 New Civil Liberties Alliance

June 3, 2024

VIA First Class Mail and Electronic Mail

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**Re: Notice of Request to Preserve All Documents and Electronically
Stored Information as Defined by Federal Rule of Civil Procedure 34**

Dear Mr. Kirschner, Dr. Fauci, Dr. Morens, Dr. Daszak, Dr. Keusch, Dr. Roberts, Dr. Collins,
Ms. Prado, and Mr. Hammond:

Please be advised that the New Civil Liberties Alliance (“NCLA”) represents Drs. Jayanta Bhattacharya, Aaron Kheriaty, Martin Kulldorff, and Ms. Jill Hines (“Plaintiffs”) in *Missouri v. Biden*, 3:22-cv-1213 (W.D. La. 2022). Dr. Anthony Fauci is one of the government defendants in this case, which was originally brought by the Attorneys General of Missouri and Louisiana and joined by Plaintiffs. Plaintiffs allege that government defendants violated their First Amendment rights through their involvement in social media censorship, specifically with respect to their speech that was not in line with the government’s position on Covid-19 and related matters. Indeed, Drs. Fauci and Francis Collins explicitly targeted Drs. Bhattacharya and Kulldorff for a “takedown” on the grounds that their Great Barrington Declaration, rejecting a lockdown approach to the Covid-19 pandemic, was dangerous and warranted suppression.¹

¹ The Editorial Board, *How Fauci and Collins Shut Down Covid Debate*, THE WALL STREET JOURNAL (DEC. 21, 2021).

The District Court denied Defendants' motion to dismiss on March 20, 2023 and granted Plaintiffs a preliminary injunction later that year. Proceedings have been stayed in the District Court while the injunction is on appeal.²

On November 23, 2022, plaintiffs deposed Dr. Fauci at the NIH headquarters. In response to the question, "Would you have CC'd one of your personal e-mail addresses on this?"³ Dr. Fauci responded, "No, I very rarely do that." When counsel asked, "Have you ever done that? Have you ever CC'd your personal e-mail on a work-related matter?" Dr. Fauci answered, "You know, I don't recall. I doubt that. I doubt that."⁴

Later on, Dr. Fauci was asked, "[w]ere you involved in the response to the various FOIA requests for your e-mails from NIAID and NIH?" to which he replied, "I'm - I don't understand what you mean was I involved in them. I don't - a FOIA request does not come to me, and I look through my e-mails and give the e-mails that they ask for. We have a system at the NIH where FOIA requests come in and a different component of the institutes tap into the e-mails and provide the e-mails that are requested. I don't decide which e-mails go and don't go."⁵

Just last week, on May 22nd, Dr. Fauci's Senior Advisor, Dr. David Morens, testified before the Select Subcommittee on the Coronavirus Pandemic. The Subcommittee simultaneously released documents Dr. Morens produced indicating that Dr. Fauci likely both perjured himself during the deposition and engaged in unlawful practices in order to avoid having to make productions pursuant to FOIA as well as discovery requests in our clients' lawsuit. For example, on April 21, 2021, Dr. Morens stated in an email to Peter Daszak, President of the EcoHealth Alliance, a recipient of government funds and implicated in the creation of coronavirus by virtue of its gain-of-function research, "i forgot to say there is no worry about FOIAs. I can either send stuff to Tony [Fauci] on his private gmail, or hand it to him at work or at his house. He is too smart to let colleagues send him stuff that could cause trouble."⁶

Several weeks later, in an email to Dr. Daszak, along with Gerald Keusch, a professor of medicine at Boston University, and Richard Roberts, of New England Biolabs, Morens wrote: "I suggested Arthur try to interview Tony directly and connected him to our 'secret' back channel. He emailed Tony a few hours ago."⁷

These emails strongly suggest that Drs. Fauci and Morens intentionally schemed to use personal email accounts in order to avoid revealing emails pursuant to FOIA requests. It also appears that they undertook a widespread effort to deny controversial documents to Congress and the public. Obviously, avoiding controversy is not a lawful basis for noncompliance with FOIA requests.

² The Fifth Circuit affirmed the injunction in part and reversed in part. See *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023). The appeal is now under consideration in the Supreme Court, with a decision expected within the next month. See *Murthy v. Missouri*, No. 23-411.

³ Fauci Dep. 55:8-10.

⁴ Fauci Dep. 55:12- 16.

⁵ Fauci Dep. 122: 6- 16.

⁶ See Email from David Morens, M.D., Senior Advisor, Nat'l Inst. of Allergy and Infectious Diseases, Nat'l Insts. of Health, to Peter Daszak, Ph.D, et. al. (April 21, 2021), attached as Ex. 1.

⁷ See Email from Morens to Gerald Keusch, M.D., et. al. (May 13, 2021), attached as Ex. 2.

Additional emails constitute strong corroborating evidence that Drs. Fauci and Morens were attempting to avoid having to reveal communications about gain-of-function research and the lab leak hypothesis, which the White House had pressured tech companies to censor.⁸ For instance, on April 26, 2020, Dr. Morens had written to Daszak: “This is sent from my gmail account. Please send all replies here to gmail[.] I have let Tony know but have not spoken to him directly. There are things I can’t say except Tony is aware and I have learned that there are ongoing efforts within NIH to steer through this with minimal damage to you, Peter, and colleagues, and to nih and niaid.” “To steer through this with minimal damage” suggests there was some crisis associated with publication of emails to be averted. Dr. Morens sent a plethora of other emails instructing recipients to be careful to use gmail or other non-official channels of communication.¹⁰

Furthermore, Dr. Morens’s emails suggest that Dr. Fauci committed perjury, or at the very least gave intentionally misleading testimony, in his November 23, 2022 deposition. According to Dr. Morens’s emails, Fauci was purposefully using gmail (or handservice) because he was “too smart to let colleagues send him stuff that could cause trouble.”¹¹ Likewise, “Tony” used a “secret” back channel, in Dr. Morens’s words.¹² That Dr. Fauci was frequently using private emails is inconsistent with his deposition testimony that he “rarely” or never copied his personal addresses. At the very least, his deposition testimony was obviously designed to intentionally mislead as the nature of his use of private email to evade public disclosure.

Dr. Morens sent numerous emails indicating that he and others were intentionally deleting emails, which is also a violation of the law. For example, on February 24, 2021, he wrote to an unidentified recipient, “You are right, i need to be more careful. However, as i mentioned once before, i learned from our foia lady here how to make emails disappear after i am foia’d but before the search starts, so i think we are all safe. Plus i deleted most of those earlier emails after sending them to gmail.”¹³

Plaintiffs have more than a colorable reason to believe that the recipients of this letter are in possession or control of emails that were not produced by Defendants in response to discovery demands in this case (as well as numerous FOIA requests made by a variety of individuals), but that are pertinent to litigation about, *inter alia*, the Great Barrington Declaration, Plaintiffs Bhattacharya

⁸ Ryan Tracy, *Facebook Bowed to White House Pressure, Removed Covid Posts*, THE WALL STREET JOURNAL (Jul. 28, 2023).

⁹ See Email from Morens to Daszak (April 26, 2020), *attached as Ex. 3*.

¹⁰ See Email from Morens to Keusch, et. al. (November 19, 2021), *attached as Ex. 4* (“BOTH my gmail and phone calls are now safe. Tex is NOT, as it can be FOIA’d, as can my govt email”); see Email from Morens to Keusch (May 12, 2020), *attached as Ex. 5* (“Please try to send only to my gmail”); see Email from Morens to Keusch (November 18, 2021), *attached as Ex. 6* (“Basically, my gmail is now safe from FOIA ... Thus, it should be safe to communicate safely with you, Peter, and others, as long as we use my private gmail”).

¹¹ See Ex. 1.

¹² See Ex. 2.

¹³ See Email from Morens (February 24, 2021), *attached as Ex. 7*. See also Email from Morens to Daszak (Oct. 5, 2021), *attached as Ex. 8* (“However, Ron Johnson is all over it and now after me. Tony will be pissed, rightly so. I deleted that email but now I learn that every email I ever got/sent since 1998 is captured and will be turned over, whether or not I instantly deleted it. Gmail, phone, text ... i need to scrupulously rely on those.”); Email from Morens to Daszak (June 16, 2020), *attached as Ex. 9* (“We are all smart enough to know to never have smoking guns, and if we did we wouldn’t put them in emails and if we found them we’d delete them.”).

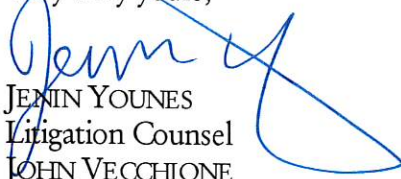
and Kulldorff, the lab leak theory and gain-of-function research, the efficacy of masking and vaccines for Covid, and Dr. Fauci's unlawful involvement in suppressing speech about all of the above via use of his authority as a government actor. Given Dr. Morens's statements about deleting emails, Plaintiffs have every reason to believe that Dr. Fauci and others have erased or may very well be in the process of attempting to delete emails from their private accounts to subvert discovery efforts.

Plaintiffs hereby notify Drs. Fauci, Morens, Daszak, Keusch, Roberts, Collins, and Ms. Prado of their obligation to preserve all documents and electronically stored information, drafts, copies and backups, as defined by Federal Rules of Civil Procedure 34 and 45, along with any paper files they and their employees maintain. Since Drs. Fauci and Morens were unlawfully using private email, it is likewise unlawful to delete or attempt to delete *any* emails sent or received in their official capacity as employees of the NIH. Moreover, as there is already evidence of deletion of emails, the recipients of this letter are instructed to maintain relevant hard drives and all other sources of electronic storage (i.e. cellular telephones, thumb drives, personal data devices) that may contain remnants of email messages as they are, with no further deletion or alteration of meta data and no opportunity to further overwrite data. Maintenance of such records will be necessary to determine whether or which unlawful deletions constitute spoliation, or aiding and abetting spoliation, as well as being otherwise unlawful.

This hold notice also applies to any communications made through other unofficial channels, including but not limited to third-party messaging applications, social media accounts, and direct messaging programs. *Cf. Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149 (D.C. Cir. 2016) (“[A]n agency always acts through its employees and officials. If one of them possesses what would otherwise be agency records, the records do not lose their agency character just because the official who possesses them takes them out the door or because he is the head of the agency.”).

Plaintiffs will seek leave from the Court to issue subpoenas and document requests during the current stay of the case or as soon as otherwise possible in order to alleviate further risks of deletion and to minimize the burden on third parties to maintain data. Thank you for your time and attention to this matter.

Very truly yours,



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Exhibit 1

Exhibit 2

Exhibit 3

Exhibit 4

Exhibit 5

Exhibit 6

Exhibit 7

Exhibit 8

Exhibit 9