to comply with confidentiality requirements imposed by these major federal research funding agencies and by the many professional societies and publishers that review and disseminate peer-reviewed scientific and scholarly work.

Section 2.2-3705.4(4) is also critical in ensuring the successful production of research in the Commonwealth, and the subsequent protection of that research, both of which are only possible if universities can elect when to patent, license, or formally publish research. Evidence from scholars across disciplines and from academic leaders both within and outside of the University of Virginia makes clear that research and scholarship develop along a spectrum. Such work requires protections at the formative stage along with rigorous accountability and disclosure at the formal publication stage. Loss of the ability to communicate freely, creatively, critically, and privately at the formation stage would mean a loss of production of research and scholarship in the Commonwealth. Professor Kubovy writes:

> The context of discovery is the realm in which most of a scientist's creative energy is expended, but it is also the realm where doubt is rampant and conviction is scant. It is within this context that frank, sometimes jocular, often anxious, and occasionally irreverent exchanges among scholars and their students or their peers take place. It is a delicate time in the life of the mind, one that can bear fruit only in the protective incubator of a trusting environment. Any expectation that such free–wheeling exchanges might be subject to compelled public disclosure is likely to undermine the creative process without which science will wither and die.

Kubovy Affidavit ¶ 5.

Provost John Simon provides a direct example from his own career in which the opportunity to engage in confidential discussions with colleagues at another institution allowed him to understand the implications of his own research in entirely new ways:

> I have personally experienced on any number of occasions the unpredictability of the course of my own research, and the unexpected importance of research results that I initially dismissed

> or found uninteresting and elected not to offer for publication. In 1997, for example, I was curious whether research from my laboratory might have a have broader significance within the medical research community than I was able to interpret on my own. I reached out to two individuals I did not know personally (two leading researchers at George Washington University Medical School), and shared my data in confidence with them. I knew that both these individuals worked on related problems from a medical research perspective. Our ensuring communications led to me to understand the greater significance of my work and ultimately resulted in a high profile publication in the Proceedings of the National Academy of the Sciences, extensive media coverage, and even an appearance on Good Morning America. These confidential communications also led to subsequent publications and additional research. Had such data (or the correspondence) been subject to forced disclosure under a state FOIA, the opportunity to reimagine the implications of my research would have been lost; yet this is how the process of science is done.

Simon Affidavit ¶12.

Dean John Gittleman of the Odum School at the University of Georgia explains:

> An essential change over the past 20 years in most scientific fields is that the research process – hypothesis development, data collection, statistical analysis, grant writing, publication in peer-reviewed journals – is not a solitary activity. It is the rare exception today that a grant or publication is single-authored; in high profile journals such as *Science* and *Nature*, over 90% of research papers are multi-authored. This necessarily means that science is collaborative, involving intense interpersonal interactions that take place at many levels and in different forms, but increasingly via electronic communication. In present context, the important point is that if there were a breach of any protection of the communication among scientists, particularly at the formative stages of this process, then the freedom and creativity that lie at the heart of the scientific give-and-take would be hampered and create an air of paranoia, very possibly eliminating many benefits of collaboration.

Gittleman Affidavit ¶ 7.

Professor Gweneth West, a noted costume designer, makes clear that the creative arts share the same need for confidential communication at the formative stage of a work:

> The work of a costume designer involves highly complex intellectual and artistic collaborations with a director, actors, and other designers within the context of the underlying dramatic work itself. Within this framework of collaboration, I have designed costumes for over 250 theater productions in a variety of academic and professional venues across the country. As an artist-scholar, I value most the depth and expansiveness of the imagination, creativity and thought shared as I struggle with my professional colleagues to discover solutions to the intense challenges that confront the translation of a written dramatic work to a theatrical production. The germination of an idea in my discipline is fragile. Willingness to share artistic ideas and concepts requires belief that those invited into the process can be trusted. Whether or not any given idea or artistic solution will move forward grows from the response (including the critique) of those trusted colleagues.
>
> Ultimately, of course, the aim of collaborative theater design processes is a public performance before an audience. However, the brainstorming, dreaming, and creative thought between trusted colleagues that are necessary to create these creative works would be jeopardized or destroyed by involuntary exposure of our thought processes. It is challenging enough to express such ideas and artistic dreams to another person; the idea that putting such thoughts into email would render them subject to public disclosure, critique, or censure, would paralyze my discipline. By way of analogy, it is a production company's decision whether or not to open up rehearsals prior to opening night. Even a dress rehearsal in a theater is typically closed to the public to protect the artistic process.

West Affidavit ¶¶ 3, 5.

Dean Gittleman explains that in an age of collaboration accomplished with digital communication tools such as e-mail, confidentiality of the scientific development process is absolutely essential:

> Discovery of new ideas, whether in science or the arts, requires the opportunity to make mistakes and correct them, without fear of involuntary public disclosure or political attacks. The process of discovery is necessarily idiosyncratic, with methods, results, and hypothesis testing being iterative: creating something new, testing it, showing it is wrong, developing as an idea, going through this process over and over until tests are consistent and a hypothesis is supported. Failure is a key feature of this iterative process and,

> rarely, do we want to be transparent when showing such failure. My observation has been that this is even more the case now with the increased prevalence of collaboration among scientists.

Gittleman Affidavit ¶ 8.

This need for privacy does not cease when the final version of a given work is published. The open and critical exchanges described by the affiants above do not rest on protections merely before the time of publication, as Petitioners have maintained. The protections are necessary for all communications relating to research and scholarship that the authors have not chosen to make public - to publish. The ability to communicate freely would mean little if the robust and honest criticisms included in scholarly exchanges were subject to involuntary public disclosure the moment some portion or version of related work happened to be published.[26] As Dean Gittleman points out:

> The point of accountability in scientific disciplines is the moment when the decision is made that work is ready for public distribution; i.e., where a paper is submitted for peer review and is accepted or is not accepted for formal publication. No scientist would claim a right to withhold data or research results described in a published article. We expect to be questioned on and to be accountable for what we elect to publish and present as truth to the

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[26] The concern for privacy and the impact of compelled disclosure of confidential communications (even if devoid of substantive information), is central to the Virginia Supreme Court's decision in *Taylor v. Worrell Enterprises*, 242 Va. 219, 222 (1991) (noting that even though data sought under the Virginia Freedom of Information Act may be "totally devoid of substantive information…the data, standing alone, could provide a basis for public speculation [and]… an information base for further investigation which could subject recipients of such calls to inquiries regarding the calls and their content."), citing *United States v. Nixon*, 418 U.S. 683, 705 & n. 15 (1974) ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process;" noting that "the meetings of the Constitutional Convention in 1787 were conducted in complete privacy…that all records of those meetings were sealed for more than 30 years after the Convention….[and that] most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written.")

> broader community However, a mandatory disclosure of all materials/data/ideas/failures related to this process will lead to less internal discussions, rigor, and ultimately, jeopardize the entire scientific process.

Gittleman Affidavit ¶9.

Molly Broad, the President of the American Council on Education ("ACE") states:

> This "sifting and winnowing process" has been remarkably successful at producing the inventions, intellectual breakthroughs, and innovations that benefit society as a whole. American universities and scholars are recognized throughout the world for the freedom of mind, the creativity, the willingness to try out ideas and be thought wrong, and proven wrong, that they embrace. Thus human understanding advances and improves. It is through this process that American universities, their students, faculty and graduates have produced many of the greatest technological advances in the history of humanity.
>
> This dialectical process, which is integral to the academy and vital for the advancement of knowledge and the betterment of life, is fragile. Any trepidation that the uninhibited and free exchange of ideas will be subject to intrusion at the behest of litigants would tend to dampen scholars' willingness to participate in the process, to try out novel, controversial, non-mainstream theories and hypotheses. Such a result is bound to have adverse consequences for the quality, productivity, and utility of research that are hallmarks of American higher education. To work well, the winnowing process must be fearless.

Broad Affidavit ¶¶ 3, 4.

It is not simply the production phase of research that would suffer from a lack of protection for informal or preliminary communications. Untimely disclosure of research results imperils both the possibility of obtaining patent protections and the potential to have final work accepted for publication. As Ms. Broad suggests:

> Specifically, collaboration and deliberation between researchers at public institutions and private or international institutions—which are not subject to state FOIA laws—will be adversely affected if those laws are interpreted to lack protections for informal and unpublished scholarly and scientific exchanges. Advancements

> resulting from research conducted at institutions result in a significant number of patents every year. However, research will be stifled if these exchanges are subject to involuntary disclosure.
>
> The recognition and chance of fame associated with new discoveries motivates some researchers. However, this motivation is jeopardized by the compelled release of information which in some cases can affect patentability under U.S. law. It is important that the decision regarding what information to disclose and include in a patent application is made by the researcher and their institution. Further, researchers at private and international institutions will hesitate or even refuse to deliberate or collaborate with researchers at public institutions due to the risk that their confidential materials, which would otherwise not be subject to records requests, could be disclosed.

Broad Affidavit ¶¶ 6, 7.

At a federal level, in 1999, the Office of Management and Budget specifically amended its guidelines to ensure that research data was defined in a manner to protect research communications, drafts, preliminary analyses, peer reviews, and communications with colleagues from being subject to disclosure under the Shelby Amendment, a rider attached to the Omnibus Appropriations Act of 1999, PL 105-277. The Shelby Amendment required the OMB to amend its Circular A-110—*Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations* "to require Federal awarding agencies to ensure that all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act." After hearing from thousands of scientists about the impact that forced disclosure would have on their research, institutional proprietary rights, and collaborations with industry, the OMB created explicit protections for research data. OMB's Circular A-110, see 64 Fed. Reg 43786, 43787(August 11, 1999),[27] included an express carve-out from the definition of "data" subject to disclosure under the federal FOIA pursuant to the Shelby Amendment: *"(i) Research data is*

[27] http://www.gpo.gov/fdsys/pkg/FR-1999-08-11/pdf/99-20683.pdf

defined as the recorded factual material commonly accepted in the scientific community as necessary to validate researching findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues." (Emphasis added.) In its final rule amending the Circular, OMB stated that "[a]s in many other fields of endeavor, scientists need a private setting where they are free to deliberate over, develop, and pursue alternative approaches."

OMB's carve-out of scientists' deliberative communications reflected input from many, including testimony by Bruce Alberts, President of the National Academy of Sciences to the House Committee on Government Management, Information, and Technology, Subcommittee, Committee on Government Reform:

> For example, researchers could be forced to make certain information publicly available, including their lab notebooks, draft manuscripts, electronic mail, and raw research data, even before its publication and analysis. We can predict that it will have a chilling effect on joint university-industry research collaborations, *and that it will be used by various special interest groups to harass researchers doing research that these interests groups would like to stop*. It will be exploited by both foreign and domestic concerns, as well as foreign military interests, as a new tool for scientific espionage. *For example, commercial interests that have a strong competitive interest in particular areas of research will now be able to use FOIA requests to obtain university-based research data for their own use and competitive advantage in an effort to dominate or control that area of research, ultimately discouraging independent university research in these areas.* (Emphasis added).

Statement of Bruce Alberts, President, National Academy of the Sciences, Exhibit F hereto.

As noted by Dr. Mann, *see* Mann Affidavit ¶56, the "very danger against which this federal protection was crafted is at work in this case. In its final rule amending the Circular, OMB stated that '[a]s in many other fields of endeavor, scientists need a private setting where they are free to deliberate over, develop, and pursue alternative approaches.'" 64 Fed. Reg

43786, 43787(August 11, 1999). In its comments submitted to OMB, the Association of American Universities warned that:

> We are concerned that subjecting research data to FOIA *will subject scientists to harassment from interested parties that may be opposed to the research.* Repetitive FOIA requests could be filed in an effort to delay or prevent the research. Complying with these requests is likely to be costly and cumbersome. These requirements could have a chilling effect on research in areas deemed controversial, or that evokes the greatest public interest and concern.

Comments of the Association of American Universities Against proposed revision to OMB Circular A-110, March 23, 1999, available at http://www.thecre.com/ipd/access/agency/1999-03-23.html. The American Lung Association expressed direct concerns about the potential for harassment of scientists if the OMB did not ensure protections for research data:

> The ALA is gravely concerned that the proposed changes in the OMB Circular A-110 will be used a tool to harass researchers engaged in research with public policy implications. American Lung Association volunteers are engaged in a wide range of research pursuits, including studies of the health effects of air pollution, tobacco use and work place safety. Recent research findings in all three of these areas have prompted state and federal governments to take active legislative and regulatory actions to protect the health of the American people in these three areas. Many of the legislative and regulatory actions, though needed and fully appropriate, were not welcomed by certain industries that wanted to maintain the status quo. Additional research into the health effects of air pollution, tobacco use and work place safety may support further government protections.
>
> Under the proposed amendments, industries that have a financial interest in opposing additional government protections on clean air, tobacco control and work place safety will be able to use the Freedom of Information Act (FOIA) to harass federally funded researchers who are doing work in these areas. *If research data becomes subject to FOIA requests, impacted industries can easily tie up researchers time and energy by filing endless requests for data. Additionally, once these vested interests have the data in hand, they may try to unfairly discredit the data, forcing*

> *researchers to spend additional time, energy and resources to defend the validity of their data.*
>
> Furthermore, should the proposed changes to OMB Circular A-110 occur, *research harassment or the threat of research harassment will dramatically reduce the flow of valid scientific data that is needed to establish public health standards on issues like clean air, clean water, work place safety and other publichealth issues.* (Emphasis added.)

American Lung Association, Comments Against proposed revision to OMB Circular A-110, March 24, 1999, available at http://www.thecre.com/ipd/access/agency/1999-03-24a.html. Mann Affidavit ¶ 56.

Dr. Mann has been the direct target of baseless character and professional attacks that seem clearly calculated to destroy his ability to conduct scientific research. *See* Mann Affidavit ¶ 53; *see also id.* ¶¶ 49, 50, 51, 52, 57, 58, (describing the intrusion on the privacy interests of other scientists with whom Dr. Mann corresponded; the chilling effect on climate science research that has been decried by the American Association for the Advancement of Science; and the personal impact on his research that Dr. Mann believes has been the direct result of the attacks he has experienced.)

Scientific publishers will generally not accept work that has already been made public: "For this reason, scientists and scholars are very careful to integrate planning for future publications in their decisions about when and how to release or discuss research results." Simon Affidavit ¶10. Further: "Scholarly reputations are built on the formal publications, grants, or public presentations submitted voluntarily and intentionally by scientists. It is the final work, not the interim results, the false starts, the misinterpretations, or the wrong paths, which count. Loss of the ability to decide when to publish would translate into risk-adverse research decisions and a loss of bold and creative exploration." *Id.* ¶ 11. Provost Simon also explains that patent filings

depend on the timing of disclosure of research results. "Disclosure of research data and communications that a scientist or scientific collaborative group has chosen to not yet make public can imperil future patenting of research. Similarly, a patent application filed or a publication submitted describing certain specific research, may intentionally omit description of other existing data which the scientific team believes requires additional work." *Id.* ¶ 14. Compelled disclosure would also threaten university licensing and commercialization activities federally authorized under the Bayh-Dole Act and which have led to enormous public benefits through the exploitation of university research—the very intention of that legislation. *Id.* ¶ 15. "It is virtually impossible for a university to license intellectual property to a private sector company if the data or research results have been prematurely released and are already publically available." *Id*

The Commonwealth will also suffer other losses of scientific productivity and ultimately, a loss of financial gains from the monetization of proprietary research, if these confidential records are not subject to protection. First, public institutions like the University of Virginia will lose or fail to recruit star faculty and researchers; second, faculty at private institutions or at public institutions subject to sound protections for scientific research under their state FOIAs, will stop collaborating with Virginia institutions. As Dean Gittleman points out:

> In my role as a dean of a school, I also believe that the inability of an institution of higher education to protect the emails, preliminary data, drafts, and other informal communications or information created by its faculty from involuntary disclosure would put the institution at a distinct disadvantage in recruiting faculty as compared to private institutions.

Gittleman Affidavit ¶ 10. Dr. Rawlings from the AAU states:

> Compelled disclosures under state freedom of information acts will stifle collaboration between researchers at public and private institutions and affect the motivation of researchers. Researchers

> employed at private institutions will not collaborate with researchers at public institution for fear that by virtue of working with a public institution, their ideas and research will be subject to records requests, which they are otherwise not subject to, resulting in forced disclosure of confidential material. The motivation to patent an idea or research is lost if researchers, from institutions regardless of whether they are public or private, have to make guesses about whether their scholarly and research communications and results will be subject to compelled public disclosure which can itself affect patentability under U.S. law. The quality of research and scientific advancements and the ability of public institutions to undertake licensing and technology transfer to the private sector will suffer as a result.

Rawlings Affidavit ¶ 4. Provost Simon, reflecting on his experience serving at a high administrative level at both Duke University and the University of Virginia states:

> Compelled disclosure will also impair recruitment and retention of faculty. I have served as the Vice Provost for Academic Affairs at Duke University (a private institution not subject to a state FOIA) and as Provost at the University of Virginia (a public institution subject to the Virginia FOIA). Both of these positions involve the recruitment and retention of key faculty. I can state unequivocally that recruitment of faculty to an institution like the University of Virginia 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 Duke, if their continued work at University of Virginia will render their communications involuntarily public.

Simon Affidavit ¶¶ 21, 22. *See also* Mann Affidavit ¶¶ 7,8,33,55,56,59.

In summary, the very interests protected by Section 2.2-3705.4(4)—research, scholarship, patents, licensing, arts, and publications—are all threatened by a failure to interpret this provision in a manner that adequately and appropriately protects the informal scientific and scholarly communications which are the very building blocks of the finished results. The scientific process itself, which demands that valid results can be replicated or verified by others, ensures that the professor's published work is scientifically sound. Peer review is the

cornerstone of this process in the area of research and publication. *See generally* National Institutes of Health, *Enhancing Peer Review at NIH* (Dec. 22, 2009).[28]

The protection of confidential and proprietary unpublished research, notes, data, and communications between scholars is of paramount importance. This confidentiality between scholars is an integral part of the academic freedom of research and publication that is being threatened by Petitioners' FOIA request. To force the University to disclose unpublished materials and correspondence between scholars would require it to violate the professional norms and guidelines by which it and its faculty are bound. As Provost John Simon explains it:

> The great American research institutions have thrived and have benefited the country as a whole because of a dual framework: Internal freedoms of thought, expression, and exploration are coupled in higher education with rigorous systems of external peer review, accountability for published research results, tenure and promotion, and compliance with the many federally-imposed research accountability mandates. Interpretation of the Virginia FOIA to breach the privacy rights and norms attendant to these systems will harm great public institutions such as the University of Virginia and ultimately, the Commonwealth which it has served for almost two hundred years.

Simon Aff ¶ 23.

C. Disclosure of the E-Mails Sought by Petitioners Would Violate the First Amendment of the U.S. Constitution.

Interpretation of Section 2.2-3705.4(4) in a manner that protects the documents withheld by the University is also necessary to ensure that the Virginia FOIA is implemented in a manner that protects the University's constitutional right of academic freedom, as embodied in the First Amendment. Courts have a duty when construing a statute to avoid any conflict with the Constitution. *Kopalchick v. Catholic Diocese of Richmond*, 274 Va. 332, 340, 645 S.E.2d 439,

[28] http://enhancing-peer-review.nih.gov/index.html

443 (2007); *Jeffress v. Stith*, 241 Va. 313, 317, 402 S.E.2d 14, 16 (1991); *see Tanner v. City of Va. Beach*, 277 Va. 432, 438-39, 674 S.E.2d 848, 852 (2009); *In re Phillips*, 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003). Courts must attribute to the General Assembly the intent to enact statutes that comply with the Constitution in every respect. *Kopalchick*, 274 Va. at 340, 645, S.E.2d at 443. Therefore, whenever possible, statutory language must be interpreted in a manner that avoids a constitutional question. *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 428, 657 S.E.2d 71, 75 (2008); *Yamaha Motor Corp. v. Quillian*, 264 Va. 656, 665, 571 S.E.2d 122, 127 (2002); *Eaton v. Davis*, 176 Va. 330, 339, 10 S.E.2d 893, 897 (1940); *Commonwealth v. Doe,* 278 Va. 223, 229, 682 S.E.2d 906, 908 (2009).

In a series of cases in the 1950s and 1960s, the U.S. Supreme Court recognized that the First Amendment to the U.S. Constitution had special resonance in the educational environment and the concept of academic freedom, as a special concern of the First Amendment emanating from the free speech and association clauses, took shape. This concept of academic freedom as a special concern of the First Amendment was first articulated, as is often the case, in a dissent, in this case the dissent of Justices Douglas and Black in *Adler v. Bd. of Educ. of City of N.Y.*, 342 U.S. 485, 510 (1952), in which the dissenting justices noted: "Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. Supineness and dogmatism take the place of inquiry."

The next case in which the Supreme Court identified and commented on the importance of educators having the ability freely to conduct their scholarship and inquiry without

interference was *Wieman v. Updegraft*, 344 U.S. 183 (1952), in which the Court invalidated a loyalty oath requirement for Oklahoma state employees. Justices Frankfurter and Douglas noted in their concurring opinion:

> [I]n view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.

Id. at 195.

The concept of academic freedom became more fully alive in *Sweezy v. N.H.*, 354 U.S. 234 (1957), in which Sweezy, a professor at the University of New Hampshire, was summoned by the state attorney general to testify pursuant to a broad resolution of the state legislature to determine if there were "subversive persons" in the state and recommend legislation on the subject. Sweezy refused to answer certain questions posed by the state attorney general about a lecture he had given at the university and was found in contempt. In reversing the contempt judgment against Sweezy, Chief Justice Warren's plurality opinion noted:

> The State Supreme Court thus conceded without extended discussion that petitioner's right to lecture and his right to associate with others were constitutionally protected freedoms which had been abridged through this investigation. These conclusions could not be seriously debated. Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters. These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression — areas in which government should be extremely reticent to tread.

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id. at 249-250. In their concurring opinion, Justices Frankfurter and Harlan built on the importance of academic freedom, noting:

> "In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates — 'to follow the argument where it leads.' This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant [Page 263] to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself."

Id. at 262-263 (quoting a conference statement by scholars from the Union of South Africa).

Three years later, in invalidating a state statute that required teachers in public schools and universities to reveal all organizational affiliations or contributions for the previous five years, the Court noted: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Then, in *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967), the Court further acknowledged the importance of academic freedom, stating, in language that has been much-

quoted: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'" (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)) The *Keyishian* Court held that a certificate that the State of New York required faculty members to sign, which stated that they were not and had never been communists, violated the First Amendment. In so doing the Court rejected the majority opinion in *Adler* and made clear that the *Adler* dissent, with its explicit recognition of the importance of academic freedom, was the a majority opinion of the Court.

The concept of academic freedom has been revisited by the Supreme Court and acknowledged as of continuing importance since *Keyishian*. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition"); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n. 12 (1985) ("[a]cademic freedom thrives . . . on the independent and uninhibited exchange of ideas among teachers and students"); *Regents of Univ. of Cal v. Bakke*, 438 U.S. 265, 312 (1978) (the principle that scholars should be free to pursue their research and express their opinions without fear of intrusion or reprisal is a "special" First Amendment concern).

As the concept of academic freedom has evolved, it has variously been described as an individual right of the teachers and faculty in public educational institutions, an institutional right of those institutions themselves, or both. In Virginia the Fourth Circuit Court of Appeals has

come down on the side of institutional academic freedom. In *Urofsky v. Gilmore*, 216 F.3d 401 (2000), the full Fourth Circuit *en banc* considered objections raised by a number of professors at Virginia's state universities to a statute limiting their internet access to pornographic materials. The majority opinion contains a lengthy explication of academic freedom and concludes:

> Taking all of the cases together, the best that can be said for Appellees' claim that the Constitution protects the academic freedom of an individual professor is that teachers were the first public employees to be afforded the now-universal protection against dismissal for the exercise of First Amendment rights. Nothing in Supreme Court jurisprudence suggests that the "right" claimed by Appellees extends any further. Rather, since declaring that public employees, including teachers, do not forfeit First Amendment rights upon accepting public employment, the Court has focused its discussions of academic freedom solely on issues of institutional autonomy. We therefore conclude that because the Act does not infringe the constitutional rights of public employees in general, it also does not violate the rights of professors

Id. at 415.

While the Fourth Circuit's opinion on a question of First Amendment interpretation is entitled to great deference, many believe it to be too restrictive. *See, e.g.*, "Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy," 29 *J. Coll. & Univ. Law* 35 (2002). The more conventional view is probably that expressed by the Circuit Court of the City of Richmond in *Feiner v. Mazur*, 18 Va. Cir. 136, 140, 1989 Va. Cir. LEXIS 354, **8 (1989), in which the court noted: "Academic freedom is not enjoyed solely by the teacher who becomes tenured. Rather, there are aspects which belong to the university and its staff, particularly those aspects involving the granting and denial of tenure."[29] In the instant case, however, where the right of academic freedom resides is not important, because it is the University itself which is vigorously asserting the right to protect

[29] The Circuit Court of the City of Richmond has also found the "concept of academic freedom" to be "basic to our society." *Corr v. Mazur*, 15 Va. Cir. 184, 188, 1988 Va. Cir. LEXIS 265, **7-8.

the scholarly and scientific communications of its faculty and the institution's proprietary records as a matter of its own academic freedom and prerogatives.

Indeed, the Fourth Circuit's view of academic freedom reinforces the importance of academic freedom to "institutional autonomy." Clearly, under *Urofsky* the University has standing to assert academic freedom as a reason for its non-disclosure of e-mails being challenged in court. Of course the University's academic freedom argument also involves Dr. Mann: The e-mails Petitioners seek are to and from Dr. Mann and without Dr. Mann's presence as a member of the University's faculty for a number of years, the records at issue would not exist. The University cannot write e-mails; only its faculty, employees, and agents can write e-mails. Moreover, the individual-institutional dichotomy is significant only where there is a controversy between a member of the faculty and his or her university. Where, as here, both are aligned on the same side of the controversy, the distinction is one without a difference. It is important to note, nonetheless, that Dr. Mann has made clear that the disclosure of his email correspondence would violate his individual liberty interest under the First Amendment and the principles of academic freedom. *See* Affidavit of Michael Mann dated September 8, 2011 In Support of Motion to Intervene at ¶¶ 14, 26.

Although the Virginia Supreme Court has only infrequently addressed issues of academic freedom, it has several times made clear that an institution's failure to protect the academic freedom rights of its faculty would weigh heavily in the Court's view of the availability of public financing under the Establishment Clause of the United States Constitution and Article 1, Section 16 of the Virginia Constitution. In 2000, the Virginia Supreme Court found the academic freedom afforded faculty under the policies of Regent University to be a critical factor in that institution's eligibility for bonds issued by the Virginia College Building Authority. *Virginia*

College Building Auth. v. Lynn, 260 Va. 608, 538 S.E.2d 682 (2000). The Court noted that: "Dr. Selig testified, and the SACS and the ABA agree, that the Statement of Faith has not interfered with academic freedom. *Regent's detailed academic freedom policy encourages faculty to "pursue truth ... by research, discussion, and other forms of inquiry."* ... The SACS in a review of Regent's accreditation application in 1998 found that *"[f]aculty and students are free to examine all pertinent data, question assumptions, be guided by the evidence of scholarly research, and teach and study the substance of a given discipline."* *Id* at 618, 538 S.E.2d at 686 (emphasis added). Earlier, in applying the U.S. Supreme Court decision in *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736 (1976), the Virginia Supreme Court noted that "Liberty's published policies required its faculty and students to attend church and chapel six times each week, its faculty and students were required to subscribe to Liberty's doctrine, *and its faculty's academic freedom was circumscribed* by Liberty's doctrinal statements." *Habel v. Industrial Development Authority*, 241 Va. 96, 101, 400 S.E2d 516, 519 (1991) (emphasis added). These decisions make clear that the Virginia Supreme Court considers the presence or absence of institutional protections of faculty rights to academic freedom to be highly relevant to its analyses under the state constitution.

Putting aside the vagaries of academic freedom and who has it, it is worth noting that courts have also recognized a "scholar's privilege" rooted in the First Amendment (also referred to as a "researcher's privilege"), which protects against interference with the academic process. *See Sweezy,* 354 U.S. at 261-62 (the First Amendment protects "findings made in the laboratory" and precludes "governmental intervention in the intellectual life of a university") (Frankfurter, J., concurring); *Deitchman v. E.R. Squibb & Sons*, 740 F.2d 556, 560-61 (7th Cir. 1984) (a university may have a qualified privilege in a medical registry due to the "vital interest in

promoting research of the type the [r]egistry carries out"). *See also Dow Chemical v. Allen*, 672 F.2d 1262, 1276 (7th Cir. 1982) (affirming quashing a subpoena for research data because enforcement would "threaten substantial intrusion into the enterprise of university research").

In the earlier portion of this memorandum dealing with exemptions available under the FOIA it was noted that the Act, as this Court has accurately noted, does not require that a requester state a reason for wanting the public records requested. It was further noted that we nonetheless know that Petitioners seek Dr. Mann's e-mails because of their animus for him and his published scholarship about climate change. We know this because they have told us so. Petition ¶¶ 58-63.[30] In the context of the argument concerning academic freedom, this animus is highly significant because a fundamental purpose of the protections afforded by academic freedom is enabling faculty and educational institutions to inquire into controversial areas of research and scholarship without being subjected to harassment and intimidation. The threat of this is the cause of the "pall of orthodoxy over the classroom" that the *Keyishian* Court decries, and of the "unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice" alluded to by the Court in *Wieman v. Updegraft, supra.* The protection of faculty from the type of behavior exhibited by Petitioners and ATI is at the heart of academic freedom.

The chilling effect that requests like this one has on scholarship and research is fully described in *Dow Chem. Co. v. Allen, supra*, in which Dow Chemical Company sought through

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[30] ATI has been relentless in its criticism of Dr. Mann and vehement in its assertions of his alleged scientific bad faith. *See, e.g.,* the article posted at the ATI website which is typical of ATI's tone and begins as follows: "Climate change alarmist, Dr. Michael Mann, former professor from the University of Virginia (UV) was involved in an intentional lie to coerce the American public into believing the propaganda that is the man-made global warming perspective now dubbed 'Climategate'." http://www.infowars.com/climategate-scientists-governments-private-industry-conspire-to-fool-the-world/. See also Mann Affidavit ¶¶ 53, 54.

administrative subpoena all of the notes, reports, working papers, and raw data of University of Wisconsin researchers relating to ongoing animal toxicity studies. In affirming the judgment of the district court quashing the subpoena, the Seventh Circuit considered the importance of academic freedom, noting:

> These requirements [of the subpoena] threaten substantial intrusion into the enterprise of university research, and there are several reasons to think they are capable of chilling the exercise of academic freedom. To begin with, the burden of compliance certainly would not be insubstantial. More important, enforcement of the subpoenas would leave the researchers with the knowledge throughout continuation of their studies that the fruits of their labors had been appropriated by and were being scrutinized by a not-unbiased third party whose interests were arguably antithetical to theirs. It is not difficult to imagine that that realization might well be both unnerving and discouraging. Indeed, it is probably fair to say that the character and extent of intervention would be such that, regardless of its purpose, it would inevitably tend ( ) to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor. In addition, the researchers could reasonably fear that additional demands for disclosure would be made in the future. If a private corporation can subpoena the entire work product of months of study, what is to say further down the line the company will not seek other subpoenas to determine how the research is coming along? To these factors must be added the knowledge of the researchers that even inadvertent disclosure of the subpoenaed data could jeopardize both the studies and their careers. Clearly, enforcement of the subpoenas carries the potential for chilling the exercise of First Amendment rights.

Id. at 1276. Substituting "FOIA request" for "subpoena" in the above quote makes it fully applicable to the instant case. *See also* J. Kempner, "*The Chilling Effect: How Do Researchers React to Controversy?*"[31] in which the author concludes: "These findings provide evidence that political controversies shape what scientists choose to study. Debates about the politics of

[31] Available at: http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1000014

science usually focus on the direct suppression, distortion, and manipulation of scientific results. This study suggests that scholars must also examine how scientists may self-censor in response to political events." *Id.* at 1276 (citation and internal quotation marks omitted).

IV. CONCLUSION

American institutions have created some of the greatest science and innovation in the world because of the freedoms of thought and experimentation at the heart of our system of higher education, coupled with rigorous peer review at every stage of the scholarly and scientific enterprise. In tandem, this potent combination of freedom and accountability has been unparalleled. The unprecedented attacks on Dr. Michael Mann and the demands for his confidential communications with other scientists pose a grave threat to the University of Virginia which was his academic home for a number of years, but the more serious threat is to research and innovation in the Commonwealth generally. The Virginia General Assembly wisely ensured that the Freedom of Information Act contained provisions which would allow institutions of higher education to protect proprietary scientific and scholarly communications. Protecting the documents withheld by the University is not only plainly contemplated by the scholarly research exclusion under the statute and by the protections afforded under OMB Circular A-110, it also entirely consistent with prudent public policy and the constitution. As UVA Provost John Simon stated:

> Twenty three of the top twenty five large research institutions as reported by U.S. News and World Report are private institutions. Alone among them are two great public institutions: The University of Virginia and the University of California, Berkeley. States like Virginia and California have benefitted enormously from research, innovation, and commercialization activities that have been spun off of the research conducted on their campuses. Loss of the personal rights to privacy of thought and exploration; loss of the ability to comply with the norms of scholarly and scientific peer review; and loss of the ability to choose when to disclose and publish one's research, will mean that such great

> public institutions will no longer be able to attract the scientists and scholars that have made them great.

Simon Affidavit ¶ 22.

For all of these reasons, this Court should affirm the University's refusal to disclose the proprietary, scholarly communications Petitioners seek.

Respectfully submitted,

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

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CERTIFICATE

I hereby certify that on the 24th day of July 2012, a true copy of the foregoing Memorandum in Opposition to Petitioners' Verified Petition for Mandamus and Injunctive Relief was served electronically on counsel for Petitioners, David Schnare, Esq., 9033 Brook Ford Road, Burke, Virginia 22015 at the following address: DWSchnare@gmail.com; and on Christopher Horner, Esq., 2020 Pennsylvania Avenue NW #186, Washington, D.C. 20006 at the following address: Chris.Horner@ATInstitute.org.