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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

GOVERNMENT ACCOUNTABILITY & OVERSIGHT, P.C., Petitioner, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. 20STCP01226 **PETITIONER'S OPENING TRIAL BRIEF** Date: December 14, 2021 (*Reserved*) Time: 9:30 a.m. Place: Dept. 82 Petition filed: April 1, 2020

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I. INTRODUCTION AND STATEMENT OF FACTS[1]

On November 14, 2019, Petitioner Government Accountability & Oversight, P.C. ("GAO") served a PRA request ("PRR 19-7464") on Respondent The Regents of the University of California ("Regents"). (PET 3:3-15; AR 1-4.) PRR 19-7464 requested the production of any emails sent to or from two UCLA law professors, Ann Carlson ("Carlson") and Cara Horowitz ("Horowitz"), during the period April 25, 2016 through November 14, 2019 that were to, from or included four specified email domains (the "Requested Public Records"). (Id.) In PRR 19-7464, GAO expressly stated its reason for making the request (the "Climate Litigation/Regents Interface") as follows:

> "This request is being made in the public interest, and furnishing this information will benefit the public's understanding of recent events regarding climate litigation and municipalities which have been filing lawsuits against energy companies and working closely with attorneys general also to pursue opponents of the 'climate' policy/political agenda. This information is being requested for the purpose of understanding how state institutions are involved, if at all, in the larger effort feeding this litigation industry." (AR 3(bottom)-4(top).)

On April 1, 2020, GAO initiated the instant proceeding because Regents had failed as of that date to complete its production of the Requested Public Records, instead producing only three partial productions of 2,794 pages of a single category of documents (electronic case filing ["ECF"] notices) from only one of the identified faculty (Horowitz). (AR 354:2-6.) No emails regarding the Climate Litigation/Regents Interface, or any substantive topic, were included. (AR 354:5-6.)

On August 31, 2020, the day before the Trial Setting Conference ("TSC"), Regents finally stated that it was (1) concurrently producing all remaining public records that were not subject to one of a number of claimed exemptions (the "8/31/20 Production") and (2) withholding additional documents that they were not public records. (AR 5-6, 354:7-10.) The 8/31/20 Production again included zero emails regarding the Climate Litigation/Regents Interface. (AR 354:10-11.)

[1] All of the cited facts are supported by (1) the verified First Amended Petition (the "Petition" or "PET") filed herein on May 4, 2020 or (2) one or more of the Declarations of Chris Horner, Richard Lindzen, Scott Walter, James K. T. Hunter and William Happer (collectively, "Supporting Declarations"). The Supporting Declarations are being served on Respondent concurrently with the filing of this Brief and will be filed with the Court on or before October 5, 2021 as part of the Joint Evidentiary Record ("AR"), which will include the relevant portions of those documents cited in the Trial Brief. Citations will be to the pertinent page(s) and line number(s) separated by a colon.

The 8/31/20 Production did, however, include some substantive emails evidencing the financial relationship between Professors Carlson and Horowitz and Dan Emmett ("Emmett"), the namesake and principal founder of the Emmett Institute at UCLA Law School (the "Emmett Center" or "Emmett Institute") at which both Carlson and Horowitz teach. (AR 354:12-15.) In particular, an email from Carlson to Emmett disclosed the financial ties that bind Carlson and the Emmett Center to Emmett's leadership in a shared, agenda-driven campaign "to protect our planet":

> "Jennifer let me know of the incredible news that you are matching a [$500,000] gift from the Shapiros to the Carlson discretionary fund. Thank you so, so much. I continue to be humbled by the faith you have shown in the Emmett [Center] team and in me and am so, so grateful for all you do. We will continue to fight the good fight to protect our planet, inspired by you and your leadership." (AR 7:2-5, 354:15-22.)

Since Regents failed to provide a log with the 8/31/20 Production listing the specific records it asserted are either subject to one or more particular exemptions or not public records, the facts supporting its claims for withholding those documents, or the total numbers of documents claimed to be exempt or not public records, GAO promptly requested a log from Regents (1) separately identifying each of the documents withheld from production on the ground it was subject to an exemption or not a public record and (2) the facts on which Regents intended to rely in support of its claims. (AR 354:23-355:1.) On December 16, 2020, three and a half months after the TSC, Regents provided two separate logs: (1) an Exemption Log listing 120 separate documents (AR 8-53) and (2) a Not Public Record Log ("NPR Log") listing 544 separate documents (AR 54-143, 355:1-3.)[2]

On January 15, 2021, in response to a follow up PRA request by GAO ("PRR 20-8371") triggered by a reference to the "Center for Climate Integrity" ("CCI") in one of the emails included in the 8/31/20 Production, Regents produced 169 pages of records (the "1/15/21 Production"), together with a letter (AR 218) stating that certain of the records being produced were also responsive to PRR 19-7464 and constituted a "supplemental production of records" discovered in the course of responding to PRR 20-8371. (AR 355:7-12.) The eighteen, "newly-discovered" pages of the 1/15/21 Production (AR 200-217) which were also responsive PRR 19-7464 consist of eight emails between Carlson and Emmett, all of which deal with the Climate Litigation/Regents Interface

[2] The initial form of the Exemption Log was provided in a barely readable 3-point font. (AR 144, 355:4-5.) It was not until March 3, 2021 that Regents, following a meet and confer, finally provided the Exemption Log in the usable form attached as part of the AR. (AR 8-53, 355:5-6.)

(the "1/15/21 Climate Litigation/Regents Interface Production"). (AR 355:12-15.) They include the following exchanges (collectively, the "CCI Introduction/Solicitation") on June 23, 2019 and June 24, 2019 (presented in chronological order) between Carlson and Emmett:

> Carlson: "I am writing to you because folks from [CCI] … are coming to LA and would love to meet with you. I just thought I'd let you know that I've been following their work, largely through an event I participated in Honolulu about nuisance litigation against the oil industry, and think really highly of what they're doing. … What was most impressive to me … is that they're focused on sophisticated communication efforts to make the public and public officials aware of the oil industry's campaign to deceive the public about climate change. The communication strategies are designed to support the litigation efforts and I was struck by their sophistication and persuasiveness." (AR 202, 2d paragraph from top.)
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> Emmett: "I am aware of the group ….. I have not been an active supporter. If you think their work is great and that we can or should be working with them let me know. I am glad to meet with them and you when they are out here if you think appropriate." (AR 215, top of page.)
>
> Carlson: "They [CCI] have put together a very interesting cachet [sic] of documents from the oil companies about what they knew about climate change, when they knew it and how they've engaged in their denialist campaign." (AR 213, top of page.)
>
> Carlson: "… I've been working with them [CCI] a bit – we participated in a conference in Hawaii to try and encourage Hawaii to consider a nuisance lawsuit [against the oil companies].I've also discussed them with Vic Sher [for whom Carlson acted as a consultant in lawsuits filed by cities against oil companies] and he thinks they are an important part of the broader effort on the lawsuits to engage the public. I think our involvement will continue. And as you may remember the clinic has been working on the nuisance cases." (AR 207, top of page, 355:15-356:3.)

In addition, the 1/15/21 Production included a partially-redacted nineteenth page (AR 199, the "Smog and Flying Email") which Regents claimed in the Exemption Log was exempt in its entirety as related to "pre-publication research" (AR 53), even redacting its Message Subject. (AR 356:4-6.) In fact, when Regents produced a partially-redacted copy of the Smog and Flying Email dated July 18, 2019 in response to PRR 20-8371, its Message Subject was revealed to be "Smog and Flying" and its initial full paragraph (in a single page, two paragraph email) disclosed information regarding the Climate Litigation/Regents Interface (i.e., that the CCI Introduction/Solicitation had resulted in Emmett meeting with CCI on July 15, 2019):

> "Thanks again for meeting with the CCI/Rockefeller folks on Monday. I'm glad to see their presentation and am thinking about ways the Emmett Institute might collaborate with them." (AR 199, 356:6-13.)

On January 21, 2021, GAO filed a Request for Three Month Continuances of Current Briefing and Trial Dates in order to allow the new issues presented by the 1/15/21 Production to be explored in discovery and addressed at trial. On February 4, 2021, this Court granted the Request, setting a new trial date of September 14, 2021 and corresponding new briefing dates.

On July 1, 2021, as GAO's counsel was in the midst of drafting GAO's Opening Trial Brief addressing, *inter alia*, all of Regents' justifications for its failure to produce the 664 documents identified in the Exemption and NPR Logs, Regents served an 86-page Supplemental Responses to Certain Special Interrogatories (the "7/1/21 Supplemental Responses") which included a revised Exemption Log (the "Amended Exemption Log", AR 145-198). (AR 356:14-18.) The 7/1/21 Supplemental Responses state new claims of exemption with respect to 104 of the 120 documents specified in the original Exemption Log. (AR 356:18-20.)

On July 2, 2021, GAO's counsel requested that Regents' counsel stipulate to a second continuance of the existing briefing and trial dates to allow GAO to conduct discovery regarding the new matters raised in the 7/1/21 Supplemental Responses. (AR 356:21-23.) Regents' counsel agreed and the current briefing schedule and trial date of December 14, 2021 were set. (AR 356:23-24.)

On July 23, 2021, in response to a further follow up PRA request by GAO ("PRR 21-8912") triggered by multiple references to CCI in several of the emails included in the 1/15/21 Production, Regents produced 98 pages of documents (the "7/23/21 Production"), together with a letter stating that one of the documents being produced was within the search parameters of PRR 19-7464 but did not constitute a second "supplemental production of records" discovered in the course of responding to PRR 21-8912 because it purportedly is not a public record.[3] (AR 219 (third and fourth paragraphs), 356:25-357:3.) In fact, the document in question (AR 222-223) (1) is a public record that should have been located and produced[4] and (2) reflects the successful consummation of the

[3] Notably, all three of PRR 19-7464, PRR 20-8371 and PRR 21-8912 required only "keyword" searches for responsive terms, not subjective analyses. (AR 1-4, 391-403.) It is incomprehensible (and not credible) that Regents somehow failed to turn up the "newly discovered" emails provided in response to PRR 20-8371 and PRR 21-8912 when PRR 19-7464 was processed. GAO suspects the explanation lies in the difference in who conducted the searches – namely, Carlson and her assistant with respect to PRR 19-7464 and UCLA's IT staff with respect to PRR 20-8371 and PRR 21-8912. (AR 418:13-419:19, 420:25-421:26, 422:20-423:15, 425:20-426:15 and 427:12-429:4.)

[4] See Part III, B, infra.

above quoted CCI Introduction/Solicitation that was only belatedly disclosed by Regents in its first "supplemental production" on January 15, 2021. (AR 357:3-6.)

II. SUMMARY OF ARGUMENT

In the 7/1/21 Supplemental Responses, Regents asserts GAO's "climate-related agenda supportive of fossil fuel industry" as a basis for refusing the production of certain of the documents requested in PRR 19-7464. (AR 235:8-15, 299:18-20.) Of course, it is not, as the CPRA does not allow an agency to "cancel" a requester or request because of who the requester is, or the agency's views about requester's "purpose".[5]

But Regents' very assertion of GAO's "climate-related agenda supportive of fossil fuel industry" as a basis for refusing production is a "tell". Regents, the Emmett Center and Professors Carlson and Horowitz perceive themselves, under the leadership of major donor Emmett, on a mission, with those like CCI they are "working with", "to fight the good fight to protect our planet" from "the greatest environmental existential threat to humankind".[6] That includes delaying and obstructing the public records act requests of GAO by any and all means possible, including procrustean efforts (1) to stretch the exemptions allowed under the CPRA far beyond the breaking point and (2) to mischaracterize patently public records as "purely personal".

For the reasons set forth in greater detail below, substantially all of Regents' purported claims that withheld documents are either exempt from production or not public records should be rejected on their face on the ground that Regents cannot present a prima facie case in support of any asserted grounds for withholding their production from GAO. With respect to any documents which warrant individual review in order to establish whether the justification(s) asserted by Regents actually apply to such documents, GAO consents, should the Court deem it appropriate, to the appointment of a special master to conduct that review and report his or her findings to the Court.

[5] Government Code § 6257.5. *Los Angeles Unified School Dist. v. Superior Court* (Cal. App. 2d Dist. 2014) 228 CA 4th 222, 248, fn. 18, 175 CR3d 90, 109 ("*LAUSD v. Superior Court*").
[6] Declaration of Christopher Horner, AR 327:16-328:1.

III. ARGUMENT

A. Exemption Claims

1. Fundraising

Eighty-six (86) of the Exemption Claim Documents (Document Nos. 1, 3, 15-31, 33, 35-37, 39, 40, 42-62, 64-84, 87, 88, 90, 91, and 93-107, the "Fundraising Documents") are supported in the Amended Exemption Log by the following Explanation, with case law and legal argument omitted:

> "The record concerns pre-decisional … internal fundraising discussions relating to how to raise private funds relating to, among other things, strategies and particular donor interactions which, if subject to public disclosure, would chill the candor of such discussions or preclude them entirely. As a result, disclosure would hamper the University's ability to raise funds that are essential to its public education, scientific, medical and other academic pursuits that the University would be unable to fully fund with public funding alone. … [H]ere, these emails are internal discussions among UCLA employees about potential fundraising strategies. If such information were disclosed, public university employees will not feel free to candidly discuss potential fundraising strategies and targets, which will severely limit the university's ability to secure the private funding it needs to supplement other sources of funding for its operations.…" (AR 145-198, 357:10-19.)

The seminal CPRA case regarding donor information and fundraising, which Regents itself cites in the Amended Exemption Log's Fundraising Explanation, is *California State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal. App. 4th 810. That case holds that statements by University personnel as to the "likely" effect of disclosures will be inadequate to demonstrate any significant public interest in nondisclosure as follows:

> "The University further asserts that large donations will be canceled if promises of confidentiality are breached. First, the University has set forth no competent evidence that licensees demanded, or University or Association personnel promised, confidentiality. The license agreements, themselves, contain no such provision, and also sport an integration clause. …. Second, any claims by the University that donations will be canceled are speculative, supported only by inadmissible hearsay. Statements by University personnel that disclosure of the licensees will "likely" have a chilling effect on future donations, resulting in a "potential" loss of donations, are inadequate to demonstrate any significant public interest in nondisclosure. [Citations omitted.]
>
> "The unsupported statements constitute nothing more than speculative, self-serving opinions designed to preclude the dissemination of information to which the public is entitled. There is no admissible evidence in the record that any license agreements will be canceled if licensee names are disclosed to the public. Any genuine concerns of donor withdrawals should have been presented with competent evidence through an in camera hearing, which then could have been evaluated on appeal." (Id., 90 Cal.App.4th at 834-5; underlining added.)

Not only will Regents be unable to make a prima facie case that ordering production of the

Fundraising Documents will (1) chill or preclude internal discussions of fundraising strategies or (2) interfere with Regents' ability to obtain private funding, but two internationally-renowned academic scientists, Will Happer and Richard Lindzen, explain in their declarations (AR 236-246 and 247-250, respectively) why the public's interest in transparency is so great. As stated by Professor Happer:

> "19. With respect to the importance of transparency as to communications between two faculty members at the Emmett Center who are Climate Emergency Alarmists (1) to or from Dan Emmett and/or (2) which relate to Dan Emmett, climate change, global warming or fundraising strategies, priorities or uses of or for the Emmett Center (the "Emmett/Regents Communications"), given the inescapable economic and social implications of the demanded policies and particularly given the involvement of public institutions in this enterprise, it is hard to imagine a subject in which the public has a more significant interest. Regardless of which side of the climate change debate is correct, or closer to being correct, the public should know all it can about any influence, direct and obvious or indirect and covert, that is being utilized by donors such as Dan Emmett who have a clear political agenda as Climate Emergency Alarmists, including any fundraising strategies, priorities or uses of the Emmett Center. The political agenda being promoted by Dan Emmett and the Emmett Center (the "Climate Emergency Alarmists' Agenda") is inherently one of imposed scarcities. To the extent this agenda is realized, it will affect virtually every aspect of the lives of Californians. All Californians, whether they agree or disagree with the Climate Emergency Alarmists, have an interest in determining whether, and to what extent, the Regents, which is primarily supported by the taxes of its citizens, the UCLA Law School and/or any of its faculty, have been influenced, or subject to bias or an appearance of bias, in the research conducted, the papers published, the opinions expressed, the subjects taught, the scholarships awarded and other influences including a need or a desire to adhere to, or avoid impeding, the Climate Emergency Alarmists' Agenda." (AR 242:18-243:10.)[7]

As for the asserted countervailing public interest in avoiding potential harm to Regents' ability to raise funds, Professor Happer, an expert on fundraising by nonprofit organizations (AR 238:7-25), confirms that such harm is speculative, if not fanciful, as follows:

> "22. If all internal email communications related to fundraising matters (1) were potentially subject to disclosure to the public and (2) one or more internal communications concerned matters which I would not want disclosed to the public, the prospect of the potential disclosure of such communications if set forth in an email would neither chill the candor of such discussions or preclude them entirely. It would simply mean that instead of using email for any internal communications relating to matters that I did not feel should be at risk of public disclosure, I would do what I previously did, which is arrange an in-person meeting, or a telephonic or Zoom/Teams conference call, for the discussion of such matters. Presumably Regents' expenditure of taxpayer dollars on such technologies is in contemplation of just that. (AR 243:24-244:5.)
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> "23. Even assuming that for some reason there were no possible alternative means for conducting person-to-person discussions relating to fundraising matters, the implicit assumption that there are numerous internal communications relating to fundraising matters (including 86 involving Professors Carlson and/or Horowitz) which, if made public, would "severely limit the university's ability to secure the public funding it needs

[7] See also AR 250:5-20.

> to operate" is at best speculative, and, more realistically, fanciful. Unless the internal communications in question were insulting or derogatory about existing or prospective donors or evidenced that Regents or Professors Carlson or Horowitz were not true believers in the Climate Emergency Alarmists' Agenda, there are no deep, dark secrets about how and from whom to raise funds in support of the Climate Emergency Alarmists' Agenda. The major donors are all well known, as are the activities such as Climate Rides, symposia and other events that cater to such donors. The success of Regents, the Emmett Center and Professors Carlson and Horowitz in raising funds has not stemmed from some unique fundraising tactic or trade secret, but from the high profile of the Emmett Center's and its faculty members' advocacy in support of imposing financial and policy obligations on private parties for supporting the narrative that CO_2 is a "pollutant" rather than a beneficial, natural part of life." (AR 244:6-245:2.)

In addition, the Amended Exemption Log establishes that thirty-eight (38) of the Fundraising Documents[8] were not "internal email communications" because the Log itself asserts they were sent to, from or copied to Emmett. Pursuant to Government Code § 6254.5, this manifestly intentional and selective disclosure to one member of the public (not coincidentally, a major donor to Carlson and the Emmett Center) effects a waiver of all of the exemptions claimed by Regents to apply to those documents. See, e.g., *Ardon v. City of Los Angeles* (2016) 62 Cal. 4th 1176, 1190 199 Cal. Rptr. 3d 743, 753 ["Our holding that the inadvertent release of exempt documents does not waive the exemption under the Public Records Act must not be construed as an invitation for agencies to recast, at their option, any past disclosures as inadvertent so that a privilege can be reasserted subsequently. This holding applies to truly inadvertent disclosures and must not be abused to permit the type of selective disclosure section 6254.5 prohibits."].[9]

As for the remaining forty-eight (48) Fundraising Documents that the Amended Exemption Log does not state to have been to, from or copied to Emmett[10], the search parameters of PRR 19-7464 inherently ensure that when and if those emails are individually examined by this Court or a

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[8] Nos. 15, 17, 22, 26-28, 30, 31, 37, 43, 45-50, 52-59, 61, 62, 64, 67, 68, 70, 71, 74, 77, 78, 83, 91, 95 and 97. (AR 148-191.)

[9] Nor can Regents escape waiver by arguing that Section 6254.5 applies only to "exemptions specified in Section 6254 or 6254.7, or other similar provisions of law". Subsection (a) of Section 6254 specifies the exemption of "[p]reliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure." (Underlining added.) Thus, with respect to the Fundraising Documents, Section 6255 constitutes a "similar" provision of law to Section 6254(a), both of which Sections incorporate the exact same "clearly outweighs the public interest in disclosure" standard.

[10] Nos. 1, 3, 16, 18-21, 23-25, 29, 33, 35, 36, 39, 40, 42, 44, 51, 60, 65, 66, 69, 72, 73, 75, 76, 79-82, 84, 87, 88, 90, 93, 94, 96 and 98-107. (AR 145-196.)

Special Master[11], all of those emails will be found to consist of email threads which include one or more complete (and ipso facto "reasonably segregable") emails to, from or copied to Emmett.[12] In particular, Regents' Response to Special Interrogatory No. 75 of GAO's Fifth Set of Interrogatories admits that "@douglasemmett.com" constituted the only domain name specified in PRR 19-7464 which was included in all the Fundraising Documents. (AR 265:1-18. 358: 7-11.) Yet when asked in an interrogatory to specify the CONTEXTS[13] in which "@douglasemmett.com" appeared in each email, Regents ducked the question (after first making several meritless objections) as follows: "A search reasonably designed to produce documents responsive to the PRA request was conducted, and that search returned these documents." (AR 265:19-266:10, 358:11-15.)

An examination by Regents of these documents in its possession indisputably would have allowed Regents to provide the requested CONTEXTS. Pursuant to Evidence Code § 412, "[i]f weaker or less satisfactory evidence is offered when it was within the power of the party to produce stronger or more satisfactory evidence, the evidence offered should be viewed with distrust." Accordingly, any explanation Regents now offers to explain how the remaining forty-eight (48) Fundraising Documents contained the domain name "@douglasemmett.com" other than as the email address of the sender or recipient of an email should be viewed with distrust.

2. Pre-Publication.

Nine (9) of the Exemption Claim Documents (the "Pre-Publication Documents") are supported in the Amended Exemption Log by the following Explanation,[14] with case law and legal argument omitted:

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[11] No individual examination of the emails will be required if Regents fails to present a prima facie case in support of its exemption claims.

[12] The Log only states the Message To, Message From and CC of the lead (i.e., latest) email of the listed document. Thus, where a document consists of an email thread, the Log does not set forth Message To, Message From and CC for all of the earlier emails included in that email thread.

[13] GAO's Fifth Set of Special Interrogatories includes the following definition: "The term 'CONTEXTS' when used in connection with a special interrogatory requesting information regarding PRA 1 REQUESTED EMAIL ADDRESS ENDINGS means the manner in which each and all of the PRA 1 REQUESTED EMAIL ADDRESS ENDINGS appear in the DOCUMENT in question (e.g., (i) as part of the email address of the sender of email, (ii) as part of the email address of a recipient of email, (iii) if the email consists of an email thread, as part of the email address of the sender of one or more of the emails that comprise the email thread, (iv) if the email consists of an email thread, as part of the email address of a recipient of one or more of the emails that comprise the email thread)." (AR 268:16-23, 358:16-24.)

[14] Document Nos. 108, 110, 112, 114, and 116-120, AR 197-198.

> "The record concerns pre-publication academic research …. The public interest in non-disclosure particularly applies because this record concerns drafts of academic texts whose disclosure would chill academic freedom, particularly research into sensitive or controversial topics. …..."

Firstly, as noted above with respect to the Fundraising Exemption claim, not only will Regents be unable to make a prima facie case that ordering production of the Pre-Publication Documents will chill academic freedom, but the previously-noted declarations of Professors Happer and Lindzen explain why the public interest in transparency is so great. As for the asserted countervailing public interest in avoiding the chilling of academic freedom, Professor Happer, an expert on scientific research, its publication and academia generally (AR 236:25-238:6), confirms that such harm is speculative, with the real danger to academic freedom that posed by the Climate Emergency Alarmists:

> "24. With regard to the risk that the disclosure of any or all of the nine emails exchanged between Professor Carlson and Dan Emmett would constitute a threat to academic freedom, particularly research into sensitive or controversial topics, real scientific research is not threatened by the disclosure of drafts. Even assuming (implausibly) that Professor Carlson was actually engaged in seeking to obtain information or comments from Dan Emmett as part of her preparation of a research paper intended for future publication (as opposed to make a major donor feel catered to and privy to advance information), scientists routinely circulate preliminary results, and report on preliminary results at conferences. In fact, the more attention given to honest scientific work, the better it is for the authors. I also note this on UCLA's website, that, "'It's just gibberish to say these laws stifle research,' said David Cuillier, director of the University of Arizona School of Journalism and a member of the Society of Professional Journalists's [sic] freedom of information committee. 'These are government scientists funded by taxpayers, and the public is entitled to see what they're working on.'" "Article Reminds: Public University emails (and other documents) are not private," March 20, 2016, https://uclafacultyassociation.blogspot.com/2016/03/article-reminds-public-university.html (viewed June 21, 2021).
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> "25. Sadly, the real threat to academic freedom today, as the Climategate e-mails show, is that posed by the Climate Emergency Alarmists, of which the Emmett Center is a key player. It is the Climate Emergency Alarmists who constitute a threat to academic freedom by routinely ensuring rejection of any scientific papers that fail to support the narrative of impending climate doom. Editors of journals that publish off-message papers are fired.….
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> "26. Just last month, French geophysicist Dr. Pascale Richet was viciously attacked by Climate Emergency Alarmists for a paper he published in History of Geo- and Space Sciences. After threats to the editorial staff of the journal, and to its publisher, the paper, which had undergone through peer review, was flagged for cancellation.…. Not since Lysenko's hijacking of biology in the Soviet Union has honest science been so thoroughly subject to political diktats as contemporary climate science. UCLA's Emmet Center is part of this serious problem." (AR 245:2-246:12.)[15]

[15] See also 250:16-17.

In addition, the Amended Exemption Log establishes that all nine (9) of the Pre-Publication Documents were sent to or from Emmett. (AR 197-189 (first column).) As previously noted with respect to the Fundraising Documents, this manifestly intentional and selective disclosure to a major donor to Carlson and the Emmett Center effects a waiver of all of the exemptions which Regents claims apply to those documents.

3. FERPA.

Eight (8) of the Exemption Claim Documents (the "FERPA Documents")[16] are supported in the Amended Exemption Log by the following Explanation:

> "This record contains personally identifiable information protected from disclosure by the Family Education Rights and Privacy Act (FERPA). Further, the public interest in protecting student information and protecting academic freedom by allowing candid discussions between students and professors outweighs the public interest in disclosure of such documents. …. This record implicates a student's right to privacy and is thus exempt from disclosure." [Note: The original Exemption Log stated only the underlined first sentence as justification for the withholding of all of the FERPA Documents.]

The law is settled, in a case litigated by Regents, that "like FERPA, the IPA applies only to institutional records that are preserved in the ordinary course of business by a single, central custodian. In a university context, registration forms and transcripts would be typical of such records." *Moghadam v. Regents of the University of California* (Cal. Ct. App. 2d Dist. 2008) 169 Cal. App. 4th 466, 480, 86 Cal. Rptr. 3d 739 (underlining added). See also: *BRV, Inc. v. Superior Court* (Cal. Ct. App. 3d Dist. 2006) 143 Cal. App. 4th 742, 753-4. Yet in its response to Special Interrogatory No. 167 of GAO's Sixth Set of Special Interrogatories, Regents conceded: "No, the Regents do not contend that any of the EXEMPTION LOG – FERPA DOCUMENTS were preserved in the ordinary course of business by a single, central custodian like a University registrar." (AR 270:6-271:2, 358:25-359:2.)

Regents' belated attempt on July 1, 2021 to supplement its sole initial claim of exemption with respect to the FERPA Documents by serving an Amended Exemption Log over six months after it served its original Exemption Log on December 16, 2020, and barely two weeks before GAO's initial trial brief was then due to be filed, should be summarily rejected by this Court as

[16] Document Nos. 7-14, AR 146-147.

procedurally impermissible. While GAO has located no California case which addresses under what circumstances, if any, a public agency can raise new exemption claims not initially raised by it, FOIA case law establishes that Regents' deliberate delay in waiting to bolster its patently deficient FERPA exemption claim must be rejected. In the seminal case of *Maydak v. DOJ* (D.C. Cir. 2000) 218 F.3d 760, 765, 767-8, the District of Columbia Circuit Court of Appeals held as follows:

> "As we have observed in the past, the delay caused by permitting the government to raise its FOIA exemption claims one at a time interferes both with the statutory goals of 'efficient, prompt, and full disclosure of information,' …. and with 'interests of judicial finality and economy.'
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> *****
>
> "We have recognized two exceptions for unusual situations, largely beyond the government's control: specifically, extraordinary circumstances where, from pure human error, the government failed to invoke the correct exemption and will have to release information compromising national security or sensitive, personal, private information unless the court allows it to make an untimely exemption claim; and where a substantial change in the factual context of the case or an interim development in the applicable law forces the government to invoke an exemption after the original district court proceedings have concluded.….."

Even if Regents were entitled to expand its original FERPA exemption claims to encompass generic appeals to academic freedom and student privacy (and it should not be), neither exemption applies, much less clearly outweighs the public interest in transparency regarding the contents of these records. More particularly, according to the Amended Exemption Log, each of these emails was sent by a UCLA student to Horowitz with the Message Subject "thanking you [sic] summer fellowship [or funding] supporters". (AR 146-147, second column.)

Given the Message Subjects, GAO reasonably infers, as should this Court, that all of the FERPA emails relate to, and likely include as segregable portions, emails sent by UCLA students to Emmett, possibly among others, thanking him/them for providing financial support that funded such students' summer fellowships or other summer program. To assert that the disclosure of such emails would interfere with "academic freedom" stretches the scope of that "freedom" far beyond that specified by Regents in APM – 010 of its Academic Personnel Manual as follows:

> "The University of California is committed to upholding and preserving principles of academic freedom. These principles reflect the University's fundamental mission, which is to discover knowledge and to disseminate it to its students and to society at large. <u>The principles of academic freedom protect freedom of inquiry and research, freedom of teaching, and freedom of expression and publication</u>. These freedoms enable

> the University to advance knowledge and to transmit it effectively to its students and to the public……" (AR 272(first paragraph), underlining added.)

As for student privacy, at most that interest would justify the redaction of the students' names and contact information if, and only if, the possibility that the disclosure of that information would result in the harassment, embarrassment or intimidation of such students clearly outweighed the light that could be shed on an agency's performance of its statutory duties or otherwise let citizens know what their public institutions are up to. See, e.g., *LAUSD v. Superior Court* (2014) 228 CA 4th 222, 241, 175 CR 3d 90, 103 ("*LAUSD*"). Neither common sense nor human experience suggest that revealing the names and contact information of the summer scholarship students has any likelihood in resulting in their harassment, embarrassment or intimidation. Yet in the absence of any likelihood of "serious harms" to students from disclosure, no countervailing interest "clearly outweighs" the public interest in disclosure. See, e.g., *LAUSD*, 228 CA 4th at 252-3, 175 CR 3d at 112-3.

4. Anti-Semitic Harassment.

One (1) of the Exemption Claim Documents (the "Anti-Semitic Harassment Document") is supported in the Amended Exemption Log by the following Explanation,[17] with case law and legal argument omitted:

> "The record concerns pre-decisional internal discussions … Further, the emails in this chain are not responsive to the subject of the instant Public Records Request … because Daniel Emmett was involved in a personal capacity as a university supporter. … Further, the right to privacy of the students at issue, as well as the need for staff and faculty of public institutions to be able to discuss and respond to harassment allegations clearly outweighs any disclosure of these internal discussions…." (AR 146, underlining added.)[18]

First of all, that portion of the email chain which was addressed or forwarded to Emmett must be produced pursuant to Government Code § 6254.5. As for the assertion that the email chain is "not responsive to the subject of the instant Public Records Request" (underlining added), as long

[17] Document No. 5, AR 146.

[18] Regents' original response to GAO's Special Interrogatory No. 22 (Set Three) provides further details regarding the Anti-Semitic Harassment Document as follows: "….A September 4, 2016 email from a UCLA donor was forwarded to Dan Emmett, Cara Horowitz and Ann Carlson. The email pertained to a former UCLA Law School Student who was the target of anti-Semitic bullying outside of the Law School, apparently because of his role on the Graduate Student Association. The email chain includes a draft response email addressing the circumstances surrounding the former student and the Law School's proposed response to those circumstances, which was composed by Law School Dean Jennifer Mnookin and also includes a dialogue among Law School leadership on the Law School's decision making process for the response...." (AR 348:19-26, 359:3-10.)

as (1) the record falls within the defined parameters of that request and (2) there is a public interest in the record which is not clearly outweighed by the public interest in refusing its disclosure, it is irrelevant what the requester's individual motive, intent, purpose or "subject" was in making the request. *LAUSD,* 228 CA 4th at 248-252.

Underscoring the irrelevance of GAO's reason(s) for serving PRR 19-7464 is that on July 26, 2021, an additional requester, Milan Chatterjee ("Chatterjee"), the victim of the subject claim of anti-Semitic harassment, served a separate CPRA request on Regents ("PRR 21-9195") which seeks the Anti-Semitic Harassment Document and the attachment thereto. PRR 21-9195 explains Chatterjee's purposes in seeking the records as follows:

> "The stated purposes of this request within the meaning of California Government Code § 6253.1 are to allow a determination of (1) how UCLA Law School dealt with a claim of anti-Semitic harassment, and in particular whether that claim of harassment was accorded the same consideration, and treated with the same seriousness, as claims of harassment against members of other groups that may be deemed more worthy or deserving of protection, and whether any of the comments or recommendations of the persons involved in the email chain reflect a dismissal or diminishment of the seriousness of such a claim of harassment, (2) whether the claim of anti-Semitic harassment was accorded any special treatment or consideration by reason of the fact that the requested email chain includes a September 4, 2016 email from a UCLA donor which was forwarded to UCLA major donor Dan Emmett (as referenced at lines 13-14 of page 5 of 86 (bearing a page number 4 at the bottom) of the Supplemental Responses), thereby suggesting that at least one, and potentially two, major donors to Regents had indicated an interest in such claim, and (3) if and why the September 4, 2016 email from a UCLA donor included in the email chain was not segregable from the remainder of the email chain.
>
> "Chatterjee was the victim of the subject claim of anti-Semitic harassment and seeks to ensure that his claim of anti-Semitic harassment was properly addressed by Regents, and in particular by UCLA Law School and Dean Mnookin." (AR 359:11-25, 350-351.)

Only by considering the public's, not the specific requester's, interest in the records in question can this Court determine whether the public interest in disclosure is clearly outweighed by its interest in non-disclosure. Not only is this the test expressly mandated by Government Code § 6255(a), it avoids the potential necessity for multiple determinations of whether a public record must be produced in response to requests by multiple requesters, each of whom articulates a separate personal interest therein.

In the instant case, even if the Anti-Semitic Harassment Document and attachment appear unlikely to elucidate the Climate Litigation/Regents Interface, it is undisputed that (1) the record

falls within the defined parameters (i.e., includes a specified email domain) of that request and (2) there are the public interests in those records noted by Chatterjee in the above-quoted excerpt from PRR 21-9195. Presumably, Regents will speculate that (1) those personnel involved in discussing and responding to harassment allegations will not feel free to express their thoughts and opinions if those thoughts and opinions might subsequently be publically revealed and (2) the consequence of that restraint will be that Regents will make a less optimal response to the harassment allegations.

Yet the public (which includes subsequent requester Chatterjee) has an interest in discovering whether the involved personnel responded appropriately to the harassment allegations. For example, was the response impacted, whether to make it more or less forceful, by concerns that (1) one or more major donors had expressed a strong interest in a strenuous condemnation of, or avoidance of an overreaction to, the harassment or (2) the response should decry or acknowledge the complaints of the harassers, such as that Israel purportedly is racist? GAO submits that the public interest in transparency is not "clearly outweighed" by a highly speculative interest in non-disclosure.

5. Attachments

Sixteen (16) of the Exemption Claim Documents (the "Attachments")[19] are supported in the Amended Exemption Log solely by the following Explanation: "Attachment to email". Accordingly, in those instances where this Court overrules the exemption claim made to a parent email, any attachment(s) to such email should also be ordered produced.

B. Not Public Record Claims

1. Purely Personal

Government Code § 6252(e) defines "public records" as used in the PRA as including "any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency…." Pursuant to Section 3(b)(2) of Article 1 of the California Constitution, "A statute, court rule, or other authority … shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." As stated in *San Gabriel Tribune v. Superior Court* (1983) 143 Cal. App. 3d 762, 774, 192 Cal. Rptr. 415, 422:

"This definition [of public records, as defined by Government Code section 6252

[19] Document Nos. 2, 4, 6, 32, 34, 38, 41, 63, 85, 86, 89, 92, 109, 111, 113, and 115. (AR 145-197.)

> subdivision (d)] is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed. Only purely personal information unrelated to 'the conduct of the public's business' could be considered exempt from this definition, i.e., the shopping list phoned from home, the letter to a public officer from a friend which is totally void of reference to governmental activities." Assembly Committee on Statewide Information Policy California Public Records Act of 1968. 1 Appendix to Journal of Assembly 7, Reg. Sess. (1970), see also 53 Ops. Cal. Atty. Gen. 136, 140-143 (1970).' (58 Ops. Cal. Atty. Gen. 629, 633-634 (1975).)" (Underlining added.)

Three hundred and eight (308) of the NPR Log Documents (the "Purely Personal Documents")[20] are supported in the NPR Log by the following Explanation, with case law and legal argument omitted:

> "This email contains purely personal conversation, and does not relate to the conduct of the public's business……. Further, this correspondence was not relied upon by the public entity in carrying out its business……"

While Regents admits that all of the Purely Personal Documents include one or both of the email domains @douglasemmett.com and @nextenergytech.com, Regents refused to state the CONTEXTS[21] in which the domain name(s) appear in each email, stating only: "A search reasonably designed to produce documents responsive to the PRA request was conducted, and that search returned these documents." (Regents' Responses to Special Interrogatory Nos. 63 and 64 of GAO's Fifth Set of Interrogatories, AR 380:1-381:13.) Accordingly, for the reasons articulated above regarding the exact same response offered by Regents as to the Fundraising Documents (in Part III, A, 1, *supra*), this Court should assume that all of the emails were to or from Emmett or his son and fellow Emmett Institute Advisory Board member, Daniel Emmett.[22]

Once it is recognized that the great bulk, if not all, of the emails almost certainly constitute communications between Carlson and/or Horowitz to or from Emmett or his son, and at the very least relate to such communications, Regents' mischaracterizations of the emails as "purely personal conversation [which] does not relate to the conduct of the public's business" are obvious. Firstly, Regents supports its Fundraising Exemption claims with the assertion that the "University's ability to raise funds that are essential to its public education, scientific, medical and other academic pursuits that the University would be unable to fully fund with public funding alone". Thus, any

[20] Document Nos. 13-15, 50-52, 59-114, 130-194 and 197-377. (AR 55-124.)
[21] See footnote 13, *supra*.
[22] https://law.ucla.edu/academics/centers/emmett-institute-climate-change-environment.

activity that relates to Regents' ability to raise funds from Emmett, for whom the Emmett Center at UCLA Law School was named, and who has donated over $5,000,000 to Regents, the Emmett Center and UCLA's Carlson discretionary fund since January 1, 2005[23], relates to an essential activity of Regents in which the public has an interest.

As stated by Scott Walter ("Walter") in his declaration (AR 251-263), it is a fundamental principle of fundraising for charitable nonprofit organizations that it is crucial to nurture relationships with their existing donors. (AR 260:7-261:14.) In the article *Showing respect for donors* by Jennifer Chandler[24], quoted with approval by Walter, this principle is aptly summarized as follows:

> "Donors like to feel connected. Many fundraising and marketing gurus, including Kivi Miller Leroux, in her excellent article for Guidestar, 'Nine Clever Ways to Thank Donors,' point out that donors are eager for updates on progress. Donors want to feel a personal connection with those helped by the nonprofits they supported……
>
> "Whatever you do, keep connected with your existing donors. The 2012 AFP Fundraising Effectiveness Survey recently startled many by pointing out that during the period studied (2010 - February 2012), for every $100 of new dollars raised, $100 was lost in downgraded or lapsed gifts. Additionally, the report documented that for every new 100 donors recruited, nonprofits lost 107 donors through attrition. The authors of the report observe that it 'usually costs less to retain and motivate an existing donor than to attract a new one.' Therefore, 'taking positive steps to reduce gift and donor losses is often the best strategy to increase net fundraising gains.' This report underscores that charitable nonprofits must continuously nurture the very important relationships they have with existing donors to maintain those donors as active supporters. Keep your friends close!" (AR 261:4-14, underlining added.)

Regents contends in its Responses to Interrogatories 68 through 71 of GAO's Fifth Set of Special Interrogatories ("Fifth Interrogatories", AR 384:5-390:17) that both Carlson and Horowitz "have known [Emmet] for some time, have become friendly, and have interacted on subjects that do not relate in a substantive way to the conduct of the public's business on multiple occasions". As noted by William Sturtevant in "The Artful Journal: Cultivating and Soliciting the Major Gift" 2nd ed. (Chicago: Institutions Press, 2004), at p. 71 (quoted by Walter in his declaration at AR 260:1-3):

> "….In major gifts fundraising, cultivational calls, where you listen and nurture, far outnumber solicitation calls. The ratio of one to the other depends upon the particular prospect, his or her relationship with the organization, and the level of the solicitation.

[23] Responses to Interrogatories 66 and 67 of Fifth Interrogatories, AR 382:14-384:4.)
[24] Posted by the National Council of Nonprofits at https://www.councilofnonprofits.org/thought-leadership/showing-respect-donors.

But whatever the specifics, it is safe to say that time spent in cultivation outweighs that expended on solicitation."

The emails exchanged between Carlson and Horowitz and major donor Emmett are not remotely comparable to "the letter to a public officer from a friend which is totally void of reference to governmental activities".[25] The public has an interest in how Regents' professors nurture their relationships with major donors as an ineluctable component of Regents' fundraising efforts, including, but in no way limited to, the extent to which such major donors are allowed special insight into the ideological and political biases of such Regents personnel or are pressured, expressly or implicitly, to conform to the ideological and political biases of its major donors -- particularly ones such as Emmett who donate $500,000 to their individual discretionary funds.

Nor should this Court (or Regents itself) become bogged down in trying to establish criteria that establish a "substantive" connection between a specific email, or portion of a specific email, and the "conduct of the public's business" of fundraising. Any communication directly to or from a major donor is inherently part of the grooming process; and a bright line test that any email that is either addressed to or from Emmett or his son to Carlson, Horowitz or any other UCLA personnel constitutes a public record and must be produced to GAO will not only minimize the burdens on both this Court and Regents of attempting to discern whether a specific email can somehow be considered "purely personal" but will respect the Constitutional imperative that any authority, including the concept of "purely personal" records, should be "narrowly construed if it limits the [public's] right of access".

2. Unaffiliated Entities Documents and Attachments

One hundred and seventy (170) of the NPR Log Documents (the "Unaffiliated Entities Documents")[26] are supported in the NPR Log by the following Explanation:

"This email was sent or received by [Carlson or Horowitz] in her capacity as a

[25] See also UCLA's Faculty Resource Guide for California Public Records Requests (AR), which states, in relevant part: "**3. Are records of the faculty considered to be public records?** … **Records of personal communications**: Email communications that are wholly personal in nature do not relate to the conduct of university business and, thus, are not 'public records.' …. For example, non-University-related communications with a faculty member's healthcare provider, or communications with a sibling who is not a colleague, would be deemed wholly personal and not a 'public record,' even if stored on a University network or computer." (AR 405; underlining added.)

[26] Document Nos. 1-12, 115-129 and 391-533. (AR 54-142.)

> [board member or supporter] of a private entity unaffiliated with UCLA. This writing does not relate to the conduct of the public's business, and is therefore not a public record under The Public Records Act."

An additional eleven (11) of the NPR Log Documents (the "Unaffiliated Entities Attachments") are supported in the NPR Log by the following Explanation[27]:

> "This document is an attachment to an email was sent or received by Ann Carlson and Dan Emmett capacity as a board member of a private entity unaffiliated with UCLA. This writing does not relate to the conduct of the public's business, and is therefore not a public record under The Public Records Act."

In its Responses to Special Interrogatory Nos. 40, 45, 50 and 55 of GAO's Fifth Set of Interrogatories, Regents has identified the referenced "unaffiliated entities" as (1) the Environmental Law Institute ("ELI") (as to Document Nos. 1-12 and 115), (2) Campbell Hall Day School ("Campbell Hall") (as to Document Nos. 116-129), and (3) Los Angeles Waterkeepers ("LA Waterkeepers") (as to Document Nos. 391-544). Regents admits that all the Unaffiliated Entities Documents include the email domain "@douglasemmett.com.com", but again refused to state the CONTEXTS in which the domain name(s) appear in each email.[28] Accordingly, for the reasons articulated above regarding the Fundraising Documents (in Part III, A, 1, *supra*), (1) this Court should assume that all of the Unaffiliated Entities Documents were emails to or from Emmett and (2) all of the Unaffiliated Entities Attachments were attached to emails to or from Emmett. For the reasons stated above regarding the Purely Personal Documents, any email that is either addressed to or from Emmett to Carlson, Horowitz or any other UCLA personnel (and any attachment thereto) constitutes a public record which relates to "the conduct of the public's business."

In addition, two of the Unaffiliated Entities, ELI and LA Waterkeepers, are directly involved in environmental protection, the specific area of expertise of both Carlson and Horowitz and the core mission of the Emmett Center. As stated in the first sentence of Regents' APM – 011 on "Academic Freedom, Protection of Professional Standards, and Responsibilities of Non-Faculty Academic Appointees":

> "The fundamental mission of the University is to advance knowledge, to disseminate to its students and to society at large, and to foster in its students a mature

[27] Document Nos. 534-544. (AR 142-143.)
[28] Regents' Responses to Special Interrogatory Nos. 42, 43, 47, 48, 52, 53, 58 and 59 of GAO's Fifth Set of Interrogatories, AR 363-377.

independence of mind." (AR 277 [first sentence of first paragraph, underlining added].)

In Regents' APM – 025 on "GENERAL UNIVERSITY POLICY REGARDING ACADEMIC APPOINTEES Conflict of Commitment and Outside Activities of Faculty Members" (AR 279-295), the importance of public outreach by faculty to Regents' "fundamental mission" is further delineated as follows:

> "….In service of the University's to advance and communicate knowledge through interaction with the public, faculty have an obligation to provide, within limits, University-related public service by using their expertise to contribute to the University and/or the professions, business, the community or the public. Such activities also help faculty identify and address community needs and afford practical experience and knowledge valuable to teaching and research or creative activity…." (AR 279 [third and fourth sentences of second paragraph].)

Accordingly, any emails that relate to the activities of Carlson or Horowitz as board members of ELI or LA Waterkeepers[29] relate to "the conduct of the public's business", and specifically how and the extent to which those professors are fulfilling Regents' self-professed "fundamental mission" even if the email is not to or from Emmett.[30] In contrast, if there are any emails that are not directly to Emmett from Carlson or from Carlson to Emmett that relate their service as board members of Campbell Hall[31] (i.e., if both Carlson and Emmett were addressed or copied on an email sent to all Campbell Hall board members regarding a matter to be addressed by the Campbell Hall board), those emails would not relate to "the conduct of the public's business".

[29] Document Nos. 1-12, 115, and 391-544. (AR 54-143.)

[30] Further, according to publicly available IRS Form 990s (see ELI IRS Form 990 for 2019, available at https://www.guidestar.org/profile/52-0901863), Prof. Carlson served on the board of ELI as well as its governance committee when, during the period covered by PRR 19-7464, ELI established a program, the "Climate Judiciary Project," (see https://www.eli.org/tags/climate-judiciary-project) "educating judges about climate science" (id.) demonstrably from the perspective of climate nuisance litigation plaintiffs (see, e.g., agenda and presenters available at https://www.nationalacademies.org/event/02-24-2021/emerging-areas-of-science-engineering-and-medicine-for-the-courts-identifying-chapters-for-a-fourth-edition-of-the-reference-manual-on-scientific-evidence-virtual-workshop). Carlson wrote to Emmett in records produced in response to PRR 20-8371 and quoted above at page 3:16-17: "And as you may remember the clinic has been working on the nuisance cases" (on the plaintiff side), as background for the "CCI Introduction/ Solicitation"). Correspondence between Carlson and the outside funder of Regents' efforts on this litigation pertaining to ELI is plainly relevant to Carlson's work at the Emmett Center.

[31] Document Nos. 116-129. (AR 69-71.)

C. Regents Has Repeatedly Delayed And Obstructed GAO's Inspection Of The PRR 19-7464 Documents

Government Code § 6253(d) provides that "[n]othing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records." Yet Regents has repeatedly delayed and obstructed GAO's ability to obtain inspection of the public records requested by PRR 19-7464 to an extent that cannot be excused as simply the result of a purportedly overburdened institution hampered by a pandemic.

Many of Regents' delays and obstructions have already been noted above. These include (1) the dribbling out of ECF notices in three tranches prior to the filing of the Petition when all of them clearly could and should have been produced together in the initial production, (2) the failures to segregate reasonably segregable material as required by Government Code § 6253, (3) the failure to provide the original Exemption Log and NPR Log until December 16, 2020, over three and a half months after the 8/31/20 Production, (4) the use of 3-point font in the original Exemption Log, which remained uncorrected until March 3, 2021, another two and a half months later, (5) the inclusion in the original and Amended Exemption Logs of patently unsustainable FERPA exemption claims, (6) the assertion in the original and Amended Exemption Logs that various documents were exempt as "internal fundraising discussions" when the Logs themselves confirm that the documents were copied to Emmett and, (7) the service of an Amended Exemption Log on July 1, 2021, only fifteen days before GAO was then scheduled to file its initial trial brief, which stated new claims of exemption with respect to 104 of the 120 documents specified in the original Exemption Log, thereby necessitating a second three month continuance of the trial of this matter.

The most salient of Regents' acts of obstruction, however, are those that illuminate what motivated these acts – namely: Regents' (and most obviously Carlson's) desire to hide those emails that were among the Requested Public Records which disclosed information regarding the Climate Litigation/Regents Interface, and in particular the CCI Introduction/Solicitation. More particularly, there is no other plausible explanation for the fact that (1) every one of the supplemental documents produced by Regents, as well as the unredacted portion of the Smog and Flying Email, relate to the CCI Introduction/Solicitation and (2) none of the documents produced by Regents in its initial

response to PRR 19-7464 (i.e., up to and including the 8/31/20 Production) disclosed anything about that subject, which was GAO's express, stated purpose in making PRR 19-7464.

Simply put, there is no conceivable reason why the initial "keyword" searches for the Emmett email domain performed by Carlson's assistant on Carlson's email account for PRR 19-7464 somehow failed to locate the supplemental documents later located by UCLA's IT staff in "keyword" searches of Carlson's email account (albeit of different terms) for PRR 20-8371 and PRR 21-8912. And even assuming that the second paragraph of the Smog and Flying Email was legitimately believed to be covered by a "pre-publication" exemption claim, there is also no conceivable way in which the first paragraph of that email, which "coincidentally" deals with the CCI Introduction/Solicitation, was not "reasonably segregable" from its second paragraph.

Nor can all of the responsibility for Regents' acts of obstruction and delay be laid to Carlson, though she undoubtedly was the "primum mobile". Notwithstanding the belated appearance of the other records, it was not Carlson who determined not to provide GAO with at least a partially redacted copy of the Smog and Flying Email; and it was not Carlson who recently (and after two supplemental productions had unequivocally established the inadequacy of the search of Carlson's email account initially conducted by Carlson's assistant) refused to have UCLA's IT staff conduct a second search of Carlson's email account utilizing the keyword search terms of PRR 19-7464 in response to GAO's Fourth Request for Production of Documents on the ground that "Respondent conducted a diligent and reasonable search upon initial receipt of [PRR 19-7464]." (AR 360:14-19.)

These practices to avoid the production of key Climate Change Agenda Records are intentional. Indeed, as long ago as September 2012, UCLA published a Statement on the Principles of Scholarly Research and Public Records Requests (the "September 2012 Statement on Principles of Scholarly Research and Public Records Requests") which remains in effect today stating, in relevant parts:

> "… faculty scholarly communications must be protected from PRA and FOIA requests to guard the principles of academic freedom, the integrity of the research process and peer review, and the broader teaching and research mission of the university. Moreover, these requests have increasingly been used for political purposes or to intimidate faculty working on controversial issues. These onerous, politically motivated, or frivolous requests may inhibit the very communications that nourish excellence in research and teaching, threatening

> the long-established principles of scholarly research. … *Faculty often choose research topics that are highly relevant to society and therefore may generate strong reactions*. These topics may be controversial and highly politicized (*e.g.* global warming) … Faculty must be free to work on these important topics without fear of retribution, threats or interference." (Italics in original.) (AR 411(end of first paragraph) and 412(third full paragraph.)

Indeed, during her deposition herein, Carlson acknowledged that she viewed the request at issue in this matter as "being used for political purposes or to intimidate faculty working on the issue of global warming." (AR AE 431:11-432:10.) Based upon his prior experience with drafting, and monitoring the responses by public entities to, hundreds of state and federal public records act requests, Christopher Horner ("Horner") reviewed the Regents' response to PRR 19-7464, which request he drafted, and noted numerous actions, failures to act and other "red flags" gleaned from the public record which, in his opinion (and as discussed in great detail in his supporting declaration, AR 309:21-345:9), cannot plausibly be explained as oversights. To the contrary, Horner states that, in his opinion, "Regents' approach to processing the requests and, ultimately, to the litigation effort to forestall the records' release, was impermissibly driven at least in material part by faculty bias". (AR 312:2-4.) Horner concludes as follows:

> "….It is my opinion that the instant matter reflects an intentional effort to obstruct access to public records, in the form of delay but also other steps to remove from, or avoid placing in, the review process responsive requested records. It is my opinion that this behavior began with internal efforts to impede release of records based upon the subject matter of the records requested being 'controversial and highly politicized (e.g., global warming)' … and also based upon the requester's identity….. It is my opinion that this represents one of the most exaggerated such examples of such behavior, in part due to the apparent deliberation it entails, by which I mean the breadth, within the institution and its defense, of the apparent agreement and/or assistance with the obstruction. In my opinion, this is illustrated in part by the numerous 'red flags' noted supra and Regents' failure to at any point recognize and address them and how these factors might impact its compliance with the CPRA…." (AR 344:18-345:5.)

IV. CONCLUSION

First, this Court should (1) overrule all of the objections to Regents' production of those documents specified in the Amended Exemption Log and the NPR Log regarding which Regents fails to make a prima facie case that its objections thereto are well taken and (2) order the prompt production of those documents without redaction to GAO. If there are any documents that (1) the Court finds Regents has supported by a sufficient prima facie showing and (2) as to which the Court finds that GAO has failed to rebut that prima facie showing, this Court should order the subject

documents to be produced to the Court so that they may be reviewed by the Court (or a special master if that is deemed appropriate) in order to determine if the actual contents of the documents (1) conform to the representations regarding such documents made by Regents and relied upon by the Court in its ruling and (2) include any "reasonably segregable" portions that should be produced to GAO after appropriate redactions of any exempt material has been made.

In addition, this Court should find that the initial search of Carlson's email account conducted by Regents, and in particular by Carlson's assistant, was not adequate or sufficient and direct Regents (1) to have UCLA's IT staff conduct an additional search of Carlson's email account in accordance with the search terms specified in PRR 19-7464, (2) advise GAO and the Court of the results of that search, and (3) if any new documents are located by that search, either provide GAO with copies of all such documents or, if any of the newly-discovered documents are claimed to be exempt or not public records, a single log providing the same information regarding each document withheld by Regents as was contained in the applicable Amended Exemption or the NPR Log, with the Court retaining jurisdiction to rule upon the propriety of Regents' withholding of such documents.

Finally, this Court should find that the evidence presented at trail establishes that Regents repeatedly violated its obligations under the CPRA not to obstruct or delay GAO's inspection of the Requested Public Records and should provide GAO declaratory relief detailing the specific actions of Regents which obstructed and delayed that inspection. This will not only serve for Regents' guidance in its handling of future CPRA requests but will also benefit the future requesters who are the beneficiaries of that guidance.

Dated: October 15, 2021

Respectfully submitted,

/s/ James K.T. Hunter
James K.T. Hunter
Attorney for Petitioner,
Government Accountability & Oversight, P.C

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I, Mary de Leon, am employed in the city and county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 10100 Santa Monica Blvd., 13th Floor, Los Angeles, California 90067-4003.

On October 15, 2021, I caused to be served the **PETITIONER'S OPENING TRIAL BRIEF** in this matter by sending a copy of said document(s) as follows:

John Gherini University of California, Office of the General Counsel Email: john.gherini@ucop.edu Raymond Cardozo Reed Smith LLP 101 2nd Street, Suite 1800 San Francisco, CA 94105 Email: rcardozo@reedsmith.com	

☐ (BY MAIL) I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☑ (BY EMAIL) I caused to be served the above-described document by email to the party indicated above at the indicated email address.

☐ (BY FAX) I caused to be transmitted the above-described document by facsimile machine to the fax number(s) as shown. The transmission was reported as complete and without error. (Service by Facsimile Transmission to those parties listed above with fax numbers indicated.)

☐ (BY OVERNIGHT DELIVERY) By sending by FEDERAL EXPRESS to the addressee(s) as indicated above.

I declare under penalty of perjury, under the laws of the State of California that the foregoing is true and correct.

Executed on October 15, 2012, at Los Angeles, California.

Mary de Leon

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