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' REPLY BRIEF

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I. INTRODUCTION.

In 2001, the Legislature passed a statute granting limited exemptions from the Arizona Public Records Law for certain records generated or maintained by state university personnel.[1] In 2012, the legislature amended the statute to exempt records relating to research conducted by university researchers.[2] An obvious purpose of A.R.S. §15-1640 – especially as amended -- is to protect, foster and encourage the free flow and exchange of ideas in academic and scientific research.

The bulk of the records sought here are emails exchanged by two University of Arizona climate science researchers with colleagues throughout the world. Although these emails fall under the protections added to A.R.S. §15-1640, the trial court ignored the statute and erroneously applied case law interpreting the Public Records Law to documents that are exempt from that law**.** The trial court's decision ordering the release of thousands of pages of exempt records is fundamentally flawed and has the potential of chilling the free and frank exchange of ideas among academics and scientists employed by Arizona universities -- precisely the harm the Legislature meant to prevent when it amended A.R.S. §15-1640.

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[1] 2001 ARIZ.SESS.LAWS, Ch. 216, §1.

[2] 2012 ARIZ.SESS.LAWS, Ch. 116, §1, codified at A.R.S. §15-1640.

This Court must reverse the trial court's ruling, and take this opportunity to provide guidance on what the parties agree are troubling ambiguities in §15-1640, so that scientists and academics employed by Arizona universities may rely upon the statute to protect free and unfettered exchange of ideas and critical thought with their colleagues around the world.

II. A.R.S. §15-1640 PROTECTS MORE THAN "TRADE SECRETS" OR "INDEPENDENT ECONOMIC VALUE". THIS COURT SHOULD INTERPRET THE STATUTE SENSIBLY, AND SEND THIS CASE BACK TO THE TRIAL COURT.

Academic research is conducted under generally accepted norms of confidentiality and privacy. The courts of sister states use these concepts to protect researchers' records from state FOIA laws in disputes just like this one.[3] A longstanding federal rule essentially codifies these norms to exempt from federal FOIA disclosure the same sorts of records involved in this case.

The 2012 version of A.R.S. §15-1640 is plainly intended to protect the confidentiality and privacy of research conducted at Arizona's universities against the harm that might flow from the usual rules of public access. Both sides agree the statute is ambiguous, and we agree on what the specific ambiguities are, but we disagree on how to address them. In light of the exemption's remedial purpose, the exemption must be interpreted "liberally to achieve the special purpose underlying

[3] The cases are discussed below, at pages 18, 20-22.

the legislation." *Special Fund Div. v. Industrial Comm'n*, 224 Ariz. 29, 31 ¶8 (App. 2010).[4]

If the Court takes these factors into account, and interprets A.R.S. §15-1640 in light of "the policy behind the law and the evil it was intended to remedy," *State v. Clary*, 196 Ariz. 610, 612 ¶9 (App. 2000), it must reverse the trial court's ruling and remand for further proceedings.

A. The 2001 Law. Many state statutes shield university research records from public record laws.[5] Arizona first joined their ranks in 2001, passing an exemption for "intellectual property that is a trade secret as defined in section [A.R.S. §] 44-401, ***and*** that is contained in" (i) an unfunded grant proposal, (ii) a contract containing a confidentiality agreement or (iii) "proprietary data or research material … developed by persons employed by a university," where disclosure would be "contrary to the best interests of this state."

B. The 2012 Amendments. After 2012, the exemption is no longer restricted to "trade secrets." Instead, the statute applies to information that is "a trade secret … ***or***" is information that falls into one of the three categories

[4] Interpreting remedial laws to achieve a law's special goals can even result in creating implied rights not found anywhere in the law's language. *See Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 575-76 (1974) (finding implied private right to sue for violation of Arizona's Consumer Fraud Act).

[5] See discussion in text, at Part III(A)(3), *infra*.

described above. The 2012 amendment also added a fourth exemption – the principal one applicable here -- for information that is

> (d) Composed of unpublished research data, manuscripts, preliminary analyses, drafts of scientific papers, plans for future research and prepublication peer review. [6]

Our case involves requests for email exchanged by University of Arizona Professors Overpeck and Hughes with a variety of individuals located throughout the world. [ROA 30, EP 2-3] Most of the records withheld by the University are emails exempted by both A.R.S. §15-1640(A)(1)(b) and (d). The trial court's failure to apply – or to mention the statute at all – requires reversal. Before addressing the interpretation and application of the statute, however, we first debunk one of E&E's arguments.

C. The exemption is not limited to records with "independent economic value." Appellee claims that the exemption set forth in A.R.S. §15-1640 applies only to public records that either fit the definition of a trade secret (see A.R.S. §44-401(4)), or contain what Appellee calls a recipe for a "secret sauce." Put another way, E&E claims content of university records must have "***independent economic value***" in order to come within the exemption. See

[6] A pre-2012 exemption that is arguably pertinent here is A.R.S. §15-1640(A)(1)(b), exempting records developed by university employees or their collaborators, and whose disclosure "would be contrary to the best interests of this state." Because this exemption may be applicable here, it is discussed later in this Brief. See Part III(A)(1).

Answering Brief, at 9-11. Under E&E's view, this also means that, upon publication of the "subject matter" of any such records, they lose "independent economic value" and no longer qualify for the statutory exemption. *Id.*, at 12. E&E's description of the statute is simply not accurate.

Section 15-1640(A) exempts from Title 39 certain records of a "university under the jurisdiction of the Arizona board of regents…" A.R.S. §15-1640(A). Under the 2001 version of the law the exemption required that information be *both* a trade secret *and* fall within one of the three narrow categories, so that the presumed economic value of a "trade secret" might have been a prerequisite. After 2012, however, the exemption applies to information that is *either* a trade secret under A.R.S. §44-401, *or* is among the types of information identified in A.R.S. §15-1640(A)(1)(a) through (A)(1)(d).[7] Nowhere in the statute is there a word or phrase suggesting the exemptions contained in subsections (A)(1)(a)–(d) are conditioned upon proving the "independent economic value" of a particular email, preliminary draft or peer review report. *See id.*

ABOR has never claimed the emails at issue here contain trade secrets or "secret sauces," nor did ABOR seek exemption based upon claims of "independent economic value." And E&E acknowledges the fallacy of its argument: It insists,

[7] Subsection (A) of the statute also exempts historical records donated to our universities as well as records concerning other university donors. Those provisions are not involved here. *See* A.R.S. §15-1640(A)(2) & (3).

for example, that peer review records must always be protected by the statute, and also *admits* peer review records have no independent economic value. Answering Brief, at 17. E&E's claim that ABOR must prove so-called "independent economic value" is just not accurate.[8]

D. E&E admits the exemption statute is ambiguous but its proposed "solutions" are incomplete, inconsistent with current rules and accepted norms and inconsistent with the statute's purpose.

1. Ambiguities in A.R.S. §15-1640(A). Subsections (A)(1)(b) and (A)(1)(d) exempt records that contain or are composed of unpublished "data" as well as "research data." Much of the withheld email can be fit within either subsection. Either way, E&E agrees with ABOR that subsections (A)(1)(b) and (A)(1)(d) are ambiguous because they do not define "data" or "research data." See Answering Brief, at 15.

2. Ambiguities in A.R.S. §15-1640(C). The problems caused by ambiguities in subsection (A) are more obvious when we examine A.R.S. §15-

[8] E&E's counsel made virtually the same "economic value" argument in *American Tradition Institute v. Rector and Visitors of the University of Virginia*, 287 Va. 330 (2014). American Tradition Institute ("ATI") filed the Virginia case and this one. The Virginia Supreme Court rejected ATI's argument because – as here – limiting the analysis to financial value or harm would be too narrow and "not consistent with the [legislature's] intent to protect public universities and colleges from being placed at a competitive disadvantage in relation to private universities and colleges" that are not subject to public record laws. 287 Va. at 342. This case is discussed further in Part III(A)(2), below.

640(C), which seems to eliminate the subsection (A) exemptions under certain circumstances with this sweeping language:

> C. Any 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.

What does it mean to say that "the subject matter of … records becomes available to the general public"? E&E says – and we agree -- that subsection (C) is ambiguous in stating that the exemptions disappear "if the subject matter of the records becomes available to the general public," and suggests "the civil bar will benefit from this Court reflecting on" the legislature's failure to define the term "subject matter." [Answering Brief at 12.] Yet E&E asks this Court to give the law a ridiculous interpretation: E&E claims the "'the subject matter of the records' are the ideas" contained in a published work. [Answering Brief, at 12.] Thus, according to E&E, "Once a research project has resulted in a publication, all related records [concerning those ideas] must be disclosed" in response to a public record request. [ROA 35, EP 26] For example -- again according to E&E -- publication of something related to "climate change research" or of the "IPCC report and related commentary" mandates disclosure of all otherwise unpublished material, including email. *See* Answering Brief, at 12-14. This is absurd.[9]

[9] "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

First, like most scientists Professors Hughes and Overpeck work and publish in one field – in this case climate science. To give "subject matter" the broad meaning E&E ascribes to it eviscerates the exemption.

More important, E&E does not believe its own argument, insisting that – despite the expansive language of subsection (C) -- the law should in all cases exempt "prepublication peer review" material even after publication. [Answering Brief, at 17.] E&E cites no authority for this proposition, other than to say peer review material should be protected from the sweep of subsection (C) because it "is simply something one does not disclose." *Ibid.* [10] ABOR agrees with E&E's view of peer review materials. However, E&E's interpretation does not go far enough to provide universities the protections intended by the statute.

For reasons reiterated below, publication of a final study should not result in publication of all of the working papers or communications related to the study.

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workable." *State Farm Auto Ins. Co. v. Dresser*, 153, Ariz. 527, 531, 738 P.2d 1134, 1138 (1987).

[10] In the trial court, E&E argued that, even though a "promise of confidentiality standing alone is not sufficient to preclude disclosure … confidentiality of the peer review process ensures a reviewer is not at risk of professional harm by being critical of others who may well be in a position to retaliate for a critical appraisal of their work." [ROA 35, EP 25 (citing *Moorehead v Arnold*, 130 Ariz. at 505)]. One could argue that E&E's concern is "speculative at best," but ABOR agrees a limited reading of A.R.S. §15-1640(C) is necessary to protect peer review materials, even though the interpretation might not be in strict accord with a literal reading of its words.

What "becomes available to the general public" upon publication is the content of the study and other information commonly released along with it. Prior drafts, prepublication comments (including formal peer review), communications among colleagues and other information do not become available to the public merely because a final article is published.

It is hard to tell whether the ambiguity of the term "subject matter" affected the trial court's decision; the statute is not referenced. However, the trial court must have taken such an expansive approach, because it ordered release of records merely because their 'subject matter' is "a topic as important and far-reaching as global warming and its potential causes." [ROA 123, EP 4]

Read sensibly and consistent with the policies underlying the statute as discussed in this brief, "subject matter of the *records*" must mean the subject matter of the individual public records that are requested. Therefore, if a public record, or a paraphrase or quotation of a public record, has become available to the public, the subject matter of the record is "available to the general public" within the meaning of subsection C and the records are subject to disclosure. On the other hand, if the specific content of a record has not become available to the general public, it should remain exempt.

E. Sensible interpretation of Arizona's research exemption leads to reversal of the trial court. In its June 2016 merits ruling, the trial court conceded

that the "affidavits/arguments of AzBOR are compelling." Nonetheless, the court felt that ABOR was asking for creation of an "academic privilege," a request the trial court felt should "more properly made to the legislature rather than the courts." [ROA 123, EP 4] However, the legislature has spoken in A.R.S. § 15-1640. Now it falls to this Court to analyze what the legislature said in light of its "context, subject matter, and historical background, as well as its purpose and effect." *J.D. v. Hegyi*, 236 Ariz. 39, 41 ¶9 (2014). The Court must then interpret A.R.S. § 15-1640 to accomplish the legislature's objectives.

Here and in the trial court ABOR presented a way to construe our ambiguous statute so that it makes sense and fulfills the legislature's objectives. [ROA 36, EP 35-40); Opening Brief, at 21-24] We rely principally on (i) FOIA rules applicable to certain federally funded research conducted by colleges and universities and (ii) accepted norms of confidentiality and privacy in research -- values our legislature was obviously trying to protect. [ROA 36, EP 39-40; ROA 110, EP 3-9]. In light of these factors, communications among research colleagues, including email, must be seen as -- to use E&E's words -- "simply something one does not disclose. [Answering Brief, at 17.]

1. There is a conflict between the trial court's rulings and federal law, yet it is easily resolved. In 1998, Congress passed a law referred to as the "Shelby Amendment," which imposed a broad mandate federal grant recipients

make their "data" available through federal FOIA requests.[11] To implement the Shelby Amendment, the Office of Management & Budget ("OMB") proposed amendments to an existing OMB Circular, No. A-110.[12] The first round of revisions said only that federal agencies must ensure public availability of "all data produced under an award," and (like our statute) did not define "data."[13] Comment and debate ensued, including concerns about protecting email:

> Many in the scientific community expressed concern about how the term [data] should be interpreted – it might include not only final data, but also preliminary results, as well as e-mails, physical specimens, notes of researchers, and so forth.[14]

The result of the debate is the rule adopted in 1999: When a FOIA request is made for information concerning research findings produced under a federal grant, the agency must request, and the non-federal entity [*e.g.*, a state university] must provide its "research data so that they can be made available to the public through the procedures established under the FOIA." 2 C.F.R. §200.315(e)(1). Unlike

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[11] *See* E. Fischer, *Public Access to Data from Federally Funded Research: Provisions in OMB Circular A-110*, CONGRESSIONAL RESEARCH SERVICE (March 1, 2013), at 1-3 (last accessed June 19, 2017 at https://fas.org/sgp/crs/secrecy/R42983.pdf).

[12] *See id.*, at 12.

[13] *Id.*, at 18.

[14] *Ibid.*

Arizona's statutory exemption, the revised OMB circular defines "research data" to exempt from disclosure communications such as the emails at issue here:

> (3) 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*. 2 C.F.R. §200.315(e)(3) (emphasis added).

The federal rule's limited definition of "research data" [the same term used in A.R.S. §15-1640(A)(1)(d)] was consistent with the objective of the Shelby Amendment, described in a letter co-authored by Senator Shelby in April 1999:

> [D]ata should include all information necessary to replicate and verify the original results and assure that the results are consistent with the data collected and evaluated under the award. [15]

E&E attempts to skirt the federal rule, claiming ABOR is under a "misapprehension" about its reach. [Answering Brief, at 24.] E&E claims that if federal rules were to apply here, there would never be protection for "prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary." [Answering Brief, at 25.] E&E's statement is refuted by the words of the regulation itself.

In addition, by 2013, the federal definition of "research data" was part of a broad effort to expand public access to all federally funded research, while striking

[15] *Ibid.*

a "balance between the need to foster healthy research environments and the public's right to take full advantage of the knowledge and technological advances produced by those same projects." [ROA 36, EP 526-528, 538 (Rawlings Decl., ¶s 11-15 & Attachment 1, p.5)]. The decision of the trial court in this case shows the relevance of FOIA.

To prove that emails generated during the preparation of IPCC reports are "public records," E&E told the trial court that communications with federal agencies such as the National Oceanic and Atmospheric Administration ("NOAA") are agency records subject to FOIA. Therefore -- claimed E&E -- such records must also be considered public records under Arizona law [ROA 35, EP 21-22]. The trial court apparently agreed, noting in Finding 9 that many of "the 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." ROA 123, EP 2] The effect of Finding No. 9 is to adopt federal law, *in part*. However, the trial court simply ignored the federal exemption for email created by the 1999 revision of OMB Circular A-110.

2. This Court should borrow from the federal definition of "research data." Arizona frequently applies federal FOIA rules and precedents to interpret

our public record laws.[16] A.R.S. §15-1640 should be interpreted in accord with the only parallel federal law that deals with matters such as the email at issue here. Our statute provides a blanket exemption for "information" that is

> [C]omposed of 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).

Arizona's legislature failed to define "research data," yet under FOIA the duty to disclose "research data" covers only "the recorded factual material commonly accepted in the scientific community as necessary to validate research findings," and does *not* include "communications with colleagues" and other information covered by subsection (A)(1)(d). *See* 2 C.F.R. §200.315(e)(2).[17] Application of §15-1640(C) as it might have been applied in the trial court swallows the exemption set out in subsection (A)(1)(d), rendering it meaningless.

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[16] *See, e.g.*, *Scottsdale Unified School District, etc. v. KPNX Broadcasting Co.*, 191 Ariz. 297, 301-02 ¶s14-18 (1998) (applying federal FOIA ruling to protect teacher birthdates from public record disclosure); *Salt River Pima-Maricopa Indian Community v. Rogers*, 168 Ariz. 531, 540-41 (1991) (Arizona courts will look to FOIA for guidance in interpreting Arizona's public record laws); *Phoenix New Times, LLC v. Arpaio*, 217 Ariz. 533, 539 note 3 (App. 2008) (looking to federal FOIA rules in deciding that Arpaio did not promptly respond to public record request).

[17] The other information exempted by our statute and protected by federal law after publication includes manuscripts, preliminary analyses, drafts of scientific papers, plans for future research and prepublication peer review. *Compare* A.R.S. §15-1640(A)(1)(d) *with* 2 C.F.R. §200.315(e)(2).

ABOR and E&E agree subsection (C) can be read to go too far, and Appellants ask that this problem be resolved by adopting FOIA's definition of "research data" to limit the reach of subsection (C). If that were done, upon publication of University research findings an individual making a public record request would be entitled to "the recorded factual material commonly accepted in the scientific community as necessary to validate [those] research findings." However, "preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues" are another matter. They are not "research data" and would not be subject to disclosure under 2 C.F.R. §200.315(e)(3). Similarly, under subsection (C), the emails are not records whose specific content "becomes available to the general public" merely because articles are published. Consistent with federal law, subsection (C) should therefore be construed to protect the emails even after publication. [18]

3. Construing the statute as ABOR suggests is consistent with custom and practice in science, and requires reversal. "An inherent principle of publication is that others should be able to replicate and build upon the authors'

[18] Email related to business conducted by a state employee is a public record, and entitled to the protection of the exemption statute. *See Griffis v. Pinal County*, 215 Ariz. 1, 5 ¶14 (2007). However, we confront a different question: When publication of an article occurs, do email and other unpublished records lose their exemption? The federal definition of "research data" was developed to answer the same question, and provides an instructive rationale for how to impose a reasonable limit on the operation of subsection (C).

published claims."[19] To achieve this, it "has become the norm for the authors to provide the underlying data on which their conclusions were drawn, as well as information about methodologies used…" [ROA 36, EP 366, Chandler Decl., §13].[20] "However it is not normal practice for all … related communications, drafts, editorial comments – or even unused data – to be made public along with the finished product." *Ibid.*[21]

The trial court found – and we agree – that "many of the emails include recipients who worked for scientific journals and discuss edits [or] revisions to

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[19] NATURE.COM, "*Availability of Data, Materials and Methods.* This publication was last accessed June 24, 2017, and can be found at http://www.nature.com/authors/policies/availability.html. As a condition of publication in "NATURE" and NATURE RESEARCH JOURNALS authors must make "data, code, and associated protocols available to readers without under qualifications." There is no requirement that prepublication material, such as email, must be disclosed.

[20] The data disclosure policy of *Science* magazine is to the same effect, and is intended to ensure published research is "reproducible," a goal achievable without access to authors' pre-publication email. [ROA 36, EP 304, 306 (Alberts Decl., ¶s5, 6 & 12)] *See also http://www.sciencemag.org/authors/science-editorial-policies#unpublished-data-and-personal-communications* (last accessed June 24, 2017).

[21] For example, the National Institutes of Health handle requests for research data as FOIA requests, and apply the federal definition of "research data" to exclude "communications with colleagues" from the information university researchers must provide. *See* NIH GRANTS POLICY STATEMENT, §2.3.11.2.3 (last accessed June 24, 2017. The NIH grant policy can be found at https://grants.nih.gov/grants/policy/nihgps/html5/section_2/2.3_application_information_and_processes.htm#Access).

articles that were subsequently published." [ROA 123, Finding 10] We also agree that many of the emails pertain to articles that were "referenced, revised and/or supplemented in the emails" – articles that "were subsequently published and have been in circulation for many years." *Id.*, Finding 8. If our exemption is interpreted to protect these pre-publication communications, Judge Marner's ruling should be reversed and the case returned to the trial court for it to apply an appropriately limited subsection (C) to the records withheld here. [22]

4. The opinions of E&E's witnesses (Answering Brief at 16) are not inconsistent with ABOR's position. E&E relies upon Mississippi law professor Ronald Rychlak for the idea that "once research is published, it is beneficial for the entire academic community to be able to examine how that research was conducted. *This is reflected in the 'scientific method,' which demands repeatable results."* [Answering Brief, at 16; ROA 35, EP 226, ¶28 (italics added).] E&E also cites to the Affidavit of Peter Ferrara, general counsel of the American Civil Rights Union, where he observed that research "may be flawed if … proper safeguards are not employed in experimentation, or if data is [*sic*] massaged to fit a particular narrative." [ROA 35, EP 243, ¶16.]

[22] The trial court's June 2016 ruling is confused even on this point. After concluding, in Findings 8 & 10, that various emails are, in fact, prepublication discussions of later-published articles, the court then found, without explanation, "the emails do not contain … identifiable prepublication materials." [ROA 123, Finding 14]

ABOR does not disagree with these general propositions. In fact, they are consistent with current standards mandating *only* that, once research on a specific issue has been published, the researchers should make available the information needed to attempt replication of their published findings. In upholding a lower court's decision to withhold prepublication material concerning a published study, the California court found in *Humane Society of the United States v. Superior Court* that sharing the study data and methodological information underlying the study was the correct level of disclosure needed in order to attempt either to reproduce or build upon the published research:

> As the Regents point out, a published report itself states its methodology and contains facts from which its conclusions can be tested. [And] published academic studies are exposed to extensive peer review and public scrutiny that assure objectivity. Here, given the public interest in the quality and quantity of academic research, we conclude that this alternative to ensuring sound methodology serves to diminish the need for disclosure. *Humane Society of the United States v. Superior Court*, 214 Cal.App.4th 1233, 1268, 155 Cal.Rptr.3d 93, 122 (2013) ("*HSUS*").

III. ABOR'S EVIDENCE SHOULD INFORM THIS COURT'S INTERPRETATION OF THE STATUTE.

A. The opinions of our experts describe the types of harm A.R.S. 15-1640 was intended to prevent. The email at issue here consists largely of exchanges between two Arizona researchers and their collaborators, [ROA 123, Findings 8 & 10-13], and appears to fall within two categories exempted from

disclosure by Arizona's statute. The first is A.R.S. §15-1640(A)(1)(d), discussed above. The second is subsection (A)(1)(b), which exempts "information" that was

> (b) Developed by persons employed by 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 "best interests of this state" might have been borrowed from the balancing test adopted in *Mathews v. Pyle*, 75 Ariz. 76, 251 P.2d 893 (1952), but the relationship between A.R.S. §15-1640 and *Mathews* is unclear. Nor is it clear whether the trial court applied, or even had subsection (A)(1)(b) in mind, when deciding our evidence was "speculative at best," and therefore insufficient to overcome the public's right to know about the broad subject matter of "global warming and its potential causes." [ROA 123, EP 4] E&E acknowledges and tries to explain away the ambiguities in this provision, but does not suggest a workable interpretation of it. Answering Brief, at 17. We suggest the following:

1. That withholding scientific research email is in "the best interests of this state" should be obvious. ABOR presented an array of witnesses with decades of experience in planning, funding, editing and publishing scientific research. [ROA 36, EP 27] They described the research process in sharp detail, and explained carefully the types of harm that would flow from a rule permitting the release of the very information involved here. [ROA 36, EP 27-30]

Their opinions are not speculation, but instead "grounded upon [decades] of experience." *See HSUS, supra,* 214 Cal.App.4th at 1256, 155 Cal.Rptr.3d at 112 (opinions of agricultural researcher with 30 years' experience were not speculation). Therefore, it was not "speculation" when our experts established – without contradiction -- that privacy and confidentiality among researchers are expected and essential parts of scientific work. [ROA 110, EP 9] It is likewise "not speculation for [our experts] to opine that disclosure of communications would fundamentally impair the academic research process for" Arizona's public universities. *HSUS,* 214 Cal.App.4th at 1258, 155 Cal.Rptr.3d at 114. Nor is it speculation for them to opine that, if researchers and their collaborators "expected their communications to be public, they would be less forthcoming with data and frank opinions." *Ibid.*

Put another way, our experts defined the obvious, potential problems A.R.S. § 15-1640(A) was designed to remedy, and this Court's task is to construe the statute to carry out the legislature's intent. The Court should find, as a matter of law, that the sweeping access to email granted here is not in the "best interests of this state."[23] *See Highland Min. Co. v. West Virginia University School of*

[23] We ask, further, that the Court borrow the federal definition of "data" and hold that publication of research does not require disclosure of the information covered by subsection (A)(1)(b), such as the email at issue here. See discussion, Part II(C) above.

Medicine, 235 W.Va. 370, 388 (2015) ("involuntary disclosure of Professor Hendryx's research documents would … hinder candid discussion of WVU's faculty and undermine WVU's ability to perform its operations"). Once this conclusion is reached, the Court should reverse the trial court and remand for further proceedings. *See* Part II(C)(2) above.

2. The statute should be interpreted to achieve the legislature's goal of keeping our universities competitive. It was also not "speculation" for our witnesses to opine that the disclosures of the sort ordered here will harm the process of conducting research and place the University at a competitive disadvantage. [ROA 110, EP 6]

American Tradition Institute v. Rector and Visitors of the University of Virginia, 287 Va. 330 (2014), illustrates how the concerns raised by our witnesses should guide the interpretation of Arizona's research exemption.[24] Virginia enacted an exemption from its public record laws for "proprietary information," in order to protect the competitive position of Virginia's colleges and universities. The Virginia Supreme Court had to decide whether the exemption covered only

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[24] American Tradition Institute ("ATI") submitted the public record requests to the University of Arizona, and was the original plaintiff/petitioner in this special action. E&E – a successor organization – was later substituted in the caption. [ROA 4, ROA 30, EP 9-33]

information with financial value or extended further to protect scholarly communications between Professor Michael Mann and his research colleagues (including Arizona's Malcolm Hughes).

The court rejected the claim that only financial information was protected. *Id.* at 342. As here, "many noted scholars and academic administrators submitted affidavits attesting to the harmful impact disclosure would have" if "faculty expectations of privacy and confidentiality" were not honored. *Id*. Professor Michael Mann's email was held exempt under Virginia's statute. The court found that Virginia's legislature enacted the exemption – as did ours – to improve the competitive position of its colleges and universities, defining competitive disadvantage this way:

> 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 the application of the exemption. *Id*. [25]

3. The trial court's decision makes Arizona an outlier among most of its sister states. At least 40 other states have now recognized public universities

[25] ABOR's evidence concerning competitive disadvantages from disclosure of prepublication email is summarized in the Opening Brief, at 35-38.

and scientific research merit special protection from public record laws. Three states entirely exclude public universities from their open record laws.[26] Thirty-two states protect public universities and scientific research from public record laws with statutory exemptions,[27] and several other states provide common law protection to public university or scientific research records.[28]

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[26] They are: Delaware (29 Del. C. § 10002(i)); Maine (Me. State. Tit. 1 §402(3)(E)); and Pennsylvania (65 Pa. Stat. §§ 67.101 - 67.3104).

[27] Alaska (Alaska Stat. § 14.40.453); Colorado (C.R.S. §24-72-204(2)); Florida (Fla. Stat. §1004.22); Georgia (O.C.G.A. § 50-18-72); Idaho (Idaho Code §74-107); Illinois (5 ILCS 140/7(j)); Indiana (Ind. Code §5-14-3-4(a)(6)); Iowa (Iowa Code § 22.7(65)); Kansas (Kan. Stat. Ann § 45-221(20) and (34)); Kentucky (KRS 61.870(1)); Louisiana (La. R.S. 44:4(16)); Maryland (Md. Code, Gen. Provisions, § 4-346); Massachusetts (Mass. Gen. Laws Ch. 4, § 7(26)(u)); Michigan (Mich. Comp. Laws § 390.1551); Minnesota (Minn. Stat. § 13.3215); Mississippi (MS Code §37-11-51(3) and (4)); Missouri (Mo. Rev. Stat. § 610.021(15) and (23)); Nebraska (Neb. Rev. Stat. §84-712.05(3)); New Jersey (N.J.S.A. 41:1A-1(17)); North Dakota (N.D. Cent. Code §44-04-18.4); Ohio (Ohio Rev. Code § 149.43(a)(1)(m) and (a)(5)); Oklahoma (Okla. Stat. tit. 51 §24A.19); Oregon (ORS 192.501(14)); South Carolina (S.C. Code. Ann. § 30-4-40(a) (14)); South Dakota (S.D. Codified Laws §1-27-1.5(3)); Tennessee (Tenn. Code Ann. §49-7-120); Texas (Tex. Govt. Code § 51.914); Utah (Utah Code § 63G-2-305(40)); Vermont (1 V.S.A. § 317(23)); Virginia (Va. Code. Ann. § 2.2-3705.4); Washington (Wash. Rev. Code §§ 42.56.270, 42.56.280); and Wyoming (Wyo. Stat. § 16-4-203(b)(iii)).

[28] *Humane Society supra*, 214 Cal.App.4th 1233, 1258, 155 Cal.Rptr.3d 93 (2013); *Coalition to Save Horsebarn Hill v. Freedom of Info. Comm'n*, 806 A.2d 1130 (Conn. App. 2002); Hawaii OIP Opinion Letter No.91-15, 1991 WL 474712 (Haw. A.G., Sept. 10, 1991); *Humane Soc'y v. Brennan*, 53 A.D.3d 909 (N.Y. App. 2008); *Highland Min. Co. v. West Virginia supra*.

In support of the 2001 version of A.R.S. §15-1640, Arizona State University's general counsel spoke of the need to place Arizona "on an equal footing with universities in" other states.[29] When our legislature amended A.R.S. §15-1640, supporters spoke of the need to attract research and development money to our universities. [Opening Brief, at 19-20.]

By ignoring (or misapplying) A.R.S. §15-1640, the trial court not only committed reversible error, but, for the moment at least, ranked Arizona as an outlier in the level of confidentiality its university employees can expect when exchanging emails with others in the scientific community. If not remedied by the Court of Appeals, the diminished expectation of confidentiality created by the trial court will discourage written communications to and from Arizona public university employees and harm the best interest of the state by (1) hampering the ability of its university employees to fully participate in free and frank exchanges of ideas, (2) making it more difficult for the state universities to hire and retain top level scientists and professors who will choose to do their work in other states. *See* Opening Brief, at 30-38.

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[29] Minutes of the Arizona Senate Committee on Education, March 1, 2001 (comments of Paul Ward, General Counsel, Arizona State University) (available through Westlaw). The adoption of the statute obviously indicates the legislature intended the new law to address the issues raised by Mr. Ward. *See 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 the legislators' views").

V. CONCLUSION.

A. We ask the Court to take its lead from federal law, follow the decided cases and interpret A.R.S. 15-1640 to strike a balance between (1) the public's right to know and (2) the need to protect the competitive position of our universities as well as the freedom, vigor, candor and integrity of the researchers who work there. We also ask that the Court reverse the trial court and remand for an explicit application of our research exemption to the facts of our case.

B. If the Court finds that the exemption does not protect the email in question, it should, following its own de novo review of the case, find that the public's right to know is outweighed by the need to protect the confidentiality and privacy of the work done at Arizona's universities and reverse the trial court. *See* Opening Brief, at 29-42.

RESPECTFULLY SUBMITTED this 26th day of June, 2017.

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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 6,281 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 26h day of June, 2017.

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