IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

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

APPELLANTS' OPENING BRIEF

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INTRODUCTION

After the Arizona Board of Regents ("ABOR") produced voluminous records to Energy and Environmental Legal Institute ("E&E") in response to its public records request, E&E filed a special action challenging ABOR's decision to withhold other records. [1] ABOR initially won, with the trial court noting that its experts were "impressive" and its evidence "compelling." Following remand by this Court with instructions to conduct a *de novo* review – instead of deferring to ABOR -- the trial court did an about-face, concluding in its June 2016 ruling that:

> the "potential harm [asserted by ABOR] is speculative at best, and does not overcome the presumption favoring disclosure of public records containing information about a topic as important and far-reaching as global warming and its potential causes." [ROA 123]

This conclusion is flawed for two reasons. First, the trial court failed to discuss -- or even cite -- A.R.S. §15-1640, the controlling statute. Second, the very existence of this statute belies the court's belief that ABOR's evidence is speculative, as to believe otherwise implies that the legislature enacted the statute for no good reason. By failing to consider the statute, the trial court deprived the University of the benefit of the legislature's policy decision to provide special protection to

[1] For convenience and ease of reference, Appellants will be referred to collectively as "ABOR" or "the University." Appellee will be referred to throughout as E&E, even when the record documents may use its previous name, American Traditions Institute or ATI.

researchers. Consequently, this Court should define the scope of A.R.S. §15-1640, reverse the trial court, and remand the case for further proceedings. This is especially necessary as no Arizona appellate decision has interpreted A.R.S. § 15-1640, and the trial court's decision reaches beyond climate science, with troubling implications for other areas of science – agriculture, astronomy, astrophysics, biomedical research, chemistry, education, engineering, medicine, pharmacology, psychology, and so on.

STATEMENT OF THE CASE

E&E filed a special action on September 25, 2013 against the University of Arizona ("University") and Teri Moore, in her capacity as the University's Coordinator of Public Records, to compel the production of records pursuant to the Arizona Public Records Law, A.R.S. § 39-121 *et seq.* [ROA 6][2]

By agreement of the parties, the University filed 93 sample emails, contained on a DVD submitted to the trial court under seal. The parties later agreed the University's samples were representative of the 1745 withheld records. [ROA 30]. E&E filed 12 exemplars of its own, but not under seal. On November 17, 2014, the Court ordered Appellant to separate the withheld emails into nine categories to facilitate the Court's analysis:

[2] References to the record on appeal are to "ROA #" with the electronic page of the particular record document indicated by "EP #," if applicable.

1. Withheld because emails are not public records.
2. Withheld because emails are ongoing research.
3. Withheld because emails contain prepublication research.
4. Withheld because emails are pre-publication peer review.
5. Withheld because emails contain student information or personal information not otherwise disclosed in any public forum.
6. Withheld because emails are personal correspondence not related to work activities.
7. Withheld because emails contain critical analysis to subsequently published [reports] including, but not limited to, the IPCC Assessment.
8. Withheld because best interests of the state outweigh the public policy in favor of disclosure. If this exception is relied upon, Defendant shall identify with specificity how the best interests of the state will be served by an order affirming its decision to withhold the documents.
9. Withheld for a reason not cited above. If this reason is relied upon, Defendant shall identify with specificity the reason for withholding the emails and cite any applicable case law.

[ROA 64]

Instead of using A.R.S. §15-1640, the trial court's categories 2, 3, 4 and 7 became the focal point of this litigation.

On January 20, 2015, ABOR filed its memorandum in compliance with the November 17, 2014 order. [ROA 70] Attached to the memorandum were a joint

supplemental declaration of Drs. Hughes and Overpeck and two supplemental document logs categorizing the *in camera* exemplars provided by ABOR. [See ROA 70, EP 9-17 and ROA 70, EP 19-56, respectively]

At this point, two questions were presented to the trial court:

> (1) What is the scope of the public records exemption created by A.R.S. §15-1640(A)(1)(d); and
>
> (2) If the exemption provided by the statute is not available, does Arizona's common law public records exemption justify the University's decision to withhold email?

The first merits hearing occurred on February 6, 2015. [ROA 74] On March 24, 2015, the court issued its ruling, denying E&E's request for relief, dismissing the special action, and entering judgment in accordance with Ariz. R. Civ. P. 54(c). [ROA 76] Without citing the statute, the March 24 ruling found certain categories of documents were properly withheld because, for example, they involved personnel matters, were related to ongoing research or contained prepublication peer review. [ROA 64, ¶s 3, 4 & 5]

That left the rest of the withheld emails -- "prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary" – to fall within categories 7 & 8 of the November 17 Order. As to these emails, the Court found that the University had presented an "impressive array" of witnesses who provided "compelling support" for its argument that release of these emails "would

have a chilling effect on the ability and likelihood of professors and scientists engaging in frank exchanges of ideas and information." The Court therefore held that it was not an abuse of discretion for the University to withhold these emails. [ROA 76, EP 3].

E&E appealed and, on December 3, 2015, this Court issued a Memorandum Decision vacating that portion of the trial court's order relating to the email covered by categories 7 & 8. The Court found that the trial court incorrectly applied an "abuse of discretion" standard, held that a complete *de novo* review was required, and remanded the case for further proceedings. *Energy & Environment Legal Inst. v. Arizona Bd. of Regents*, No. 2 CA-CV 2015-0086, 2015 WL 7777611 (Ariz. App. Dec. 3, 2015) (mem. decision).

Upon remand, the Court received one additional brief from each side. [ROA 110]. A hearing was held on May 25, 2016, and on June 14, 2016, the trial court issued its ruling. The court found the exact same evidence that provided "compelling support" for the University's position had become "speculative at best," and provided no support for the University's position. Therefore, the Court ordered ABOR to release to E&E "the withheld emails which were described in the initial and supplemental logs as prepublication critical analysis, unpublished data, analysis, research, results, drafts and commentary." [ROA 123, EP 4] The court again failed to mention A.R.S. §15-1640. This appeal followed.

This Court has jurisdiction over the appeal under A.R.S. § 12-2101(a)(1), Arizona Rules of Procedure for Special Actions ("ARPSA") 8(a), Arizona Rules of Appellate Procedure ("ARCAP") 8 and 9.

STATEMENT OF FACTS

A. Events prior to suit. E&E styles itself as "a nonprofit research, public policy based, and public interest litigation center" based in Washington, D. C. [ROA 4, EP 1] It claims to be pursuing a "transparency project" as part of a mission to "put false science on trial." [ROA 4, EP 2; ROA 36, EP 47] It pursues its quest by making requests for "information held by publicly funded agencies, including universities, related to the important public policy issue of alleged catastrophic man-made global warming." [ROA 4, EP 2] At this late date, however, there is little doubt that global warming is taking place and that human beings contribute to it. [ROA 36, EP 3-7]

E&E made three record requests to the University, beginning on December 7, 2011,[3] asking for emails between two prominent University climate scientists -- Drs. Jonathan Overpeck Malcolm Hughes -- and their colleagues in various parts

[3] The requests mainly sought: Emails between Drs. Overpeck and Hughes and specified individuals, or referencing certain people or terms, between dates ranging from 1999 to December 2012 [ROA 30, EP 9-10]; and correspondence between Dr. Overpeck and Thomas Stocker during February through May 2010 [ROA 30, EP 16].

of the world, initially focusing on the period from January 1999 to 2006. [ROA 30, EP 9-11] [4]

The University first answered E&E's December 7 request on June 15, 2012. [ROA 30, EP 19-21] By letter from Defendant-Appellee Teri Moore ("Moore"), the University's Coordinator of Public Records, approximately 135 pages of responsive records were produced, and Ms. Moore made it clear that production would continue on a "rolling" basis. [ROA 30, EP 19-20] In addition to redacting home or private telephone numbers from the produced records, ABOR withheld certain emails, identified in Moore's initial response letter, pursuant to "the balancing test established by the Arizona courts to protect either the confidentiality of information, privacy of persons, or a concern about disclosure detrimental to the best interests of the state, or pursuant to other statutes or case law restricting disclosure of such information." [ROA 30, EP 20] Over the course of the next three months, and concluding with the final delivery of records on September 7, 2012, ABOR produced 1614 pages of records, consisting of 547 pages from Dr.

[4] Dr. Overpeck is Co-Director of the Institute of the Environment, and Regents' Professor in the Departments of Geosciences and Atmospheric Sciences of the College of Science.[4] [ROA 36, EP 507-508] Dr. Overpeck is an active teacher, researcher, writer, and editor in the field of paleoclimatology. [See ROA 36, EP 507-508] Dr. Malcolm Hughes is Regents' Professor of Dendrochronology in the Laboratory of Tree-Ring Research, former director of the Lab, and a professor in the School of Natural Resources and Environment.[4] [ROA 36, EP 423-424]

Hughes and 1067 from Dr. Overpeck, along with a log of the other records that had been withheld. [ROA 17, EP 2]

Two more requests were made by E&E on May 31 and August 6, 2012. [ROA 30, EP 13-14, 16-17] The three E&E requests sought email and focused on the interactions of Drs. Hughes and Overpeck with a variety of scientists, academicians and scientific publications around the world, spanning a period of 13 years - from 1999 to 2012. [ROA 30, EP 9-17] Also included in the requests were communications among scientists contributing to the work of the United Nations' Intergovernmental Panel on Climate Change.

By letter dated December 19, 2012, E&E objected to ABOR's production and the sufficiency of the logs describing the withheld documents. [ROA 30, EP 23-28] ABOR responded to E&E's objection on February 5, 2013 and declined to produce additional records. [ROA 30, EP 30-33] E&E's complaint was then filed on September 5, 2013. [ROA 4]

B. E&E's pursuit of Professors Hughes and Overpeck is an outgrowth of Climategate.

Scientists like Drs. Overpeck and Hughes have long cooperated and corresponded with colleagues involved in climate change research [See ROA 70, EP 10-11 at ¶¶ 3-5], and they have paid a price for it.

Some of E&E's requests involve communications with scientists from the Climate Research Unit ("CRU") of the University of East Anglia in Great Britain. [ROA 30, EP 9-10, EP 19] In 2009, emails from CRU scientists were stolen via a "sophisticated and carefully orchestrated attack on the CRU's data files, carried out remotely via the internet" [ROA 36, EP 425, ¶ 9 (quoting the Norfolk Constabulary report of the investigation of the crime)] These are the so-called "Climategate" emails, once used to support a now-debunked claim that scientists conspired to fabricate or exaggerate climate change. [ROA 36, EP 425, ¶ 10]. [5]

E&E announced its lawsuit with a press release on September 10, 2013, saying that it was pursuing "the worst scientific scandal of our generation, … the notorious 'Hockey Stick'" and about the "group that made it famous, the Intergovernmental Panel on Climate Change (IPCC)." [ROA 36, EP 52]

[5] (See Jess Henig, "Climategate," FactCheck.Org, Dec. 22, 2009, http://www.factcheck.org/2009/12/climategate/ (last visited September 3, 2015)

A side effect of the 2009 East Anglia email theft was a series of complaints against Professor Hughes' co-author, Dr. Michael Mann. The complaints alleged improper conduct. An investigation found "no substance" to any of the allegations, and Mann was completely and unanimously exonerated on June 4, 2010. [ROA 36, EP 249 & 263] The next steps in the pursuit of Mann, Hughes and another collaborator occurred on January 6, 2011, when E&E Legal filed a public record request with the University of Virginia, *see American Tradition Institute v. Rector and Visitors of the University of Virginia*, 287 Va. 330, 334 (2014), followed in December 2011 by E&E's Arizona record requests.[ROA 36, EP 249 & 263]

The "hockey stick" reference stems from a 1999 article authored by Dr. Hughes and Professors Mann and Raymond Bradley. Benignly titled *Northern Hemisphere Temperatures During the Past Millennium: Inferences, Uncertainties, and Limitations*, the authors' research led them to conclude that a sharp spike in Northern Hemisphere temperatures took place during the latter half of the twentieth century. [*See* ROA 36, EP 58-61, EP 424 at ¶¶ 4-6] [6] The authors' findings, when plotted on a graph, were said to resemble a hockey stick. [ROA 36, EP 60]. The article generated debate and follow-up research, but its conclusions have been generally accepted since at least 2006, when the National Research Council published an article concluding that MBH99's "basic conclusion [in 1999] that the late 20th century warmth in the Northern Hemisphere was unprecedented during the last 1000 years … has subsequently been supported by an array of evidence …." [ROA 36, EP 93-98].

Dr. Overpeck was targeted by E&E for his work with the United Nations' Intergovernmental Panel on Climate Change ("IPCC"), a "scientific body [established under the auspices of the United Nations in 1988] to provide the world

[6] The article's full citation is M. Mann, R. Bradley & M. Hughes, *Northern Hemisphere Temperatures During the Past Millennium: Inferences, Uncertainties, and Limitations*, published in GEOPHYSICAL RESEARCH LETTERS, Vol. 26, No. 6, at 759-62 (March 15, 1999) (hereinafter "MBH99"). [*See* ROA 36, EP 58-61]

with a clear scientific view on the current state of knowledge in climate change and its potential environmental and socio-economic impacts."[7] The IPCC is comprised of 195 member countries and "thousands of scientists from all over the world [who] contribute to the work of the IPCC on a voluntary basis."[8] [See ROA 35, EP 56]

Dr. Overpeck was one of two coordinating lead authors of a chapter of the IPCC's Fourth Assessment Report: Climate Change 2007 ("AR-4"), a project awarded the Nobel Peace Prize.[9] The work managed by Professor Overpeck is Chapter 6 of AR-4's report, *The Physical Science Basis*. Prepared by a team of about 50 authors and editors, Chapter 6 analyzes the "paleoclimate," *i.e.*, the history of our planet's climate. [ROA 36, EP 102-119]

QUESTIONS PRESENTED

1. Did the trial court improperly fail to cite, consider and apply A.R.S. 15-1640, and if so, should this Court review the evidence, interpret the statute and

[7] This information was obtained from the IPCC's Organization Page, located at http://www.ipcc.ch/organization/organization.shtml (last visited Aug. 31, 2015).

[8] *Id*.

[9] The IPCC received one-half of the Nobel Peace Prize in 2007, for its "efforts to build up and disseminate greater knowledge about man-made climate change, and to lay the foundations for the measures that are needed to counteract such change." [ROA 36, EP 100].

decide the merits, or should the matter be remanded for the trial court for a proper application of the statute?

2. With respect to any email involved here that is not covered by A.R.S. §15-1640, should this Court, in balancing ABOR's right to withhold records against the public's right to obtain them, reverse the trial court's decision as to those records?

STANDARDS FOR JUDICIAL REVIEW

A. The Statutory Exemption of A.R.S. §15-1640. This statute creates exemptions from Title 39 of the Arizona Revised Statutes – our basic public record laws -- for unpublished information of the sort at issue here. The interpretation and application of the statute is a question of law which this Court reviews *de novo. City of Phoenix v. Glenayre Elec., Inc.*, 240 Ariz. 80, 84, 375 P. 3d 1189, 1193 (App. 2016) [10]

B. The General Rules Applicable to Public Records. An "officer" of a "public body" is required to maintain "all records … reasonably necessary or appropriate to maintain an accurate knowledge of [his] official activities and of any

[10] As for the trial court's findings, we suggest that the Court review the facts independently, but if the Court chooses not to do so, we note below certain findings that are, in our view, clearly erroneous or internally inconsistent in significant ways. In those instances, we ask that the Court to set aside those findings and remand for further proceedings. See discussion *infra* at 16-19.

of [his] activities which are supported by monies from this state…" A.R.S. §39-121.01(B). The University of Arizona is a "public body." A.R.S. §39-121.01(A)(2). As appointed faculty members, Malcolm Hughes and Jonathan Overpeck are "officers" of this "public body." *See* A.R.S. § 39-121.01(A)(1)&(2).

Absent an exemption, "[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours." A.R.S. §39-121. This ostensibly unconditional directive have a common law exception: For over 60 years our courts have recognized that Arizona's agencies and officers have discretion "to deny in the first instance the right of inspection." *Mathews v. Pyle,* 75 Ariz. 76, 81, 251 P. 2d 893, 896 (1952). "[D]iscretion to deny or restrict access" may be exercised when the officer or agency determines that "the interests of privacy, confidentiality, or the best interests of the state in carrying out its legitimate activities outweigh the general policy of open access." *Carlson v. Pima County,* 141 Ariz. 487, 491, 687 P. 2d 1242, 1246 (1984). While the right of access to public records is "subject to the official's discretion to deny or restrict access … [a]ny abuse in the denial of public access may be remedied under A.R.S. §39-121.02, *et seq." Id.*

C. The Standard of Review in this Court.

On appeal from a decision in a public records suit, the reviewing court conducts a *de novo* review of the lower court's *Mathews v. Pyle* balancing of

interests, and may "draw [its] own conclusions." *See Arizona Bd. of Regents v. Phoenix Newspaper, Inc.*, 167 Ariz. 254, 257, 806 P. 2d 348, 351 (1991) ("ABOR v. PNI"). On the other hand, a reviewing court may in some cases be bound by the trial court's findings of fact, "unless they are clearly erroneous," *id.* -- the usual rule applicable to findings of fact made following a trial. In our case, however, deference to the trial court's findings is not mandated, as there was no trial and the superior court decided the case based upon sworn declarations, affidavits, exhibits and the briefs and arguments of the parties.

"[W]hen the evidence upon which a [trial court's] findings are based is entirely documentary," the reviewing court is "not bound by the trial court's findings." *Meyer v. Warner*, 104 Ariz. 44, 46-47, 448 P. 2d 394, 396-97 (1968) (supreme court reviewed trial court's findings independently where second trial was based entirely upon the written record of the first trial).

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO CITE, DISCUSS, OR APPLY A.R.S. §15-1640.

A. The Statutory Issue. Our appeal questions whether the trial court applied or even considered A.R.S. §15-1640(A)(1)(d), which "exempt[s] from title 39, chapter 1, article 2" any "university records" that are "[c]omposed of unpublished research data, manuscripts, preliminary analyses, drafts of scientific

papers, plans for future research and prepublication peer review." A.R.S. §15-1640(A)(1)(d).

When the University answered E&E's record request on September 7, 2012, it cited the statute to support its retention of the records at issue here. [ROA 47, EP 9] In addition, as permitted by A.R.S. §39-121.01(D)(2) the University provided E&E with indexes of the withheld documents, which relied, in part, on the statute. [ROA 30] The Court later ordered ABOR to place the withheld email into nine categories. [ROA 64] ABOR complied with the Order, and provided additional indices to the Court and to E&E to analyze ABOR's exemplars.

Before the trial court, E&E claimed that none of the records described above could be withheld because (1) Hughes, Mann and Bradley had already published MBH99, (2) the IPCC had published AR-4, the Nobel prize winning report co-authored by Jonathan Overpeck or (3) other authors published articles following the emails. [ROA 46; ROA 49] E&E's claim was premised on A.R.S. §15-1640(C), which states "[a]ny exemption provided by subsection A of this section shall no longer be applicable if the subject matter of the records becomes available to the general public."[11] E&E did not point to any specific record that appeared to fall within this category, but effectively insisted that once *something* has been published (e.g., articles on climate science), anything that may have occurred or

[11] The terms "subject matter" and "becomes available" are not defined.

been communicated *prior to* publication becomes automatically available to the public. [ROA 35, EP 26]

The University responded that because E&E's reading of the statutory exemption would produce results contrary to its purpose, it should not be read as E&E claimed and should, instead, be interpreted in a manner consistent with commonsense, legislative intent, and federal freedom of information (FOIA) rules. [ROA 37, EP 34-39] *See Phoenix New Times, LLC v. Arpaio*, 217 Ariz. 533, 539 ¶15 nn. 177 P. 3d 275, 281 (App. 2008) ("When interpreting Arizona's public records statutes, it is appropriate to look to FOIA for guidance"). .

B. The trial court's rulings. Neither the trial court's March 24, 2015 ruling nor its June 14, 2016, decision mentions A.R.S. §15-1640, and the relationship of the two rulings to the statute – and to each other -- is difficult to discern. For example, the March 24 ruling concluded that ABOR properly withheld "emails that … contain information that could fairly be characterized as … student information … ongoing research [or] prepublication peer review. [ROA 76, EP 3, Finding No. 5.] A literal application of A.R.S. §15-1640(C), as requested by E&E, however, would mean that peer review materials lose protection after publication. The trial court also found in June 2016, that the withheld "emails do not contain ongoing research, peer-review material or any identifiable prepublication materials." [See ROA 123, EP 2 (Finding 14)] This finding is inconsistent with

Finding no. 5 and cannot be reconciled with other findings in the same ruling that the withheld emails *are* prepublication communications:

> 8. The articles that are referenced, revised and/or supplemented in the emails were subsequently published and have been in circulation for many years.
>
> 10. Many of the emails include recipients who worked for scientific journals and discuss edits/revisions to articles that were subsequently published.[12]
>
> 11. Many of the emails include data that was used to support subsequent publications.
>
> 12. Many of the emails include references to data which has been publicly available for decades.

[ROA 123, EP 2]

Either way, an implicit premise of the court's inconsistent findings is that publication of an article deprives at least *some* pre-publication materials, including University email, of any protection..

Many of the withheld emails fall into this category: communications that relate to subsequently published papers. For example, Dr. Overpeck's exemplars JO-5 through JO-10 are emails among co-editors and co-authors, generated as part of what Overpeck describes as their "critical analysis for [the] subsequently

[12] This finding seems to *describe* the process of peer review and, if the court meant to say in finding 10 that subsequent publication of articles deprived the communications of protection, finding 10 cannot be squared with finding no. 5, protecting peer review material after publication. [ROA 76, EP 3] Nor is finding no. 5 consistent with A.R.S. §15-1640(C), which seems to state that peer review materials are no longer exempt from publication once the "subject matter" of the peer review has reached the public domain.

published IPCC (2007) report." Overpeck explained that their analyses were "only preliminary and not intended to be made public," largely because "the final published draft ***is*** the draft of record, not the informal scientific deliberations and critical analysis contained in [the] emails." [ROA 70] However, apparently because subsequent publication of the final IPCC document occurred in 2007, the trial court ordered release of these previously unpublished emails. [ROA 70, EP 52-53]

The same thing happened with otherwise unpublished communications between Hughes and his colleagues. For instance, MH-3, ABOR/MH/Priv-000574 is a discussion with colleagues at other universities about measurement of sea temperatures, and sharing of data; an article authored by non-UA researchers was later published in INTERHEMISPHERIC CLIMATE LINKAGES. [ROA 70, EP 24] Exemplars contained in Hughes folder MH-11 contain prepublication "critical analysis" of an article authored by Michael Mann and 12 others, and later published in EOS TRANSACTIONS. [ROA 70, EP 37-38]. MH-12 includes email containing critical analysis relating to an article subsequently published in "Science" magazine. None of the authors is an Arizona researcher. [ROA 70, EP 39]. The trial court ordered publication of these and similar emails simply because articles were subsequently published, again without reference to A.R.S. §15-1640.

Some of the withheld email related to grants that were sought but never funded. [ROA 70, EP 45-46; MH-18-7060, 7074, 7169] The statute exempts such email, A.R.S. §15-1640(A)(1)(a), yet the trial court's rulings do not mention the email or the statute.

The parties briefed the trial court concerning the application and meaning of A.R.S. §15-1640, but it is impossible to determine whether the exemption had any bearing on the court's rulings. Therefore, we ask that this Court interpret A.R.S. §15-1640 in a manner consistent with the legislature's intent, and return the matter to the trial court for further proceedings

C. The origin of the research exemption. In 2012, our legislature enacted and the Governor approved House Bill 2272, amending an existing version of A.R.S. §15-1640 to include the provisions quoted above.

State Representative Vic Williams sponsored HB2272. Williams evidently was working in cooperation with SANOFI, a developer of vaccines, prescription medicines and other products concerning possible clinical trials to be conducted in Arizona. In a hearing of the Senate Committee on Commerce and Energy on March 14, 2012, Williams described HB2272 as a "jobs bill," designed to bring private sector research dollars to Arizona's universities and decrease stress on

university budgets, and hoped that passage of HB2272 would bring jobs to Arizona "tomorrow." [13]

Others who spoke in support of HB2272 -- including Senate Committee Chairman Al Melvin -- echoed the same theme: HB2272 would help Arizona attract "tech," "hi-tech," and other employers, and help the state and its universities.[14]

Under E & E's interpretation of the statute, the exception swallows the rule and produces results contrary to the legislature's intent of protecting academic communications to attract research dollars and jobs to Arizona. By construing our

[13] A video recording of the bill's consideration of and unanimous passage by the Senate Committee on Commerce and Energy can be accessed at http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=10606&meta_id=196906 (last visited April 18, 2017). Statements concerning a bill by sponsors and committees about "what they intended to accomplish with a specific provision of that bill … can be useful to clarify any ambiguity in the meaning of the enacted legislation." *Hernandez-Gomez v. Leonardo*, 185 Ariz. 509, 513, 917 P.2d 238, 242 (1996).

[14] The comments of the legislators and non-legislators who spoke at the March 14, 2012 hearing are consistent with comments by the bill's sponsor and may be considered in determining legislative intent. *See, e.g.*, *State v. Fikes*, 228 Ariz. 389, 392, 267 P.3d 1181, 1184 (App. 2011) ("Statements of non-legislators may … be relied upon if there are 'sufficient guarantees that the statements reflect legislators' views'" quoting *Ballesteros v. American Std. Ins. Co.*, 226 Ariz. 345, 349-50, 248 P.3d 193, 197-98 (2011)); *State v. Payne*, 223 Ariz. 555, 563, n. 4, 225 P.3d 1131, 1139 n.4 (App. 2009) ("the comments of a legislative supporter" of a particular law may be "pertinent, albeit not determinative, on the question of legislative intent," quoting *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 150 P.3d 773 (App. 2007)).

statute with common sense, in light of its purpose, such a result can be avoided. *See Koss v. American Express Co.*, 233 Ariz. 74, 79, ¶12, 309 P.3d 898, 903 (App. 2013). "If a literal interpretation of statutory language leads to an absurd result, the court has a duty to construe it, if possible, so that it is reasonable and workable." *State Farm Auto Ins. Co. v. Dresser*, 153 Ariz. 527, 531, 738 P.2d 1134, 1138 (1987).

D. There is a way to construe the statute to encourage publication and protect confidential communications.

The issue facing this Court is how to interpret A.R.S. §15-1640 to carry out the legislature's intent. Subsection (A) exempts "information" from Arizona's public record laws that is "unpublished research data, manuscripts, preliminary analyses, drafts of scientific papers, plans for future research and prepublication peer reviews." A.R.S. §15-1640(A)(1)(d). The exemption for "research data" is "no longer applicable, however, if the subject matter of the records becomes available to the general public." *Id.*, subsection (C). Our statute neither mentions prepublication communications between colleagues nor defines "research data." However, these concepts do have generally accepted meaning, both among scientists and in federal freedom of information laws.

Arizona's statutory exemption tracks, in large measure, federal FOIA regulations. In general, the federal rule requires that "research data relating to

published research findings produced under an award" be provided in response to a federal FOIA request.[15].

Federal law deals with pre-publication communications – such as the email at issue here –in the following way:

> (i) Research data means the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, *but not any of the following: Preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, **or communications with colleagues***. *** Research data also does not include trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected by law.

2 CFR §200.315(e)(3)(i) (emphasis added).[16]

By protecting unpublished communications, the federal rule tracks the "state of the art" in the field of scientific publication. [*See* ROA, 36, EP428, Hughes Decl. ¶s 21-38; ROA, 36, EP 305-306, Bruce Alberts Decl. ¶s 11-13; ROA, 36, EP 473-479, Levy Decl. ¶s 14-15, 18, 21-24] In our case, however, the trial court ordered release of email that would be protected by federal law, even though Arizona's statutory exemption plainly appears to be patterned after the federal rule. *Compare* A.R.S. §15-1640(A)(1) *with* 2 CFR §200.315. Where does this leave us?

[15] 2 CFR §200.315(e)(1); *see also* ROA 36, EP 527, 534-539, Rawlings Declaration, ¶s 12-14 and its Attachment 1.

[16] 2 CFR §200.315(e)(3).

Our statutes should "be liberally construed to effect their objects and to promote justice." A.R.S. §1-211(B). And when a statute is susceptible "to different interpretations, [our courts] adopt the interpretation that is most harmonious with the statutory scheme and legislative purpose." *State v. Helfrich*, 174 Ariz. 1, 5, 846 P. 2d 151, 155 (App. 1992). In addition, a "practical construction of a statute is preferred to one which is absurd, and practical construction is required if a technical construction would lead to mischief or absurdity." *State Farm, supra*, 153 Ariz. at 531, 738 P.2d at 1138. Interpreting our statute to conflict with federal law will lead to "mischief or absurdity."

An example: The trial court found that "[m]any of the [withheld] emails include recipients who work for the federal government (NASA, NOAA, National Science Foundation) and would be subject to requests under the Freedom of Information Act," suggesting this fact supports ordering release of pre-publication email. [See ROA 123, EP 2] However, federal law *protects* such prepublication communications. This obvious dilemma can be resolved simply by interpreting our statute consistently with federal law and excluding "communications with colleagues" from the reach of A.R.S. §15-1640(C). *See also Phoenix New Times v.*

Arpaio, supra, 217 Ariz. at 541, ¶28 note 5, 177 P. 3d at 283 (interpreting Arizona's public record laws so as to "agree with courts interpreting FOIA").[17]

II. THE TRIAL COURT DISREGARDED RELEVANT PRECEDENTS FROM OTHER STATES

By enacting the exemptions provided by A.R.S. §15-1640, the legislature obviously recognized the need to protect researchers against the risk posed by unlimited intrusions into their work, and our courts may not ignore "the policy behind the law and the evil it was intended to remedy." *State v. Clary*, 196 Ariz. 610, 612 ¶9, 2 P. 3d 1255, 1257 ¶ 9 (App. 2000). Other courts addressing the issue agree that unrestrained intrusion into the process of scientific research at public universities *does cause harm*, but the trial court ignored the pertinent cases cited to it. [18]

A. E&E's Unsuccessful Virginia Suit. E&E, when it was known as the American Tradition Institute, previously brought suit Virginia in another court seeking many of the very same records involving Dr. Michael Mann – co-author of

[17] A more comprehensive interpretation of A.R.S. §15-1640 was proposed in the trial court. [ROA 36, EP 38]

[18] The key precedents come from Virginia and California. There are no Arizona cases dealing with access to email and other communications sent or received by public university researchers, butthis Court may rely upon the reasoning of each of these out-of-state cases in assessing the correctness of the trial court's ruling. *See Hodai v. City of Tucson*, 239 Ariz. 34, 42 ¶25 n. 8 (App. 2016) (Arizona "courts may look to cases from other jurisdictions as persuasive authority").

MBH99 along with Malcolm Hughes.[19] The case was ultimately decided against E&E by the Virginia Supreme Court in *American Tradition Institute v. Rector and Visitors of the University of Virginia*, 287 Va. 330 (Va. 2014) (*"ATI v. UVA"*).

In January 2011, E&E asked the University of Virginia for all documents "produced and/or received" by Dr. Michael Mann "while working for the University."[20] Not receiving the response it wanted, E&E filed a mandamus suit against the University. The trial court initially ordered the University to turn over 1,793 emails. Dr. Mann later intervened, and the parties instead filed 31 "exemplars" with the court. After briefing, argument and *in camera* review, the court reversed itself, finding some emails to be personal correspondence not subject to inspection. As for Mann's "business correspondence," the court found the emails were "scientific and scholarly," and were "proprietary" information exempted from disclosure by statute. *ATI v. UVA*, 287 Va. at 337. E&E appealed, and the Virginia Supreme Court affirmed. The court found the exemption necessary "to protect public universities and colleges from being placed at a

[19] Dr. Mann was employed by the University of Virginia from 1999 to 2005, the same period for which E&E made its initial records request in this case for any exchanges between Drs. Hughes, Overpeck and Mann. E&E has never said so, but it is extremely likely these cases involve some of the very same records being sought by E&E in different forums.

[20] E&E also asked the University of Arizona for emails between and among Professors Mann, Overpeck and Hughes. [ROA 30]

competitive disadvantage in relation to private universities and colleges." *Id.* at 342. The court also made a specific finding of the harm likely to flow from enforcement of E&E's public records request. Because The Virginia court was rejecting E&E's arguments in a case involving one of Dr. Hughes' co-authors, its reasoning is uniquely applicable:

> In the context of the higher education research exclusion, competitive disadvantage implicates not only financial injury, but also harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression. This broader notion of competitive disadvantage is the overarching principle guiding application of the exemption.

Id.

Although the Virginia case overlaps with this one, and was brought to the trial court's attention, there is no mention of it in the rulings below. However, the discussion below demonstrates, the same factors underlying the Virginia decision are at play here and should be taken into account in deciding whether disclosure of unpublished email and other information is either protected by statute or would be contrary to principles of confidentiality, privacy or the best interest of our state..

B. The California Case. Similarly, despite extensive reference to it in the trial court, its rulings ignore a decision of the California Court of Appeals that upheld denial of access to unpublished communications in a situation much like ours. *See Humane Society of the United States v. Superior Court*, 214 Cal.App.4th

1233 (2013), where the Humane Society ("HSUS") requested all documents of the University of California-Davis concerning a study published by the University's Agricultural Issues Center. HSUS filed a mandamus suit. The University produced 356 pages of documents, but withheld almost 3,100 more. The trial court decided that most of the documents were properly withheld. The HSUS sought mandamus relief, and the court of appeals denied the petition. *Id.* at 1275.

As does Arizona, California permits records to be withheld if "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."[21] The court found that, even well after publication of the study, "disclosure of prepublication research communications would fundamentally impair the academic research process to the detriment of the public that benefits from the studies produced by that research." *Id.* at 1267. The court relied on an extensive affidavit from Dr. Daniel A. Sumner, director of the study in question. Based upon his 30-year career in conducting and reviewing research Sumner explained:

> Forcing us to reveal all of our sources, and all of the confidential information they provide us, and releasing every detail of our research communications, in search of bias, will only lead to fewer (if any) sources, and fewer communications, and the work we do, and the benefit we strive to confer on the public, all will suffer.

[21] Cal.Gov.Code §6255. California's "balance of interests" exemption is very similar to Arizona's "best interests" analysis. *See Carlson*, 141 Ariz. at 490.

Id. at 1243. In sharp contrast to the trial court's ruling here, the California court rejected HSUS's claim that Sumner's opinions about anticipated harm were "speculative." *See Humane Society*, 214 Cal.App.4th at 1258.

The court acknowledged the importance of accurate and objective research, but also observed "a published report itself states its methodology and contains facts from which its conclusions can be tested." Because published research is "exposed to extensive peer review and [post-publication] public scrutiny," the court found the availability of the report to be an adequate "alternative [for] ensuring sound methodology [that] serves to diminish the need for disclosure," and stated:

> [G]iven that the prepublication written communications are in jargon and involve midstream thinking, some of which was by junior researchers and some of which were supplemented during the research process with undocumented oral conversations, we conclude that the value of these documents to evaluate the conclusions and methodology is minimal.

Id. at 1268.

The court's final decision was straightforward: "Weighing the public interests asserted in the trial court and supported by the evidence, we conclude that the public interests in nondisclosure outweigh the public interests in disclosure." *Id.* at 1275. The argument in favor of nondisclosure is even more compelling here, as our legislature's enactment of A.R.S. §15-1640 is a plain recognition that the harm foreseen by Dr. Sumner and our experts is real.

III. THIS COURT MUST BALANCE INTERESTS UNDER *MATHEWS V. PYLE*. ONCE IT DOES SO, IT SHOULD REVERSE.

A. What this case is NOT about. In order to test the validity of published scientific studies, one needs three things: (i) A report of findings and conclusions; (ii) the data upon which the findings and conclusions were based; and (iii) information about the methodology used to analyze the data. We agree that this information should be made available. E&E does not claim a shortage of data concerning the published work of Hughes and Overpeck. Instead, E&E wants unpublished information found in email communications between and among Hughes, Overpeck and others with whom they communicate and collaborate. While we refer to the withheld records generically merely as "email," the email includes prepublication critical analysis of scientific work, unpublished data and analysis, unpublished research and its results, as well as drafts and commentary – the grist of the scientific mill. [ROA 76, EP 3; ROA 70, EP 19-56]

B. The relationship between A.R.S. §15-1640 and Arizona's common law public record jurisprudence. The enactment of A.R.S. §15-1640 did not repeal Arizona's common law rules. Rather, it incorporated them by exempting from Title 39 information that is:

> (b) Developed by persons employed by a university, independent contractors working with a university or third parties that are collaborating with a university, if the disclosure of this data or material would be contrary to the best interests of this state.

The information requested by E&E includes "material" or "data" developed university employees and third party collaborators, if disclosure would be contrary to the state's interests. *See*, for example, MH3-574 (discussions with colleagues at private universities, including critical analysis of subsequently published work not written by Arizona researchers). In addition, some of the withheld email is communication about work that was never submitted for publication. MH2-37, 83, 86; MH5-1718, 1803-04, 2063-67. Still other email relates, for example, to work that was submitted for publication, but either later withdrawn or its publication declined. MH3-190; MH5-1383-84, 1502-04. Email concerning unfunded proposals are also among the withheld records. MH8-4348, 4353; MH9-4446. [ROA 70, EP 20-36]

In short, should this Court decide that this or other unpublished information falls outside of the statutory exemption – that is, if there is no *exemption* -- then a *Mathews v. Pyle* analysis must be done.

C. ABOR presented overwhelming evidence of the need to protect unpublished information contained in the email.

"Public records requests … may be refused based on concerns of privacy, confidentiality, or the best interests of the state," *Lake v. City of Phoenix*, 222 Ariz. 547, 551 ¶ 15, 218 P. 3d 1004, 1008 (2009), where "disclosure 'might lead to substantial and irreparable private or public harm.'" *Hodai v. City of Tucson*, 239

Ariz. 34, 38 ¶7, 365 P. 3d 959, 963(App. 2016) (quoting *Carlson v. Pima County,* 141 Ariz. at 491). ABOR was obliged to "articulate[] sufficiently weighty reasons to tip the balance away from the presumption of disclosure and toward non-disclosure." *London v. Broderick,* 206 Ariz. 490, 493, 80 P. 3d 769, 772 (2003). We did just that.

Protection of confidentiality was, of course, at the heart of the Arizona Supreme Court's decision in *ABOR v. PNI,* in which ABOR declined to release the identity and resumes of 256 individuals considered for the presidency of Arizona State University, citing confidentiality concerns. 167 Ariz. at 255, 806 P. 2d at 349. The case is stronger here, where prominent leaders in science, publishing and academic administration confirm that generally accepted norms of confidentiality and privacy -- implicit in A.R.S. §15-1640 -- will be harmed if the burdens imposed by E&E and the trial court are permitted to stand.

1. The importance of email in the conduct of science. Among academics and researchers, email and other forms of electronic communication have taken the place of speaking in meetings or in telephone conferences, or communicating by fax, postal mail or courier, as the primary means for exchanging ideas, theories, research results, comments and criticisms, and for working on common projects. The result: global collaboration is now carried out with an

efficiency "scarcely imaginable 10 or 15 years ago." [ROA 36, EP 462 at ¶ 20, lines 3-10; ROA 70, EP 10-11 at ¶3]

The records sought by E&E are "the 21st century equivalent of the hallway chats, cryptic scribbled notes, telephone conversations, research team meetings and other informal and largely unrecorded communications [scientists and researchers] used to have" before the advent of electronic communications. [ROA 70, EP 11]

Drs. Overpeck and Hughes acknowledge that, "[a]s career scientific researchers and teachers, [they] are accustomed to the growing reliance upon email as the primary means of communicating within academic and research communities." [ROA 70, EP 10 at ¶ 4] But they were concerned that the privacy and candor previously afforded by means of communication which did not result in a written record should not be lost simply because the new methods of communication result in an electronic one. [ROA 70, EP 11 at ¶ 6]

2. Confidentiality. ABOR submitted sworn declarations from 13 preeminent experts in their fields, both within and outside of Arizona's universities. They hail from public institutions, private universities, foundations, and associations of both universities and university professors. They provide clear

evidence that confidentiality is an accepted part of the conduct of science, and Judge Marner was wrong to reject it. [*See* ROA 36, EP 302-539][22]

Dr. Vicki Chandler, Chief Program Officer-Science at the Gordon and Betty Moore Foundation, and a former Arizona plant scientist put it this way: "Confidentiality of communication between and among research collaborators, colleagues asked to provide feedback, formal peer reviewers connected with particular scholarly journals is a customary and generally expected facet of the process" of science. [See ROA 36, EP 364 at ¶ 6]

Other witnesses echoed Dr. Chandler: Dr. Donald Kennedy – President and Professor Emeritus of Stanford University: "Confidentiality is, as a matter of routine custom, taken as a given in science." [ROA 36, EP 448 at ¶ 7]. Dr. Joshua LaBaer, a biomedical researcher at Arizona State University: "[E]xisting mechanisms critically afford protections of privacy and security to the unpublished communications ... of scientists and other scholars." [ROA 36, EP 260 at ¶ 12, ¶20, lines 10-17]; Dr. Lynn H. Nadel, faculty chair at the University of Arizona: "The custom of confidentiality under which we all operate is what produces frank,

[22] To help the Court identify the exact location of ABOR's exhibits in ROA 36, including these declarations, and the electronic pages on which each exhibit begins, we have included an exhibit to this Brief, found after the signature page and before the Certificate of Compliance, at EP 44-45. The list, without page numbers, can be found at ROA 44, EP 9-10.

honest, often caustic and sometimes brutal criticism and challenges we need to improve the quality of our work." [ROA 36, EP 504 at ¶ 11(b)].[23]

3. Releasing email communications generally considered to be confidential will chill and impair the process of research. The threat to academic confidentially and privacy posed by this case was explained Dr. Bruce Alberts.[24], researcher, former editor-in-chief of the journal *Science* and holder of an endowed chair in Biochemistry and Biophysics at the University of California, San Francisco:

> [A]ny realistic threat of additional legal requirements of the type requested by the [E&E] in the present case would have a chilling effect on the practice of science in the United States…. Scientists must feel free to speak their minds in private emails - spontaneously and without fear of each informal thought being officially reviewed. They must be able to share their thoughts on the fly, to question the abilities or care of other scientists, and to be highly critical (and even scathingly rude) about the data or approaches of others in emails and other private correspondence. Any discouragement of such spontaneous and blunt honesty on the part of a scientist in private correspondence would seriously hinder the free flow of thought that is

[23] E&E had an opportunity to object to ABOR's declarations about the generally accepted norms of confidentiality followed by researchers. It did not do so. Nor did any of its witnesses credibly claim that scientists generally consider normally unpublished communications and data are generally considered to be "fair game" once simply because an article or paper has been published.

[24] E&E had an opportunity to object to ABOR's declarations about the generally accepted norms of confidentiality followed by researchers. It did not do so. Nor did any of its witnesses credibly claim that scientists generally consider unpublished communications and data to be "fair game" once simply because an article or paper has been published.

> critical to scientific invention. Forcing scientists to consider the public effect of each word in their emails would both disadvantage our nation relative to others, and retard the universal advance of knowledge on which the future of the entire globe depends. A focus on holding scientists to the rigorous, reproducible requirements for scientific publications that are already in place would be an infinitely better use of time and resources.

[ROA 36, EP 306 at ¶ 12]

Arizona State University's Dr. Joshua LaBaer summed up well what is likely to happen if unpublished communications of *precisely* the type involved here were not protected against public record requests:

> Scientists at private institutions … that are not subject to state freedom of information statutes, will not feel that it is possible to continue collaborations with scientists at public institutions if doing so means that every email or other written communication discussing data, preliminary results, drafts of papers, review of grant proposals, or other related activities, is subject to public release under a state FOIA in contravention of scholarly norms and expectations of privacy and confidentiality.

[ROA 36, EP 464 at ¶ 25, Joshua LaBaer]

4. The trial court failed to protect the competitive position of Arizona's universities. The best interests of the state "are not confined to the narrow interest of either the official who holds the records or the agency he or she serves [but include] the overall interests of the government and the people." *Hodai*, 239 Ariz. at 39 ¶7, 365 P. 3d at 963 ¶7 It is plainly in the State's interest "to protect public universities and colleges from being placed at a competitive disadvantage in relation to private universities and colleges." *See ATI v. UVA*, 287 Va. at 342.

Some of the emails ordered produced by the trial court involve plans for possible future research, unfunded grant proposals and other information that might be of interest to individuals or institutions competing for public or private research funding. *See* MH18, pages 7060, 7074, 7169 & 7275. [ROA 70, EP 45-46] Yet the trial court's decision refuses to acknowledge, let alone protect, ABOR's interest in protecting the competitive position of its universities.

a. Risks to sources of research funding can be minimized by upholding the University's decision. Arizona reportedly leads the nation in cuts to public funding of its colleges and universities.[25] While the search for outside funding for projects has always been a part of academic life at public and private institutions, it is of increasing importance. If E&E gets what it wants in this case, however, Arizona's ability to compete for scarce private funding could be compromised. [26]

b. The risk of harm to faculty recruitment and retention can be reduced by reversing the trial court's decision. Competition for "the best and the brightest" is a legitimate concern in public education. *See ABOR v. PNI, supra; ATI v UVA, supra.* Dr. Eugene Levy highlighted the reality of these concerns for

[25] http://www.azcentral.com/story/news/arizona/politics/2015/05/13/midnight-arizona-tops-nation-college-cuts-tuition-hikes/27221021/ (last visited September 1, 2015).

[26] Declaration of Vicki Chandler, [ROA 36, EP 359-360 at ¶s2, 10].

public universities. Levy is a Professor of Astrophysics at and the former Provost of Rice University – a private institution unencumbered by public record laws. He explained how a decision in E&E's favor will work against Arizona:

> I can also say with confidence that if, in such an environment, I, in my former position as provost of Rice University, were competing with Arizona to recruit a prominent (or promising) scientist, I would not hesitate to play the public-records-law card to underscore the risks inherent in working in an Arizona university as compared with the relative intellectual security of my own university.

[ROA 36, EP 478 at ¶23]

Levy has "reasonable confidence that" his counterparts at other universities would follow suit, and believes "such arguments would prove to be a very persuasive part of a recruiting pitch." [*Id.*]

A potential recruiting target could be Dr. Joshua LaBaer, currently Director of the Virginia G. Piper Center for Personalized Diagnostics at the Arizona State University Biodesign Institute, as well as the V.G. Piper Chair of Medicine and an Adjunct Professor of Medicine at the Mayo Clinic in Scottsdale. LaBaer was brought to ASU from Harvard University – a competing, private institution. Dr. LaBaer tells us that, had he known there was a potential for the sort of compelled disclosure sought by E&E, it would have impacted his decision to move to Arizona. [ROA 36, EP. 462 at ¶ 21] His concern: "While at Harvard University, which is a private institution, I did not have to worry that my emails could be

compelled to become public," thus jeopardizing the confidentiality of the research process. [*Id.*] LaBaer goes on:

> Compelled disclosure will also impair recruitment and retention of faculty. I have served on nearly a dozen search committees at Arizona State University (a public institution subject to the Arizona FOIA). These involve the recruitment and retention of key faculty. I can state unequivocally that recruitment of faculty to an institution like the University of Arizona or Arizona State University will be deeply harmed if such faculty must fear that their unpublished communications with scientific collaborators and scholarly colleagues are subject to involuntary public disclosure. We will also lose key faculty to recruitments from other institutions - such as Harvard, if their continued work at public universities in Arizona will render their communications involuntarily public.

[ROA 36, EP 464 at ¶26]

Because a serious risk of forced disclosure of the information E&E wants "could chill the attraction of the best possible candidates [to Arizona's universities] … the interests of [our universities] and the citizens of this state are best served by not discouraging the 'cream' from applying." *ABOR v. PNI*, 167 Ariz. at 258. Indeed, E&E lost the Virginia case because the evidence showed that "recruitment of faculty … will be deeply harmed if such faculty must fear that their unpublished communications with scientific collaborators and scholarly colleagues are subject to involuntary public disclosure." *See ATI, supra*, 287 Va. At 343, 756 S.E.2d at 443.

5. The trial court misunderstood the burden its ruling places on future research work in Arizona's universities. Professors Hughes and

Overpeck are concerned that impeding full use of email will adversely affect the ability of Arizona researchers to work with colleagues here and around the world. Indeed, access to their email to the extent permitted by the trial court is truly the functional equivalent of eavesdropping – uninvited access to the modern equivalent of hallway chats, telephone conversations, handwritten notes, memos, letters and other less efficient means of communications. [ROA 70, EP 11]

The trial court does not see the risk, finding instead that pre-internet tools are "[a]lternative methods of communication … available to [anyone with a desire] to correspond in confidence regarding research projects and like endeavours." [ROA 123, EP 3, Finding 24] This finding is clearly erroneous; ***any*** communication of the sort involved in this case would produce a "public record," subject to the disclosure duties and defenses involved here, whether scribbled on a napkin, recorded in a dictation machine or typewritten in a letter or memo. The trial court's unsupportable finding makes our point: Even a well-meaning desire for transparency should not force Arizona's university researchers to do their work in a public records fishbowl.

6. Constitutional notions of academic freedom support withholding the email. "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *University of California Regents v. Bakke*, 438 U.S. 265, 312

(1978). It "extends as readily to the scholar in the laboratory as to the teacher in the classroom." *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1275 (7th Cir. 1982) (refusing to enforce subpoena for information concerning ongoing research, as to do otherwise "would inevitably … check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor").[27]

To judge the University's decisions here requires an evaluation of "complex educational judgments" about research and writing in a public university -- ordinarily "an area that lies primarily within the expertise of the university." *See Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (deferring to law school's judgment that diversity was essential to the school's educational mission).

The American Association of University Professors ("AAUP") also gives some guidance about how this Court can balance the interests involved in its April 2014 report, *Academic Freedom and Electronic Communications:*

> *Efforts to protect privacy in electronic communications are an important instrument for ensuring professional autonomy and breathing space for freedom in the classroom and for the freedom to*

[27] *Accord, Board of Regents v. Southworth*, 529 U.S. 217, 237 (2000) (Souter, J., concurring) (academic freedom includes "freedom to make decisions about how and what to teach," as well as "liberty from restraints on thought, expression and association in the academy…."); *Accord, Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998) (refusing access to researchers notes, tapes and interview transcripts, because; a contrary ruling "would hamstring future research efforts" of the targeted researchers "and other similarly situated scholars" and "infrigidate the free flow of information to the public, thus denigrating a fundamental First Amendment value").

> *inquire. Although privacy is framed as an individual right, group or associational privacy is also important to academic freedom and to ensuring a culture of trust at an institution.* (Italics in original).

[ROA 36, EP 218, EP 220]

The trial court claimed ABOR wants an "academic privilege exception to A.R.S. §39-121." On the contrary, A.R.S. §15-1640(A) is such an exception and should have been applied here. ABOR also recognizes that, where the safe harbor exemption of A.R.S. §15-1640(A) does *not* apply, a "case-by-case balancing process is required," and insists "the interests advocated by the Regents are legitimate interests to be weighed in [that] balance." *See Humane Society, supra,* 214 Cal.App.4th at 1262-63, 155 Cal.Rptr.3d at 117. We also insist that the trial court, in its June 2016 ruling, essentially ignored both the statute and ABOR's interests.

IV. CONCLUSION.

The Court failed to apply, discuss or even cite A.R.S. §15-1640(A). As a result, and in light of the trial court's confusing, inconsistent and erroneous findings, this Court should (i) interpret the statute in light of its words, its purpose and the issues and (ii) reverse and remand with directions that the trial court explicitly apply the statute to the evidence in the record. Insofar as any email in question here are *not* governed by A.R.S. 15-1640(A), we ask that this Court

review the evidence before it, balance the interests involved as required by *Mathews* and its progeny, and reverse the trial court's decision.

RESPECTFULLY SUBMITTED this 28th day of April, 2017.

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EXHIBITS TO ABOR'S OPENING MEMORANDUM [ROA 36]

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G	National Research Council, *Surface Temperature Reconstruction for the Last 2,000 Years* (2006)	93
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U	U.S. Office of Management and Budget (OMB), Circular A-110	265
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Declarations

Exhibit No.	Declarant's Name	Position or Affiliation	EP
AA	Bruce Michael Alberts, Ph.D.	Chancellor's Leadership Chair in Biochemistry and Biophysics for Science and Education University of California, San Francisco Former Editor in Chief, *Science* magazine	302
BB	Susan K. Avery, Ph.D.	President and Director Woods Hole Oceanographic Institute	346
CC	Molly Corbett Broad	President, American Council on Education	353
DD	Vicki L. Chandler, Ph.D.	Chief Program Officer—Science Gordon and Betty Moore Foundation	359
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FF	Carole Goldberg, J.D.	Distinguished Professor of Law and Vice Chancellor, Academic Personnel University of California, Los Angeles	410
GG	Malcolm Hughes, Ph.D.	Regents' Professor of Dendrochronology University of Arizona	423

HH	Donald Kennedy, Ph.D.	President and Professor Emeritus Stanford University Former Editor in Chief, *Science* Magazine	447
II	Joshua LaBaer, M.D., PhD.	Director, Virginia G. Piper Center for Personalized Diagnostics, Biodesign Institute Arizona State University Adjunct Professor of Medicine College of Medicine, Mayo Clinic Scottsdale, Arizona	456
JJ	Eugene H. Levy, Ph.D.	Andrew Hays Buchanan Professor of Astrophysics Rice University	467
KK	Lynn Nadel, Ph.D.	Faculty President Regents Professor of Psychology and Cognitive Science University of Arizona	501
LL	Jonathan Overpeck, Ph.D.	Regents' Professor of Geosciences and Atmospheric Sciences, College of Science, University of Arizona	507
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14, Arizona Rules of Civil Appellate Procedure, the undersigned counsel certifies that this brief uses proportionately spaced typeface of Times New Roman font of 14 points, that this Answering Brief is double spaced and contains 10,595 words as measured with the word-counting feature of Microsoft Word, excluding the table of contents, table of authorities, certificate of compliance and any addendum.

Dated this 28th day of April, 2017.

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I, D. Michael Mandig hereby certify that on the 28th day of April, 2017, I caused the foregoing Appellants' Opening Brief to be electronically filed with:

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