they also have those horrible emails that were sent between the scientists. Where was that, in Geneva or wherever five years ago? Terrible.”).

scholarly record is so other scientists can attempt to replicate, confirm, or refute it”).

Consistent with this practice, the deliberative process privilege does not prevent the disclosure of underlying data in the government’s control where that data would not expose the scientists’ deliberative process. *Compare, e.g., Sw. Ctr. for Biological Diversity v. USDA*, 170 F. Supp. 2d 931, 941 (D. Ariz. 2000) (ordering release of “raw research data,” which “itself does not expose the deliberative process”), *with Chem. Mfrs.*, 600 F. Supp. at 117-19 (exempting preliminary data from release where scientists have not yet completed a final report).³⁴

Indeed, this distinction between underlying research data and other, more deliberative materials is reflected in the disclosure rules regarding federally funded research. *See* OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, 64 Fed. Reg. 54,926 (Oct. 8, 1999). Under those rules, federal grant recipients must turn over only “research data,” which is defined as “the recorded factual material commonly accepted in the scientific community as necessary to validate research findings.” *Id.* at 54,930. However, recognizing “the importance of ensuring that [those rules do] not interfere with the traditional scientific process”—wherein “scientists need to deliberate over, develop, and pursue alternative approaches in their research,” *id.* at 54,926-54,927—this definition specifically *excludes* “preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues,” *id.* at 54930; *see also Am. Chem. Council, Inc. v. U.S. Dep’t of Health & Human Servs.*, 922 F. Supp. 2d 56, 62 (D.D.C. 2013) (same). In other words, it exempts from compelled disclosure exactly the types of deliberative, predecisional materials at

³⁴ Of course, some data may still be exempt from disclosure for other reasons. *See, e.g.,* 5 U.S.C. § 552(b)(6) (exempting “medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”).

issue in this case.³⁵

Moreover, as described above, NOAA here complied with all the scientific transparency norms by publicly posting on its website the datasets underlying the Hiatus Paper even before Representative Smith had requested them. *See* Moller Letter, *supra* note 3. And the agency went above and beyond by sending its scientists to explain their methodology and answer questions posed by the congressional committee in person. *See* Dolan Oct. 27 Letter, *supra* note 5. The scientific organizations highlighted NOAA’s transparency in their opposition to Smith’s subpoena, and “applaud[ed] the open access to data and methodologies that NOAA consistently achieves.” AMS Letter, *supra* note 14; *see also* AAAS et al. Letter, *supra* note 13 (“The data and methodology of the paper in question have been publicly shared and discussed directly with committee staff.”); UCS Letter, *supra* note 14 (“NOAA made all data and methodology publicly available. Not a shred of evidence of scientific misconduct has surfaced.”). Thus, as NOAA noted, if anyone “doubts the integrity of the study,” they have all the “tools [they] need[] to commission a competing scientific assessment.” Sullivan Nov. 20 Letter, *supra* note 6.

Indeed, as the scientific organizations noted, since the Hiatus Paper’s publication “there have been other peer-reviewed research papers published by university scientists and derived from other independent data sources that have also analyzed the climate hiatus.” AAAS et al.

³⁵ The deliberative process privilege also likely would not prevent disclosure of any outside funding sources for government scientists, or undue influence by other outside parties. *See, e.g.*, Justin Gillis & John Schwartz, *Deeper Ties to Corporate Cash for Doubtful Climate Researcher*, N.Y. Times, Feb. 21, 2015, <http://tinyurl.com/zm772tz> (describing FOIA request which revealed that a government astrophysicist had failed to disclose substantial outside funding). This is because—in contrast to communications with non-governmental scientists who participate in formal or informal peer review, *see supra* at 16-17—communications with outside parties who act in their own self-interest are generally not considered privileged or exempt from disclosure under FOIA Exemption 5. *See, e.g.*, *Physicians Comm. for Responsible Med. v. Nat’l Insts. of Health*, 326 F. Supp. 2d 19, 29-30 (D.D.C. 2004).

Letter, *supra* note 13. Some of these papers—including one published earlier this month—have largely corroborated the Paper’s findings that there has been no slowdown in the rate of global warming during the 21st century.³⁶ Others, meanwhile, have pushed back on some of its conclusions.³⁷

“This is the way in which science advances,” the scientific organizations explained. AAAS et al., Letter, *supra* note 13. Not through fishing expeditions into scientists’ deliberative, confidential correspondence and preliminary drafts.

CONCLUSION

The government’s motion for summary judgment should be granted.

Respectfully submitted,

Ian Fein (Cal. Bar No. 281394)
ORRICK, HERRINGTON &
SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700

/s/ Kelsi Brown Corkran
Kelsi Brown Corkran
(D.C. Bar No. 501157)
Counsel of Record
Benjamin Chagnon (D.C. Bar No. 1044746)
Shani S. Harmon (D.C. Bar No. 1020893)
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400
kcorkran@orrick.com

Counsel for Amici Curiae

January 27, 2017

³⁶ See, e.g., Zeke Hausfather et al., *Assessing Recent Warming Using Instrumentally Homogenous Sea Surface Temperature Records*, 3 *Sci. Advances* (Jan. 2017), <http://tinyurl.com/hetylun>; Bala Rajaratnam et al., *Debunking the Climate Hiatus*, 133 *Climatic Change* 129 (Nov. 2015), <http://tinyurl.com/j9v228x>.

³⁷ See, e.g., John C. Fyfe et al., *Making Sense of the Early-2000s Warming Slowdown*, 6 *Nature Climate Change* 224 (Feb. 2016).