IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, Petitioners, v. KENNETH T. CUCCINELLI, II, ATTORNEY GENERAL OF VIRGINIA, Respondent.	)	Case No. CL10000398-00

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, UNION OF CONCERNED SCIENTISTS, AND THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION ON BEHALF OF THE UNIVERSITY OF VIRGINIA

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In its Petition to Set Aside the Civil Investigative Demands and subsequent briefing, the University of Virginia ("the University") has presented multiple reasons why the Civil Investigative Demands (CIDs) at issue here should not be enforced, including the CIDs' failure to comply with the requirements of the Virginia Fraud Against Taxpayers Act, the overbreadth of the CIDs, and the effect the CIDs have on academic freedom and the fundamental goals of universities. *Amici*, organizations that are committed to preserving universities as environments for robust scientific research and debate, submit this brief to elaborate the argument that enforcement of the CIDs would infringe on the University's academic freedom protected by the First Amendment. At issue is not whether academic research that has faced appropriate and extensive peer review is absolutely immune to governmental investigation but whether the First Amendment's protection of academic freedom requires a heightened justification for this type of intrusive and chilling inquiry

INTERESTS OF *AMICI CURIAE*

The American Civil Liberties Union of Virginia ("ACLU of Virginia") is the Virginia affiliate of the American Civil Liberties Union, and has approximately 10,000 members in the Commonwealth of Virginia. Its mission is to protect the individual rights of Virginians under the federal and state constitutions and civil rights statutes. The ACLU of Virginia appears regularly before the state and federal courts of this Commonwealth, both as counsel and *amicus*. Since its founding, the ACLU of Virginia has been a forceful advocate for the freedom of speech.

The American Association of University Professors ("AAUP") is a non-profit organization of over 48,000 faculty, librarians, graduate students, and academic professionals who serve at institutions of higher education in Virginia and across the country. Founded in 1915, the AAUP is committed to the defense of academic freedom and the free exchange of

ideas. The AAUP's policies have been recognized by the Supreme Court and are widely respected and followed in American colleges and universities. *See*, *e.g.*, *Bd. of Regents v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971); "1940 Statement of Principles on Academic Freedom and Tenure," *AAUP Policy Documents and Reports* (2006 ed.) (endorsed by over 200 organizations). In cases that implicate AAUP policies, or otherwise raise legal issues important to higher education or faculty members, the AAUP frequently submits *amicus* briefs in the Supreme Court and the federal circuits. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000), *cert. denied* 531 U.S. 1070 (2001); *Columbia Union Coll. v. Oliver*, 254 F.3d 496 (4th Cir. 1999); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672 (4th Cir. 1995).

The Union of Concerned Scientists ("UCS"), an alliance of more than 300,000 citizens and scientists, is the leading U.S. non-profit organization dedicated to the use of science to foster a healthy environment and a safer world. UCS combines independent scientific research and citizen action to develop innovative and practical solutions to pressing environmental and security problems and to secure responsible changes in government policy, corporate practices, and consumer choices.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of amicus curiae briefs in federal and state courts around the country. A particular focus of the Center's litigation and program efforts has been the relationship between the First Amendment and academic freedom.

ARGUMENT

I. THE REQUESTED DOCUMENTS ARE PROTECTED BY THE FIRST AMENDMENT

For decades, the United States Supreme Court has recognized that free and uninhibited scholarship and debate at our nation's universities is a core First Amendment value. In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), the Court overturned a university professor's conviction for contempt for failing to answer the state attorney general's questions in his investigation of "subversive activities." The Court found that questioning the professor about lectures he had given "unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression." 354 U.S. at 250. The Court went on to note the centrality of academic freedom to American democracy:

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

Id. The Court reaffirmed these principles in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), in which the Court invalidated a requirement that state university employees sign loyalty oaths. The Court described academic freedom as "of transcendent value to all of us and not merely to the teachers concerned" and therefore "a special concern of the First Amendment." 385 U.S. at 603.

Both professors *and* universities have a constitutional right to academic freedom. *See, e.g., Sweezy*, 354 U.S. at 250 ("We believe that there unquestionably was an invasion of [Professor Sweezy's] liberties in the areas of academic freedom and political expression – areas

in which government should be extremely reticent to tread."); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311 (1978) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment…[including] the freedom of a university to make its own judgments as to education."). The Supreme Court has sometimes defined academic freedom as an *institutional* right, but in those cases the court has often relied on *faculty* expertise as the justification for the right.[1] *See Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the *faculty's* professional judgment.") (emphasis added); *Grutter v. Bollinger*, 539 U.S. 306, 314, 328 (U.S. 2003) (holding that "the Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer" after noting that "upon the unanimous adoption of the committee's report by the Law School faculty, it became the Law School's official admissions policy"). That is, the Court recognized universities' right to make academic judgments about admissions policies and other educational matters in part because these judgments represented the expert determination of educational professionals. It is faculty members – often acting through university governance structures such as faculty senates and committees – that provide this professional expertise.[2]

Virginia courts, including the Fourth Circuit, have also recognized that "[a]cademic freedom is not enjoyed solely by the teacher . . . [r]ather, there are aspects which belong to the university and its staff." *Feiner v. Mazur*, 18 Va. Cir. 136, 139-40 (Va. Cir. Ct. 1989); *see also Corr v. Mazur*, 15 Va. Cir. 184, 188 (Va. Cir. Ct. 1988) (holding that "the very concept of

[1] *See* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, The Georgetown Law Journal 97 at p. 979-82

[2] Therefore it may be more appropriate to define [or describe] institutional academic freedom as belonging "to the faculty as a body rather than to the *institution* in a corporate sense." Areen, *supra*, at 979.

academic freedom, which is so basic to our society, demands that college and university officials be free to make academic decisions. . ."); *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (recognizing that universities hold a right to academic freedom).[3]

Although separating the theoretical strands of each right may sometimes prove conceptually difficult, *see generally* David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 Law and Contemporary Problems 227 (Summer 1990), it is clear that *both* rights are violated where, as here, a state seeks to invade the "inviolable refuge" a university offers from the "tyranny of public opinion." AAUP, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, POLICY DOCUMENTS AND REPORTS at 297 (10th ed.). Society relies on universities to provide an atmosphere where teachers and researchers can create, discover, innovate, and, in short, move society forward. *See Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (universities' role as a "traditional sphere of free expression" is "fundamental to the functioning of society"); s*ee also* AAUP**,** *1915 Declaration* at 295-97 (declaring a major "purpose[] for which universities exist" is "to promote inquiry and advance the sum of human knowledge"); AAUP, *1940 Statement of Principles on Academic Freedom and Tenure***,** POLICY DOCUMENTS AND REPORTS at 3 (10th ed.) ("institutions of higher education are conducted for the common good," which "depends upon the free search for truth and its free exposition"). At universities, "in possible contrast to legislatures or to general political debate, ideas are evaluated on their scholarly merits, not their political popularity." *See* Rabban, *supra*, at 267-68. "Disinterested and expert thought is also crucial for society as a whole because it provides a standard by which to gauge… public

[3] In its decision in *Urofsky*, the Fourth Circuit acknowledged that "to the extent the Constitution recognizes any right of 'academic freedom' . . . the right *inheres in the University*." (emphasis added). The distinction between individual and institutional academic freedom may become especially important when a professor brings an academic freedom

discussion of affairs" and to "gain perspective on the mass of 'information' that pours from the print and electronic media." J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L.J. 251, 334 (1989).

This type of objective scholarly thinking "cannot flourish in an atmosphere of suspicion and distrust," and the Supreme Court has warned governments not to "impose any strait jacket upon the intellectual leaders in our colleges and universities." *Sweezy*, 354 U.S. at 250 (1957). In *Sweezy*, the New Hampshire attorney general sought to enforce a statute forbidding "subversive persons" at public universities and claimed that what Professor Sweezy "taught the class at a state university was…relevant to the character of the teacher." *Sweezy*, 354 U.S. at 249. Similarly, Attorney General Cuccinelli is relying on the contents of Professor Mann's research to claim that Mann committed fraud.

Furthermore, the Attorney General's approach – investigating a professor on suspicion of fraud simply because his work has sparked political and scientific controversy – could have a grave chilling effect on scholarship and research at universities. Seeking to avoid the stigma (not to mention legal costs) involved in a fraud investigation, professors would hesitate to research, publish, or even teach on potentially controversial subjects. Cost-conscious universities would hesitate to employ professors whose research challenges conventional scientific or political thinking, fearing the considerable costs involved in complying with a civil investigative demand. Either result directly interferes with universities' important societal role as "intellectual experiment stations."

Moreover, forcing a university to turn over private correspondence between academics based solely on controversy surrounding an academic's work invariably chills intellectual debate

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claim against his or her university. However, where, as here, external state action threatens the academic freedom of the entire university community, it is clear that institutional academic freedom, in every sense, is implicated.

among professors. While academics expect that their research will eventually be subjected to the rigors of peer review, the correspondence the attorney general seeks likely represents not final conclusions, but initial thoughts, suspicions, or hypotheses. Exposing these thoughts prematurely to the public eye would inhibit professors from speaking freely, as they might "fear[] that any individual statement or email will be taken out of context." *Letter from Union of Concerned Scientists to Attorney General Cuccinelli* (May 26, 2010), available at http://www.ucsusa.org/assets/documents/scientific_integrity/Virginia-Scientist-Letter.pdf. This fear is particularly justified in a politically charged field like climate change, where comments and excerpts are apt to become footballs in the political arena. The Seventh Circuit gave voice to this fear in *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1276 (7th Cir. 1982), noting that:

> enforcement of the subpoenas [seeking academic documents] would leave researchers with the knowledge… that the fruits of their labors had been appropriated by and were being scrutinized by a not-unbiased third party whose interests were arguably antithetical to theirs. It is not difficult to 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." *Sweezy*, supra, 354 U.S. at 262, 77 S. Ct. at 1217-18 (Frankfurter, J., concurring in result).

The important objective, scholarly perspective that professors can provide would thereby be endangered, as professors would be forced to consider how their every remark could be used and interpreted by political actors.[4] Students also lose out if their professors are guarded about the way they teach and research. A strong democracy depends on freedom for universities,

[4] The proposition that political interference in academic affairs will chill new research in socially important topics is not speculative; such a chilling effect is confirmed by at least one scientific study. *See* Joanna Kempner, *The Chilling Effect: How Do Researchers React to Controversy?*, 5 PLoS Medicine 1571 (2008), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2586361/pdf/pmed.0050222.pdf. The study looked recipients of National Institutes of Health grants whose research was questioned in Congressional hearings. Over half of the researchers studied engaged in self-censorship following the experience. Researchers "reframed studies, removed research topics from their agendas, and, in a few cases, changed jobs." *Id.* at 1576.

professors, and students to explore and debate contentious issues without concerns about retribution for the content of their discussions.

Forced disclosure of the other materials the CID seeks could similarly endanger academic freedom of researchers and could result in a chilling affect for those engaged in peer review. In addition to requesting ten years worth of Mann's correspondence with other scientists, the CID asks for anything Mann created or generated pursuant to his grant-funded work, as well as any "computer algorithms, programs, source code, or the like created or edited by Mann" since 1999. In other words, the Attorney General seeks the substance of Mann's research and scholarship, which he would like to examine for evidence of alleged fraud based purely on the political controversy and scientific debate surrounding Mann's work. As the Attorney General has admitted, none of the many academic bodies that have evaluated Mann's research have found evidence of improper conduct. Such bodies are better able to understand the scientific and methodological context of Mann's research.[5] This type of peer review, not intervention by governmental actors, is what ensures the honesty and quality of academic scholarship. *Cf. Ewing*, 474 U.S. at 225 ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."). An unfortunate, but logical, consequence to granting this type of CID is to raise concerns among academic peer reviewers and critics that their questions or critiques could become the basis for far-reaching civil or criminal investigations into the subjects of their

[5] The Attorney General claims that he alone is qualified to examine the research for evidence of legal fraud under the Fraud Against Taxpayers Act (FATA). Admittedly legal standards are different than those of the scientific community, yet it seems highly unlikely that a FATA violation – requiring knowledge or intent, *see* Virginia Code § 8.01-216.3 – could be found after multiple independent expert panels have cleared Mann of even impropriety.

criticism. Furthermore, because the CID could deter professors and universities from conducting research into controversial issues, as discussed above, and because the attorney general has almost no basis for suspecting that any alleged fraud has occurred, the court should refuse to enforce the CID.

II. THE CIDs DO NOT WITHSTAND THE CAREFUL SCRUTINY TO WHICH SUBPOENAS FOR FIRST AMENDMENT-PROTECTED MATERIALS MUST BE SUBJECTED

Courts have repeatedly recognized that discovery requests that intrude on sensitive First Amendment areas must be carefully examined to ensure that protected activities are not unnecessarily chilled. "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community." *Sweezy*, 354 U.S. at 245. "Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling." *Id.* at 262.

Thus, when the government makes investigative demands that interfere with activities protected by the First Amendment, the government must show a sufficient nexus between the materials sought and the governmental purpose. "[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963). *See also In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291 (1987) (holding that a court must be

especially sensitive to First Amendment concerns when considering a subpoena for constitutionally protected material.)

In accord with these principles, the CIDs should be set aside because the Attorney General has failed to provide any basis for his belief that the requested materials may be relevant to a fraud investigation.

As the University's reply brief explains, the Attorney General's sole basis for investigating Professor Mann appears to be the political controversy surrounding Mann's work. The Attorney General's brief in opposition describes at great length the various critical responses to Mann's research. But As UVA has shown in its Reply Brief, such controversy does not give rise to fraud under federal or Virginia statutes. Nor should controversy alone ever be sufficient basis to justify such an intrusive investigation. Although the Attorney General may disagree with Mann's conclusions, the scientific and academic bodies that have investigated Mann's work have found no improprieties of the type the Attorney General suggests he is seeking. These groups, unlike the Attorney General, have the scholarly expertise to evaluate Mann's work in a meaningful way. Controversy in the form of peer review should not be used to justify government intervention into the scientific research process. Peer review provides "a framework of accepted professional norms that distinguish research that contributes to knowledge from research that does not. It is this framework that connects academic freedom with the function of expanding knowledge." Matthew W. Finkin and Robert C. Post, *For the Common Good*, p. 54. Therefore criticism of a professor's work within the framework of peer review does not give rise to an inference of fraud; rather, it is simply part of the process by which universities and faculty bodies ensure that their scholarship and research contributes to the marketplace of ideas.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to grant the petitioner's request to set aside the Civil Investigative Demands.

Respectfully submitted,

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I hereby certify that on this ___ day of August, 2010, I served a true and correct copy of the foregoing document by U.S. mail, postage prepaid, to the following:

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