

CERTIFICATE OF SERVICE

I hereby certify that I today caused true and correct copies of Intervenor-Respondent's Notice of Hearing on Motion for Leave to Intervene, and the accompanying Memorandum of Law, to be served by email and U.S. First Class Mail on:

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Dated: May 23, 2016

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

Christopher Horner, et al.)	
)	
<i>Petitioners,</i>)	
)	
v.)	No. CL-2015-4712
)	
Rector and Visitors of George Mason)	
University)	
)	
<i>Respondent.</i>)	

**INTERVENOR-RESPONDENT EDWARD MAIBACH’S MOTION FOR
LEAVE TO INTERVENE**

Pursuant to Virginia Supreme Court Rule 3:14, Intervenor-Respondent Edward Maibach, by and through his attorneys, respectfully moves the Court for leave to intervene in this action, as well as file the Motion to Stay Production Pending Application for a Stay from the Virginia Supreme Court, and in support thereof alleges as follows:

1. This is an action involving a demand by petitioners the Competitive Enterprise Institute (“CEI”) and Christopher Horner (collectively, “Petitioners”) for documents from George Mason University (“GMU”) pursuant to the Virginia Freedom of Information Act (Virginia Code § 2.2-3700 *et seq.*) (“VFOIA”).
2. Dr. Maibach is a GMU Communication Professor and Director of GMU’s Center for Climate Change Communication. Dr. Maibach’s research is on how to communicate the risks of climate change, and how to educate the public of the importance of reducing greenhouse gas emissions.

3. CEI and Horner are vocal opponents of the very notion of climate change and, as part of their fundraising and publicity efforts, have attacked Dr. Maibach and many others in the climate science community.
4. In the instant litigation, Petitioners seek Dr. Maibach's email correspondence under VFOIA.
5. The requested documents include thousands of pages of Dr. Maibach's email exchanges regarding a group letter drafted and signed by 20 academics, including Dr. Maibach, and dated September 1, 2015 (the "September 1 Letter"). (For further details, see Affidavit of Dr. Edward Maibach ("Maibach Aff.") attached hereto as Exhibit A.)
6. The September 1 Letter was sent to President Obama and other Administration officials to urge action on climate change. The letter was prompted, in large part, by a May 29, 2015 *Washington Post* op-ed by Senator Sheldon Whitehouse, which suggested using the federal RICO anti-racketeering statute as a potential legal tool in the fight against climate change. (Attached hereto as Exhibit B is a copy of Sen. Whitehouse's May 29, 2015 *Washington Post* op-ed.)
7. GMU has argued before the Court, and Dr. Maibach agrees, that any email correspondence over the September 1 Letter to the Obama Administration relates to Dr. Maibach's personal interest in legal responses to climate change, and is separate from his GMU work and research on how to communicate the scientific risks of climate change to the general public. Dr. Maibach's participation in the letter is distinct from his GMU work and research.

8. On February 4, 2016, GMU and Petitioners entered into a protective order under which GMU shared approximately 140 pages of Dr. Maibach's emails for the limited purpose of choosing exemplars to submit for *in camera* review.
9. Because Petitioners' VFOIA request sought all documents containing the term "RICO," this has pulled in all of Dr. Maibach's emails containing the term "Puerto Rico." Thus, a professional presentation of Dr. Maibach's work in Puerto Rico, involving a paper in which he was a co-author, has also become subject to this litigation.
10. On April 22, 2016, the Court entered an Order requiring GMU to produce all requested documents, finding that Dr. Maibach's emails regarding the September 1 Letter were "made as public business related to the employment of Maibach as Professor of Climate Change Communication and Director of the Climate Center of George Mason University, a public university of the Commonwealth of Virginia."
11. On May 4, 2016, GMU filed a Motion for Stay Pending Appeal, in which it stated that GMU was pursuing an appeal.
12. At oral argument on May 13, 2016, over GMU's opposition, the Court ruled that the protective order governing 140 pages of exemplars was dissolved. The Court also ruled that Dr. Maibach's remaining emails must be produced. That day, Petitioners posted all of the formerly-protected emails online in a series of blog posts. Petitioner CEI's blog post the next week compared Dr. Maibach and his colleagues to "quacks and snake oil salesmen" and suggested they were guilty of fraud by dint of sharing personal views, in private emails, with which CEI disagreed. (Attached hereto as Exhibit C is a copy of a CEI blog post dated May 17, 2016.)

13. Dr. Maibach learned on May 19, 2016 that GMU planned to produce an additional 1,000 to 1,500 pages or so of his emails to Petitioners on May 23, 2016.
14. Upon learning that there were additional emails soon to be produced to Petitioners, Dr. Maibach concluded he must request an opportunity to intervene and assert his individual rights in this matter.

LEGAL ARGUMENT

15. Virginia courts recognize that “[i]ntervention allows willing claimants to come into court and join a lawsuit already in progress so that their interest may be defended.” *Cluverius v. James McGraw Inc.*, No. HI0618-1, 1998 WL 972109, at *3 (Richmond Cir. Ct. Mar. 30, 1998). Intervention in a pending lawsuit is at the discretion of the court. *Stephen v. Dickens*, No. 02-875, 2003 WL 22682964, at *1 (Norfolk Cir. Ct. Dec. 19, 2003).
16. Virginia Supreme Court Rule 3:14 provides that “[a] new party may by leave of court file a pleading to interfere as a plaintiff or defendant to assert any claim or defense germane to the subject matter of the proceeding.” The term “germane” has been defined as “relevant or closely allied.” *Stephen*, 2003 WL 22682964, at *1-2. An intervenor must thus “assert some right involved in the suit.” *Layton v. Seawall Enters., Inc.*, 231 Va. 402, 406 (1986); *see also Hudson v. Jarrett*, 269 Va. 24, 32 (2005) (stating that “an intervenor must be asserting an interest that is part of the subject matter of the litigation.”) Rule 3:14 requires that an intervenor intervene specifically as a plaintiff or defendant. *Hudson*, 269 Va. at 32.
17. A professor whose emails are to be released by his university under VFOIA has an interest in the action, and may intervene in the litigation in order to prevent disclosure. *Am.Tradition Inst. v. Rectors & Visitors of the Univ. of Va.*, 287 Va. 330, 336 (Va. 2014).

18. Dr. Maibach unquestionably has an interest in this litigation because Petitioners seek to compel the production of his personal email communications with fellow academics regarding a group letter, as well as his professional emails as they relate to work in Puerto Rico.
19. Petitioners initiated this action against GMU because these emails exist primarily on a GMU computer server, and thus GMU possesses the emails. Nonetheless, the Petition leaves no doubt that the intent of Petitioners' lawsuit is to attack Dr. Maibach and his work in the climate science community by seeking his personal email correspondence.
20. Dr. Maibach's First Amendment constitutional right to academic freedom is at severe risk in this case. *See Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and university would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate. . . .") Dr. Maibach's First Amendment constitutional right to petition his government is also imperiled in this case.
21. Dr. Maibach's interests are not adequately protected because, among other reasons, GMU is planning to produce his emails, in violation of his privacy interest and the exemption protections under VFOIA.
22. Petitioners' attempt to obtain Dr. Maibach's personal emails through VFOIA, by arguing that they are part of his public work, is in direct contravention with VFOIA exemptions and Virginia Supreme Court precedent. In *American Tradition Institute v. Rectors & Visitors of the University of Virginia*, the Supreme Court ruled that public university researchers' email correspondence about their work is exempted under VFOIA

protections for “propriety interests.” 287 Va. 330, 338-39 (Va. 2014), citing Virginia Code § 2.2-3705.4.

23. In *American Tradition Institute*, the Supreme Court explained that exempting public university researchers’ professional email correspondence was critical for preventing “harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression.” *Id.* at 342-43.
24. Notably, in *American Tradition Institute*, the climate scientist targeted was granted leave to intervene in the VFOIA litigation once he learned that the University of Virginia planned to release his emails to a group attacking him. His intervention was necessary as the University of Virginia “could not sufficiently protect his interests in privacy, academic freedom, and free speech.” *Id.* at 336.
25. Dr. Maibach asserts that his email correspondence regarding the September 1 Letter is of a personal nature, as it does not relate to his GMU research or teaching work. In the alternative, considering these emails to be part of his “public business” still does not make them available under VFOIA. As data, records or information of a proprietary nature created or collected by a faculty member of an institution of higher learning, and which have not been disclosed to the public, these emails are exempted under Virginia Code § 2.2–3705.4(4); *Am. Tradition Inst.* at 340-44. Likewise, Dr. Maibach’s professional emails regarding his work in Puerto Rico are also protected under Virginia Code § 2.2–3705.4(4) and *Am. Tradition Inst.*
26. Petitioners are aware of the precedent in *American Tradition Institute* and yet have provided no justification for disregarding its holding in the instant case. Christopher

Horner, one of the Petitioners in this case, was and is an attorney with that plaintiff, the American Tradition Institute.

WHEREFORE, Intervenor-Respondent Edward Maibach respectfully requests the Court's leave to intervene in this matter and grant such further and other relief as the Court deems necessary and proper.

Respectfully Submitted,

EDWARD MAIBACH

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