



# Public Employees for Environmental Responsibility

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This complaint of unlawful prohibited personnel practices (“PPP”) by the Centers for Disease Control and Prevention (“CDC”) against Dr. George Luber, Supervisory Health Scientist, GS-601-15, is filed through counsel and requests an investigation by the Office of Special Counsel (“OSC”). The alleged PPP, commonly known as “whistleblower reprisal” or “whistleblower retaliation” is described at 5 U.S.C. § 2302(b)(8). Dr. Luber requests a stay of a July 3, 2019 proposal to suspend him for 120 days by Dr. Patrick Breyse, Director of the National Center for Environmental Health (“NCEH”), currently pending before Ms. Shaunette Crawford, the deciding official and Executive Officer of CDC, based on the following grounds.

CDC committed the following PPPs against Dr. Luber:

1. Preventing him from speaking to members of the public or the press in his official capacity in or around January-February 2017;
2. Placement on administrative leave on or around March 19, 2018;
3. Conducting a retaliatory investigation;
4. Involuntary reassignment of Dr. Luber to a series of details unrelated to his training and expertise from April 2018 to the present; and
5. Proposing Dr. Luber’s suspension for 120 days on July 3, 2019.

These PPPs were committed in retaliation against Dr. Luber’s protected disclosure of what he reasonably believed to be a violation of law to Dr. Breyse and other management officials of the NCEH in March 2018: the merging of the CDC Climate & Health Program’s budget, staff, and resources into an unrelated branch of the NCEH, which would impermissibly blend the \$10 million line of funding appropriated by Congress for work on climate change into an unrelated program focusing on asthma and air pollution. They were also in retaliation for Dr. Luber’s repeated public disclosures about the threat to

human health and public safety posed by climate change.

The second, third, and fourth PPP were also committed in retaliation against Dr. Luber for his reporting to the public and to Congress in May 2019 of the unlawful dissolution of the CDC Climate & Health Program, the diversion of its funds to non-climate work, and the prior unlawful PPPs committed against him.

## **I. FACTUAL BACKGROUND**

George Luber, Ph.D., is one of the nation's preeminent climate scientists, and for years was the head of the Climate and Health Program at the U.S. Centers for Disease Control and Prevention ("CDC"), the United States' sole program dedicated to climate and human health, including adaptation research, public science diplomacy, cooperation with the academic community, and partnership with city, state, and tribal governments to mitigate the most severe impacts of climate change to public health. Dr. Luber was also Co-Chair of the Climate Change and Human Health Interagency Workgroup at the U.S. Global Change Research Program, a Convening Lead Author for both the 3<sup>rd</sup> and 4<sup>th</sup> US National Climate Assessments' [Chapter on Human Health](#) impacts from climate change, a member of the American Anthropological Association's Presidential Task Force on Climate Change, and a lead author for the Intergovernmental Panel on Climate Change ("IPCC"), Fifth Assessment Report. He is not only one of the nation's best scientific minds, but a world leader in climate research and public health practice. He has written over 50 journal articles and the definitive textbook on the subject. Dr. Luber has a 16-year record at CDC with, until 2018, no proposed or actual disciplinary action, official reprimands, or unsatisfactory performance reviews. His lowest employee evaluation was a 4.2/5 and his average evaluation between 2012 and 2018 was 4.4/5.

In the days after the November 2016 presidential election, the Director of the CDC's National Center on Environmental Health ("NCEH"), under which the Climate and Health program was organized, Dr. Patrick Breyse, and his Policy Lead Pam Protzel-Berman, summoned Dr. Luber to order him to cancel an upcoming event which he had been organizing to be held at CDC in February 2017 about climate change, featuring Former Vice President and climate activist Al Gore as Keynote Speaker. These managers

expressed that they thought it would be politically unwise to have such a high-profile conference about climate change weeks after the inauguration of President Trump. This was not the only step taken by the Centers to downplay references to climate change during the transition. At the same time Dr. Luber was being ordered to cancel the event in late November 2016, the National Institute for Occupational Safety and Health (NIOSH) deleted numerous mentions of “climate change,” links, and information from its website.<sup>1</sup> When NCEH told Dr. Luber to call off the climate event, it also asked him to personally sign the letter cancelling it. Dr. Luber argued against the cancellation and flatly refused to be the authority which executed it. Dr. Luber insisted this sudden about-face on an existential issue would undermine the scientific integrity of the agency and the public’s faith in the CDC and in climate science generally. Over his objection, CDC issued an unsigned notice in December announcing the cancellation of the climate event. When knowledge of the cancellation became public the next month, it rapidly became a national story exemplifying the federal government’s preemptive retreat on climate issues before President Trump came to power.<sup>2</sup> CDC made no denial was made of the claim that the decision to terminate the meeting was a cynical calculation to placate the incoming administration.<sup>3</sup> NCEH was eager to scrap any programs that the new Administration might disapprove of.

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<sup>1</sup> See Chris Mooney, *The mysterious disappearance of the phrase ‘climate change’ from a CDC website*, WASH. POST (Jul. 2, 2018), <https://www.washingtonpost.com/news/energy-environment/wp/2018/07/02/the-mysterious-disappearance-of-the-phrase-climate-change-from-a-cdc-website/>.

<sup>2</sup> See, e.g., Brady Dennis, *CDC abruptly cancels long-planned conference on climate change and health*, WASH. POST (Jan. 23, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/01/23/cdc-abruptly-cancels-long-planned-conference-on-climate-change-and-health>.

<sup>3</sup> Brian Resnick & Julia Belluz, *Sudden changes at the EPA, USDA, and CDC under Trump, explained*, VOX (Jan. 25, 2017) (“Georges Benjamin, executive director at the American Public Health Association, was booked to be one of the keynote speakers at the event. ‘This was a preemptive decision on the part of CDC in light of the perspective of the new administration toward climate change,’ he told Vox. ‘It is unusual to do this, but the incoming administration has been so openly opposed to climate change work that it seemed prudent.’”).

While this critical media reaction to the cancellation of the conference was inevitable, NCEH concluded, incorrectly, that it must have come from Dr. Luber. The Center believed that Luber told the press that the meeting was cancelled for political purposes, however Luber had no contact with the press about that cancellation. From then on, Dr. Luber was then forbidden from speaking with the press. Until then, he had received years of press calls and requests for comment as the planet's leading expert on climate change and public health. Since President Trump was inaugurated, he has made no comments in his official capacity, and no members of the press have been permitted to speak to him as a CDC scientist. The CDC press office bluntly told Dr. Luber that he would never be cleared to speak to a reporter again.

Around this time, Dr. Luber was personally instructed by Director Breysse that in any future meetings or public statements he should not use the words "climate change," and should instead use language like "extreme weather." Scientific facts became a political liability. Meanwhile, a false rumor developed within NCEH that Dr. Luber was the one actually responsible for cancelling the conference. This undermined his credibility among his staff and deflected blame from NCEH's administrators. To many of his co-workers in the office, he had been the popular and public face of climate science. They came to resent him for an official retreat which he attempted to prevent.

Dr. Luber attempted to continue his work as before. In 2017 he was invited by the National Geographic Channel to be a regular guest on their popular new program *Mars*, which presents a fictionalized account of astronauts landing on Mars, featuring interviews with public figures, scientists, and engineers, including Elon Musk, Andy Weir, Robert Zubrin, and Neil deGrasse Tyson, about difficulties humans might face on a journey to, and the colonization of, Mars. Dr. Luber was told by the CDC office of communications that there was no way they would ever approve any appearances on the program. NCEH administrators declared in no uncertain terms by email that "Luber will never be on *Mars*[" This silencing of Dr. Luber violates both the CDC's Scientific Integrity Policies

regarding communications with the media<sup>4</sup>

From February 2017 through March 2018, Director Breysse enlisted consultants from PricewaterhouseCoopers to effectuate his preexisting plan to merge the small Climate Change and Health program into the substantially larger and better-funded Asthma Branch of NCEH. The newly formed branch was originally planned to be called the “Asthma and Climate Health” Branch, but was ultimately dubbed the “Asthma and Community Health” Branch to minimize the role of climate change in its mission.<sup>5</sup> Director Breysse selected a chief for the newly formed Asthma and Community Health Branch, but the chosen individual lacked the academic qualifications required to serve in that position.

In March 2018, lacking another qualified candidate, NCEH promoted Dr. Luber to Acting Branch Chief. In that role Dr. Luber met with the consultants drawing up the merging of the Climate & Health Program with the Asthma branch. On review of those plans, Luber told them that the \$10 million budget for the Climate & Health Program had been explicitly appropriated by Congress, and that the merging would cause impermissible “blending” of those funds: any person paid from the climate budget who supported asthma activities would be diverting funds earmarked for climate work to another program with its own separate funding line.<sup>6</sup> Dr. Luber argued that it was

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<sup>4</sup> CDC, GUIDANCE ON SCIENTIFIC INTEGRITY at 15 (2016), *available at* [https://www.cdc.gov/od/science/docs/CDCSIGuide\\_042516.pdf](https://www.cdc.gov/od/science/docs/CDCSIGuide_042516.pdf). That policy states:

In compliance with the Code of Conduct for CDC Media Relations Employees policy for Release of Information to News Media, CDC media relations employees are to be honest and accurate, respond promptly, and promote the free flow of scientific and technical information. In its communication with the public and the news media, CDC is committed to openness, free exchange of information and data, accuracy, timeliness, and responsiveness. Further, CDC offers the widest practical and appropriate dissemination of information about public health research, science, programs, and recommendations. In keeping with the desire for a culture of openness, CDC employees may, consistent with this policy, speak to members of the press about their work.

<sup>5</sup> See Branch description at <https://www.cdc.gov/asthma/community-health/about.htm>. Note that the word “climate” does not appear on this page.

<sup>6</sup> See, e.g., Conference Rep’t for H.R. 6157, DEPARTMENT OF DEFENSE FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2019, AND FOR OTHER PURPOSES, H.R. Rep.

inevitable that he, as Acting Branch Chief, and other members of the Climate & Health Program would have to divide their time by managing both Asthma work and Climate Change work. This would go against the express will of Congress. Dr. Luber also raised this concern with NCEH administrators, who did not respond to his concerns.

Ultimately the merger went forward. Dr. Luber found that he and other employees formerly handling matters solely related to climate change had been scattered across the much larger Asthma and Community Health Branch and were spending considerable amounts of their time on asthma work, while their salaries continued to be paid by monies appropriated exclusively for climate change and public health.

### **A. Dr. Luber is Removed from NCEH and Placed on a Series of Details**

Dr. Luber was branch chief for less than a month. On March 19, 2018, NCEH administrators called a meeting in which they informed him of “troubling” allegations against him and placed him on administrative leave. The only allegation raised at that time related to his failure to obtain written ethics approval for an outside activity, a book he had co-authored between 2012 and its publication in 2015. The approval in question had actually been obtained in paper form but had not been migrated to the CDC’s new electronic database. Dr. Luber informed the NCEH leadership of this at the time, and offered to produce the document from his personal hardcopy files in his office, but was instead escorted out of the facility by security and placed on administrative leave.

His badge, phone, and credentials were revoked. Security personnel at the facility he is permanently assigned to were ordered to place him on the BOLO (be on the lookout) List of dangerous persons who should not be allowed on the grounds without prior approval, and then only after a rigorous and publicly humiliating search. Because his permanent office is in a building he is now prohibited from approaching, let alone

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115–952, at 526-27, 115<sup>th</sup> Cong., 2d Sess. (Sept. 13, 2018), <https://www.congress.gov/115/crpt/hrpt952/CRPT-115hrpt952.pdf> (appropriating \$10,000,000 for the NCEH Climate & Health Program, and \$29,000,000 for Asthma, of the \$209,350,000 for all NCEH programs).

entering, he can only retrieve materials or supplies from it under guard escort and with prior approval by Breysse. Every time he has visited, he and his car have been thoroughly searched for weapons in front of his colleagues, a degrading and humiliating experience. Reportedly, Dr. Lubber's replacement in charge of the Asthma and Community Health branch at CDC, Josephine Malilay, has ordered staff to not speak his name even in passing because he was "toxic," and told them that he was "gone for good." Those instructions were given at a general meeting of the Asthma staff. It is highly unusual to discuss personnel matters on such a broad basis and before a final personnel action has been taken.

Dr. Lubber was detailed in April 2018 to another office within CDC handling waterborne diseases, at the National Center for Emerging and Zoonotic Infectious Diseases (NCEZID).<sup>7</sup> His detail was originally slated to last 120 days but after that period had elapsed, paperwork was not completed to extend his detail or reassign him. He was then detailed to the Office of Science in the Office of the Director of the CDC for 90-120 days, and most recently detailed to the Office of Science within NCEH. None of these details have involved the use of Lubber's knowledge, skills, or experience. His primary job duty since April 2018 has involved scientific review of manuscripts documenting lab research in fields he is not professionally trained in. When Lubber objected that the work he was being assigned was outside of his expertise, he was told by his detail supervisor that they had been instructed to keep Lubber away from any matters relating to climate change and that he should attend webinars on subject matter he was unfamiliar with.

Despite retaining his official title as a "Supervisory Health Scientist," he has not supervised anyone since March 2018, rendering him incapable of fulfilling many of the duties necessary for his performance evaluations. In fact, for much of his time on detail assignment, paperwork was left incomplete for his detail and it was unclear who was even

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<sup>7</sup> Dr. Lubber is unable to perform many of the duties in his position description as a supervising researcher, because there is nobody for him to supervise. As a result, he lacks productive duties to perform, and his upcoming employee evaluations will inevitably suffer, which sets the stage for further collateral consequences from NCEH's actions.

responsible for completing his performance evaluations. A series of emails discussing the *ad hoc* nature of his reassignments is attached as Exhibit A. Instead of supervisory epidemiology, Dr. Luber was involuntarily assigned to perform cursory review of laboratory reports far outside his scientific expertise.

Involuntary reassignment of unwanted climate change professionals has been a common tactic for the Trump Administration to use to compel their resignations. The most prominent example is that of Joel Clement, former director of the Office of Policy Analysis at the U.S. Interior Department. He was reassigned from that role, in which he assisted climate adaptation for endangered communities in Alaska, to an unrelated accounting position. In July 2017 he filed a complaint with the Office of Special Counsel for whistleblower retaliation supported by 13 law professors writing through the Georgetown Law Center's Institute for Constitutional Advocacy and Protection which led to an OSC investigation.<sup>8</sup>

## **B. Dr. Luber's Proposed Removal**

In October 2018, Dr. Luber received notice of proposed removal ("NPR") from Director Breysse.<sup>9</sup> No explanation was offered for the six-month long delay between the report of "troubling allegations" and the NPR itself. The actual charges detailed in Dr. Luber's NPR consisted of:

1. Twenty-three Specifications of improper timekeeping related to time off for a class he teaches at Emory University, the vast majority of which are easily disprovable with documentary evidence he has provided, and the remainder of which are tainted by a conflict of interest in the staff member assigned to him that handled timekeeping, who had previously threatened to maliciously alter other employees

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<sup>8</sup> See Eric Katz, *Interior's High-Profile Whistleblower Gets a Boost From OSC and Legal Community*, GOVERNMENT EXECUTIVE (Aug. 25, 2017), <https://www.govexec.com/oversight/2017/08/interiors-high-profile-whistleblower-gets-boost-osc-and-legal-community/140550/>.

<sup>9</sup> The proposed removal and Dr. Luber's response (with appendices) have been attached as Exhibits G and H, respectively.



timesheet records in retaliation for ongoing disciplinary action against her relating to consistently poor performance.

2. Three specifications of failure to obtain approval for outside activities, two of which he did receive actual approval for, and the third based on barely inaccurate auto-filling of a form (HHS-520) which had been accepted by his supervisor and the departmental ethics official at the time -- because the dates for a course he was teaching, provided in both a "date" field and a narrative description, did not match up. At the time these forms were completed, the reviewing official recommended approval of the outside activity and it was approved by the ethics office. The "date" part of the form that contained the date information was filled out correctly, noting that his class would be taught from fall 2017 through the end of the spring 2018 semester. The narrative box describing the activity, however, said he was seeking clearance for a course to be taught in the fall of 2016 because its text was automatically filled with the information he had submitted on the same HHS-520 from the previous year.
3. Four specifications of misuse of position, involving a) proper offers he made to junior researchers who were yet-unpublished to co-author educational materials with him for professional development purposes; b) spurious allegations related to classes he did not, in fact, teach; c) coursework he developed jointly with Yale University, and the approval of his supervisor, in response to a 2015 GAO recommendation that the climate program develop a strategic plan regarding communication pertaining to climate change; and d) a charge that Luber had directed his subordinate, Kathryn Conlon, to be a guest lecturer for a course he was not even teaching.
4. Three specifications of conduct unbecoming, based on a) an unfounded allegation that he used government funds on a "fishing trip" in Alaska in 2016 that was actually a site visit for new research facilities, made in the company of a local funded collaborator; b) a related hearsay allegation that he had been "high" on that

trip from an anonymous source who could not have had knowledge of such;<sup>10</sup> and c) an allegation that he had passed out after binge drinking in his hotel on a visit to a 2016 conference in Denver and slept through a speech he was supposed to deliver. In fact, he had not been drinking, but had been given an incorrect draft schedule by the organizer of the event which listed his speech as occurring on the next morning. When he was called by his colleague, he arrived at the event within 45 minutes and delivered his address normally.

Dr. Lubber responded to each of these allegations through his then-counsel on November 20, 2018. On December 13, 2018, the deciding official, Shaunette Crawford, sent an email to Dr. Lubber stating:

This email is to inform you that I am looking into the matters raised in Mr. Lubber's response to the proposal to remove him from federal service. I will provide you with any new or additional information I receive from the proposing official. You will be given an opportunity to respond to what is provided to me by the proposing official.

No decision on the proposed termination was reached, however. On December 17, 2018, reporters from the New York Times made inquiries concerning the proposed action against Dr. Lubber and the changes to the CDC Climate Change and Health program. The following evening, December 18, 2018, Mr. Breyse abruptly rescinded the removal in an email to Dr. Lubber:

This is to inform you that I have received your response dated November 20, 2018 regarding the 'Proposal to Remove' memo addressed to you on dated October 22, 2018. After reading your response and thoughtful consideration, I will rescind the 'proposal for removal' memo and provide you with a new notice of disciplinary or adverse action in the future.

### **C. Dr. Lubber is Wrongfully Denied Ethics Approval to Receive an Award**

In February, 2019, Dr. Lubber was informed that the Hugh M. Hefner Foundation

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<sup>10</sup> The local collaborator, David Driscoll, submitted a letter attesting to both the purpose of the site visit and to Dr. Lubber's good conduct on said trip which was included with Lubber's response to the 2018 Proposed Removal.

would be awarding him its First Amendment Award in a ceremony to be held at the Newseum in Washington, DC on May 15, 2019. The award was established in 1979 “to honor individuals who have made significant contributions in the vital effort to protect and enhance First Amendment rights for all Americans.”<sup>11</sup> The award is granted to one nominee per year from the areas of journalism, education, publishing, law, government, and arts and entertainment. Judges for the award are drawn from prominent members of civil society, and have included law professors, prominent journalists, and activists. It consists of a plaque of negligible market value, \$5,000 cash, and covers the costs of travel and attendance.

On February 19, 2019, Dr. Luber, through counsel, submitted a request to the CDC for ethics clearance in accordance with applicable statutes and regulations. An employee may generally accept an award for public service or achievement, provided the award and any item incident to the award is from a person or organization that does not have interests that may be substantially affected by the employee's official duties. The Hugh M. Hefner Foundation is not known to have any official business with CDC. On February 20, Erik Svendsen, Director of the Division of Environmental Health Science & Practice within the National Center for Environmental Health, informed Dr. Luber through counsel that he should submit his request through the CDC’s EPATS system for ethics clearance, which he did.

On March 6, 2019, the CDC informed Dr. Luber that his request for ethical clearance for the award had been denied. A single sentence explanation reasoned “CDC's climate change and health program is not closed.” The system-generated message was copied to Josephine Malilay, who at that time held the position from which Dr. Luber had been placed on administrative leave in March 2018, and who is believed to have been the deciding official for the request.

On March 11, 2019, Dr. Luber emailed Svendsen and Director Breysse to inquire

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<sup>11</sup> See Hugh M. Hefner Foundation, Past Winners and Judges of the Hugh M. Hefner First Amendment Awards (visited March 14, 2019), <https://www.hmhfoundation.org/winners-judges>.

about the scant reasoning behind the denial of his request. Svendsen informed Dr. Luber by email that “it is my understanding that the award description noted the ‘closure of the CDC’s climate and health program’. The CDC’s climate and health program is not closed. I hope this helps.” Mr. Svedensen stated that he lacked further details about the EPATS request, and Dr. Luber’s inquiry should be directed to the ethics office, which administered the system. A call was arranged on March 13, 2019, with representatives from the CDC ethics and general counsel’s offices, Dr. Luber, and PEER counsel to determine the status of the ethics request. CDC ethics staff informed Dr. Luber and counsel that they had no information about the factual or legal reasoning underlying the denial of Dr. Luber’s request and would be contacting NCEH to determine why the Center had denied the request. After a series of communications between Dr. Luber, counsel, and CDC ethics officials through March 2019, Dr. Luber’s ethics request was approved on April 5, 2019. This approval only came the day after an inquiry from a reporter from the ATLANTA JOURNAL CONSTITUTION, who on April 4, 2019 had called the agency for comment on a story he was preparing to publish.<sup>12</sup> A discussion of these events also appears in more detail in Dr. Luber’s response to the proposed 120-day suspension at pages 33-35, attached as Exhibit B.<sup>13</sup>

#### **D. Disclosures to Congress Concerning the CDC Climate Program**

On January 7, 2019, shortly after Dr. Luber’s proposed removal was withdrawn, counsel for Dr. Luber notified CDC that he was interested in pursuing a negotiated settlement of his dispute with the agency. That letter also explained that if the agency persisted in its unlawful retaliation and misuse of appropriated funds, Dr. Luber would be forced to bring the matter to the attention of Congress. A copy of that letter is attached as

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<sup>12</sup> See Bill Torpy, *Very hot indeed for CDC’s former climate change chief*, ATLANTA JOURNAL-CONSTITUTION (April 8, 2019), <https://www.ajc.com/news/local/torpy-large-very-hot-indeed-for-cdc-former-climate-change-chief/zpwBYHYJK2Cle4P45CtgI/>

<sup>13</sup> Exhibit B mistakenly states that Luber emailed Svendsen about the denial on March 6. That email was actually sent on March 11, and Svendsen replied on March 12 as reflected in this document.

## Exhibit C.

On April 12, 2019, Dr. Luber was contacted by the majority staff from the House Committee on Oversight and Reform Subcommittee on Environment for his assistance in planning hearings on the public health impacts of climate change. In April and May 2019 arrangements were made between Dr. Luber's counsel and congressional staff for members and committees with interests in the CDC Climate & Health Program for Luber to hold discussions with them the week of May 15 when he would be in Washington, DC for the First Amendment Awards. Because part of Dr. Luber's initial internal objections focused on misuse of appropriated funds by merging the Climate & Health Program into the Asthma Branch, members of Congress and their staff focused on that concern. Congressional wanted to know whether CDC was failing to respect Congress's request to spend \$10 million on climate change and health research. Its concern was heightened when viewed in context with the agency's FY 2018, 2019, and 2020 budget requests, each of which have sought to eliminate all funding for the climate program.<sup>14</sup>

On May 15, 2019, Dr. Luber was awarded the Hugh M. Hefner Foundation's First Amendment Award, at which he delivered an address discussing his experience attempting to protect the CDC Climate Change program. A transcript of his address is attached as **Exhibit D**.<sup>15</sup> That address was viewed in person by members of Congress and congressional staff, and was adapted into a video by the WASHINGTON POST.<sup>16</sup> Karen

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<sup>14</sup> See DEP'T OF HEALTH & HUM. SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, *Fiscal Year 2018 Justification of Estimates for Appropriation Committees 14-15*, 31, 131 (2017), <https://www.cdc.gov/budget/documents/fy2018/fy-2018-cdc-congressional-justification.pdf>; *Fiscal Year 2019 Justification of Estimates for Appropriation Committees 40* (2018), <https://www.cdc.gov/budget/documents/fy2019/fy-2019-cdc-congressional-justification.pdf>; *Fiscal Year 2020 Justification of Estimates for Appropriation Committees 42* (2019), <https://www.cdc.gov/budget/documents/fy2020/fy-2020-cdc-congressional-justification.pdf>.

<sup>15</sup> The address can also be viewed at <https://youtu.be/MXRN8yQiyKA>.

<sup>16</sup> *Trump's CDC wants to silence this climate change scientist, but he isn't going away*, WASHINGTON POST (May 22, 2019),

[https://www.washingtonpost.com/video/editorial/opinion--trumps-cdc-wants-to-silence-this-climate-change-scientist-but-he-isnt-going-away/2019/05/22/81e111c5-0232-4d9c-9ea3-94e5bf5da8c6\\_video.html](https://www.washingtonpost.com/video/editorial/opinion--trumps-cdc-wants-to-silence-this-climate-change-scientist-but-he-isnt-going-away/2019/05/22/81e111c5-0232-4d9c-9ea3-94e5bf5da8c6_video.html).

Tumulty, a political columnist for the POST and a judge for the 2019 First Amendment Awards, also published a column about Dr. Luber's experience.<sup>17</sup>

After delivering his address and receiving the award, Dr. Luber attended a series of four in-person meetings with personal and committee staff in the House and Senate on May 16 and 17, and attended an additional meeting by phone with Rep. Donna Shalala, former Secretary of Health and Human Services under President Clinton, on May 23, 2019. Those discussions included, *inter alia*, the history of the Climate & Health Program, Dr. Luber's experiences leading it, specific threats posed by climate change to public health which the Program had faced in the past, how those threats were being exacerbated by the diminished capacity of the post-merger Asthma & Community Health Branch to respond to climate threats, the diversion of appropriations which took place during and following that merger from climate work to asthma work, and Dr. Luber's personal experiences of retaliation and marginalization following his attempt to interrupt the unlawful dissolution of the Climate & Health Program. Counsel for Dr. Luber had informed the agency in January 2018 that seeking oversight by Congress would be a central component of his representation. *See* Exhibit C.

On May 16, Dr. Luber, accompanied by counsel, met with personal staff for Sen. Bernard Sanders, at which he discussed the work of the CDC Climate Change and Public Health program and his personal experiences attempting to protect it from administrative encroachment by NCEH leadership, including substantially all of the facts contained *supra* this Complaint. Of particular interest was the allegation that funds allocated for climate change were being used for non-climate purposes, particularly asthma, the branch of NCEH with which the Climate program had been "merged." A substantially similar meeting was held later the same day with the minority staff of the Senate Committee on Environment and Public Works. On May 17, 2019, Dr. Luber and counsel attended two

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<sup>17</sup> Karen Tumulty, *The administration tried to muzzle this scientist on climate change. But he won't go away.*, WASHINGTON POST (May 22, 2019), [https://www.washingtonpost.com/opinions/the-administration-tried-to-muzzle-this-scientist-on-climate-change-but-he-wont-go-away/2019/05/22/66b0b684-7bd8-11e9-a5b3-34f3edf1351e\\_story.html?utm\\_term=.36544604db32](https://www.washingtonpost.com/opinions/the-administration-tried-to-muzzle-this-scientist-on-climate-change-but-he-wont-go-away/2019/05/22/66b0b684-7bd8-11e9-a5b3-34f3edf1351e_story.html?utm_term=.36544604db32).

further meetings with committee staff for the House Committee on Energy & Commerce and the House Select Committee on the Climate Crisis. Again, the subject matter and concerns raised by committee staff were substantially similar to what has been discussed in this document.

These discussions also sparked interest among members of Congress with a background in public health and with the Department of Health and Human Services. On May 23, 2019, counsel for Dr. Luber appeared personally for a meeting requested by Congresswoman Donna Shalala, who served as Secretary of Health and Human Services under President Clinton, which Dr. Luber attended by telephone. On June 7, 2019, counsel for Dr. Luber responded to an inquiry by staff from Congresswoman Lauren Underwood, who previously served as a senior advisor at the Department of Health and Human Services under President Obama. These meetings led to congressional action, including the introduction of legislation and the delivery of oversight letters to CDC, of which the agency was aware.

As a result of this public whistleblowing activity and disclosures to Congress, Dr. Luber has been approached by multiple other current CDC employees who have alleged similar treatment by CDC center-level leadership who have offered their support and encouragement, including the former chiefs of other branches which were merged as a part of NCEH's reorganization. Dr. Luber's outreach to the House Energy & Commerce Committee was at least partially responsible for a letter delivered July 30, 2019 from Chairman Frank Pallone, Jr., to Robert Redfield, Director of the CDC, inquiring as to the state of the Climate and Health Program and requesting a staff briefing by August 12, 2019. That letter is attached as Exhibit E.<sup>18</sup> As of the date of this filing, August 16, 2019, CDC has not responded to that request. Furthermore, on July 18, 2019, Congresswoman Underwood introduced H.R.3819, the Climate and Health Protection Act, which explicitly remedied the concerns raised by Dr. Luber concerning the misuse of the Climate and

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<sup>18</sup> available at <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/CDC.2019.7.30..pdf>

Health Program's appropriation for asthma and other work.<sup>19</sup>

## II. DR. LUBER WAS RETALIATED AGAINST FOR ENGAGING IN MULTIPLE PROTECTED WHISTLEBLOWER ACTIVITIES

Dr. Luber made multiple disclosures protected by 5 U.S.C. § 2302(b)(8) and § 2302(b)(12) for which he was retaliated against by the CDC. It is a prohibited personnel practice to take or threaten to take a personnel action, including firing, detailing, transferal, or demotion, against an employee, because of "any disclosure of information by an employee . . . which the employee or applicant reasonably believes evidences (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8).<sup>20</sup> A disclosure is protected if the employee shows he

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<sup>19</sup> The Act orders that "[t]he Secretary, acting through the Director of the Centers for Disease Control and Prevention, shall continue to implement the Climate and Health program carried out by the National Center for Environmental Health (or successor program) . . . ." It also specifies that, with regard to blending of the program's funding with *e.g.*, the Asthma Branch, "the Secretary, acting through the Director of the Centers for Disease Control and Prevention, shall submit to Congress a written notification of any transfer or reprogramming of funds to establish such a successor program." Finally, the Act includes an explicit prohibition on "transfer[ing] or reprogram[ing] by the Secretary to carry out another program administered by the Secretary."

<sup>20</sup> "disclosure" means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences--

(i) any violation of any law, rule, or regulation; or  
(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(a)(2)(D).

A disclosure shall not be excluded from subsection (b)(8) because--

(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);  
(B) the disclosure revealed information that had been previously disclosed;  
(C) of the employee's or applicant's motive for making the disclosure;  
(D) the disclosure was not made in writing. § 2302(f)(1)



reasonably believed the disclosed information evidenced a violation of law, rule, or regulation; gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8); see also 5 U.S.C. §§ 1209.4(b) and 2302 (b)(8)(A)(ii). To establish “reasonable belief,” the employee must only show that the matter disclosed was one which a reasonable person in his position would believe evidenced one of the situations specified. The test, outlined in *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000), asks whether a disinterested observer with knowledge of the essential facts readily known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence wrongdoing as defined by the Whistleblower Protection Act. See also *Wojcicki v. Dep’t of the Air Force*, 72 M.S.P.R. 628, 632 (M.S.P.B. 1996) (citing *Special Counsel v. Eidmann*, 49 M.S.P.R. 614 (1991) *aff’d*, 976 F.2d 1400 (Fed. Cir. 1992)), *Horton v. Dep’t of the Navy*, 66 F.3d 279, 283 (Fed. Cir. 1995), *cert. denied*, 116 S. Ct. 1271 (1996)).

The employee must also show that the agency took the adverse personnel action in retaliation for the protected disclosure. “Since direct evidence of a proposing or deciding official's retaliatory motive is typically unavailable (because such motive is almost always denied), federal employees are entitled to rely on circumstantial evidence to prove a motive to retaliate.” *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1371 (Fed. Cir. 2012) (citing *McCarthy v. Int'l Boundary & Water Comm.*, 116 M.S.P.R. 594, 613 (2011)). Retaliatory motivation may be inferred from a variety of factors, including proximity in time between the employee's action and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, disparate treatment of certain employees compared to others employees with similar work records. See *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001). Evidence of an employee's assertions of misconduct by a supervisor can bear upon whether the supervisor has a motivation to retaliate. *Fellhoelter v. Department of Agriculture*, 568 F.3d 965, 971 (Fed. Cir. 2009).

### **A. Dr. Luber’s Protected Disclosures**

#### **1. Violation of CDC Scientific Integrity Policy and (November 2016)**

The first such disclosure was immediately following the November 2016 election,

when Dr. Luber told superiors within the agency that the cancellation of the Al Gore address would undermine the scientific integrity of the agency. This disclosure was that to cancel the meeting would be in violation of an agency regulation regarding the rights of agency staff to participate in public scientific fora, the CDC Scientific Integrity Policy. Dr. Luber informed Dr. Patrick Breysse and his Policy Lead Pam Protzel-Berman during his debate with them over the February 2017 conference that cancellation was an abuse of authority, and would undermine the integrity of the agency, its public and scientific reputation, and the agency's own scientific integrity policy, which he understood to be binding on the agency's management and employees.<sup>21</sup> It also violated the CDC's policy document "SECURING APPROVAL FOR SPONSORSHIP OF CONFERENCES," which explains policy for approval of and attendance at CDC sponsored conferences.<sup>22</sup> CDC-GA-1997-02 (revised 2008), available at <https://www.cdc.gov/maso/policy/Securing-Approval-for-Sponsorship-of-Conferences-10-22-2007-c.pdf>.

Additionally, even if he was not factually responsible, the agency perceived him to be a whistleblower because of the assumption that he had told the press that the event was canceled for political reasons, which would also be an abuse of authority and violation of the scientific integrity and conference policies.

## 2. Threats Posed by Climate Change (continuously)

His second composite disclosure is made up of the many various instances in which Dr. Luber communicated the grave risk to the public posed by climate change, "a substantial and specific danger to public health or safety." § 2302(b)(8)(ii). Those

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<sup>21</sup> See CDC, GUIDANCE ON SCIENTIFIC INTEGRITY 8, 14-17 (2016), available at [https://www.cdc.gov/od/science/docs/CDCSIGuide\\_042516.pdf](https://www.cdc.gov/od/science/docs/CDCSIGuide_042516.pdf) (section on Public Communications).

<sup>22</sup> The policy is based on the following principles:

- Scientific meetings and conferences should be unbiased forums for exchange of scientific information and consider the implications for public health.
- In the interest of promoting robust science, scientific meetings and conferences should provide venues for open scientific discourse.
- Organizers of scientific meetings and conferences should provide a transparent
- process for selecting presentations based primarily on scientific merit.

disclosures, which are too numerous to list, included:

- Participation as lead author in the human health section of the 2014 National Climate Assessment. See George Luber *et al.*, “Chapter 9: Human Health,” *Climate Change Impacts in the United States: The Third National Climate Assessment*, U.S. Global Change Research Program, doi:10.7930/J0PN93H5, 2014.
- Participation as federal coordinating lead author in the human health section of the 2018 National Climate Assessment. See George Luber *et al.*, “Chapter 14: Human Health,” *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II*. U.S. Global Change Research Program, doi: 10.7930/NCA4.2018.CH14, 2018.
- Public statements in support of CDC’s mission to assist state and local governments build resilience against the impacts of climate change. See Kristen Lombardi and Fatima Bhojani, *An Army Of Deer Ticks Carrying Lyme Disease Is Advancing And Here’s Why It Will Only Get Worse*, HUFFINGTON POST (Aug. 9, 2018), [https://www.huffingtonpost.com/entry/an-army-of-deer-ticks-carrying-lyme-disease-is-advancing-and-heres-why-it-will-only-get-worse\\_us\\_5b69b04fe4b0b15abaa74ea0](https://www.huffingtonpost.com/entry/an-army-of-deer-ticks-carrying-lyme-disease-is-advancing-and-heres-why-it-will-only-get-worse_us_5b69b04fe4b0b15abaa74ea0).<sup>23</sup>
- Participation in the Emmy-winning climate change series *Years of Living Dangerously*, in which he appeared as an expert Science Advisor on June 2,

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<sup>23</sup> The article states, in relevant part:

The only federal support for state and city health officials on climate change is the CDC’s Building Resilience Against Climate Effects (BRACE) grant program. George Luber, chief of the CDC’s climate and health program, considers it “cutting-edge thinking for public health.” He intends to expand it to all 50 states, but funding constraints have kept him from doing so.

Republicans in Congress have tried repeatedly to excise BRACE’s \$10 million budget, to no avail. Its average annual award for health departments has remained around \$200,000 for nearly a decade.

2014 to discuss the human health effects of heatwaves caused by climate change and the need for adaptation, stating “This is a threat that we should take seriously, the one that I think can engage us in decisions so that we’ll help make a better world.”<sup>24</sup>

- Appearing at or the 2017 climate change conference hosted by Al Gore in lieu of the original conference which was cancelled by CDC in February 2017. Dr. Lubber was not made available for comment by Bernadette Burden, a senior press officer with the CDC, despite media requests.<sup>25</sup>

While these activities did not engender retaliation under the last administration, the new administration has a well-known policy of denying the public health implications of climate change and preventing federal employees from speaking out about or working on climate-related issues.<sup>26</sup> This hostility towards climate scientists is evidenced in this case by the direction to Dr. Lubber to not even use the words “climate change,” a rhetorical

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<sup>24</sup> <http://theyearsproject.com/>

<sup>25</sup> Max Blau, *The CDC climate change conference, scrapped after the election, is being resurrected Thursday*, STAT NEWS (Feb. 14, 2017), <https://www.statnews.com/2017/02/15/cdc-climate-change-al-gore/>; see also Anne Polansky, *The Insanity of Self-Censorship: Climate Change, Politics, and Fear-Based Decision-Making*, GOV’T ACCOUNTABILITY PROJECT BLOG (Apr. 4, 2017), <https://www.whistleblower.org/blog/014604-insanity-self-censorship-climate-change-politics-and-fear-based-decision-making> (discussing how CDC’s “self-censorship” of climate scientists and “political interference in the communication of scientific findings crucial to informing policymakers and the public is literally a life-threatening act of betrayal against current and future generations”).

<sup>26</sup> See, e.g., Helena Bottemiller Evich, *Agriculture Department buries studies showing dangers of climate change*, POLITICO (June 23, 2019), <https://www.politico.com/story/2019/06/23/agriculture-department-climate-change-1376413> (USDA U.S. Global Change Research Program dropped “Global Change” from its name in November 2016 and sidelines scientific inquiry into climate change, resulting in departure of senior researchers); Robbie Gramer, *Trump’s Shadow War on Climate Science*, FOREIGN POLICY (July 31, 2019), <https://foreignpolicy.com/2019/07/31/trumps-shadow-war-on-climate-science-state-department-intelligence-analyst-resigns-white-house-muzzles-intelligence-assessment-climate-change-environment/> (State Department intelligence analyst resigns after warning that the White House is systematically suppressing science and objective analysis on how large a threat climate change is to national security).

chilling similar to the one at USDA where “[n]o one wanted to say climate change, you would say 'climate uncertainty' or you would say 'extreme events.' Or you would use whatever euphemism was available to not draw attention.”<sup>27</sup> Luber’s failure to comply with what he understood to be an unreasonable and potentially unlawful order engendered a retaliatory animus against him by the management of NCEH.

Therefore, Dr. Luber’s very public earlier work on the subject contributed to the agency’s motivation to retaliate against him as an act of self-censorship. The public statements made by Dr. Luber concerning climate change have been cited by outside observers as improper grounds on which he might be retaliated against by CDC. Laura Turner Seydel, an environmentalist who sits on the board of the Turner Foundation, a sponsor of the cancelled 2017 Al Gore climate meeting, stated that CDC scientists may be “scared by the wrath of Trump.”<sup>28</sup> Reporting on Ms. Seydel’s statements continued:

researchers like George Luber, an epidemiologist who’s participated in the global warming documentary series, *Years of Dangerously Living* [sic], might be deterred from speaking further about issues of climate and health. “George Luber had done a very good job of describing the problem,” Seydel said. “He’s been quiet for the past couple of years as he hangs in there like a loose tooth.”

These disclosures by Dr. Luber involved not only the ongoing threat posed by climate change, but how it was exacerbated by the diminished capacity of the Climate & Health Program to respond to it.

### 3. Diversion of Congressional Appropriations for Non-Climate Work (March 2018, May 2019)

The third disclosure was the misuse of agency funds specifically appropriated by Congress for climate change work at CDC, which, by being merged into the asthma unit, blurred the lines of appropriations in violation of the express will of Congress, and is both

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<sup>27</sup> Helena Bottemiller Evich, 'It feels like something out of a bad sci-fi movie', POLITICO (Aug. 5, 2019), <https://www.politico.com/story/2019/08/05/ziska-usda-climate-agriculture-trump-1445271>.

<sup>28</sup> Max Blau, *At a resurrected climate conference, concerns loom that CDC scientists may be silenced*, STAT NEWS (Feb. 16, 2017), <https://www.statnews.com/2017/02/16/climate-conference-cdc-scientists/>.

a violation of statute and “a gross waste of funds [and/or] an abuse of authority.” *Id.* This disclosure was made to the management officials and consultants organizing the merging of his program with the Asthma branch and to NCEH management including Director Breyse, who proposed Dr. Luber’s removal in October of 2018 and his suspension in July 2019. He also made this disclosure in May 2019 to the audience of the First Amendment Awards and to Congress.

4. Acceptance Speech for First Amendment Award (May 15, 2019)

The fourth disclosure was the address he delivered to the audience of the May 15, 2019 Hugh M. Hefner Foundation First Amendment Awards, in which he detailed the threats of climate change, the agency’s abuse of authority and unlawful prohibited personnel practices regarding his employment at CDC, and the CDC’s diminished capacity to respond to public health threats posed by climate change as a result of its management failures. *See Exhibit D; Section I(D) supra.*

5. Disclosures to Congress of Wrongdoing by NCEH Concerning Luber’s Personnel Case and environmental threats to public health and safety (May 2019)

Finally, Dr. Luber engaged in multiple disclosures to Congress protected under 5 U.S.C. § 7211 and by extension § 2302(b)(8) and § 2302(b)(12).<sup>29</sup> On May 16 and May 17 Dr. Luber met with representatives from the personal staff of Sen. Bernard Sanders, the minority staff of the Senate Budget Committee, the minority staff of the Senate Environment & Public Works Committee, the majority staff from the House Committee on Energy and Commerce, and the majority staff of the House Select Committee on the Climate Crisis, and on May 23 spoke by phone with Rep. Donna Shalala. In those meetings Dr. Luber discussed the history of the Climate & Health Program, its work prior to November 2016, the ways in which its work diminished and he was personally prevented from speaking from November 2016 through March of 2018, the diversion of

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<sup>29</sup> “The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.”

appropriations from climate work to unrelated work on asthma and indoor air pollution,

## **B. Dr. Luber's Proposed Removal and Treatment between March 2018 and July 2019 was Based on a Retaliatory Investigation**

Retaliatory motivation may be inferred from a variety of factors, including proximity in time between the employee's action and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, and disparate treatment of certain employees compared to other employees with similar work records. See *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001). Evidence of an employee's assertions of misconduct by a supervisor can bear upon whether the supervisor has a motivation to retaliate. *Fellhoelter v. Dep't of Agriculture*, 568 F.3d 965, 971 (Fed. Cir. 2009). "Those responsible for the agency's performance overall may well be motivated to retaliate even if they are not directly implicated by the disclosures, and even if they do not know the whistleblower personally, as the criticism reflects on them in their capacities as managers and employees." *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1370-717 (Fed. Cir. 2012) (citing *Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1322-23 (Fed. Cir. 1999); *Chambers v. Dep't of the Interior*, 116 M.S.P.R. 17, 55 (2011) (finding motive to retaliate because proposing and deciding officials were high level officials and the disclosures "reflected on both of them as representatives of the general institutional interests of the agency"); *Phillips v. Dep't of Transp.*, 113 M.S.P.R. 73, 83 (2010) (finding that comments generally critical of agency's leadership "would reflect poorly on" officials "responsible for monitoring the performance of the field staff and making sure that agency regulations are carried out correctly and consistently")). Since direct evidence of a proposing or deciding official's retaliatory motive is typically unavailable (because such motive is almost always denied), federal employees are entitled to rely on circumstantial evidence to prove a motive to retaliate. *McCarthy v. Int'l Boundary & Water Comm.*, 116 M.S.P.R. 594, 613 (2011) In this case, several factors provide circumstantial evidence of retaliatory motive.

While Dr. Luber's proposed removal is no longer a currently proposed action, it is relevant to demonstrate the retaliatory animus motivating NCEH and Director Patrick Breyse's personnel practices, as Breyse was the proposing official for both the proposed

removal and the July 3, 2019 proposed suspension currently pending. NCEH provided a list of the “troubling allegations” which necessitated Dr. Luber’s placement on administrative leave, involuntary reassignment, and proposed removal in the since-withdrawn notice of proposed removal. Several circumstances of Dr. Luber’s proposed removal suggest that it and subsequent personnel actions based on the same grounds were and are pretextual: 1) the long delay between the behavior cited in the NPR and the issuance of that proposal; 2) the agency’s marginalization of Dr. Luber before issuing his NPR, including the extreme measures of putting Dr. Luber on the BOLO list and searching his car, only to lead to an NPR alleging time card violations and participation in entirely legal and non-violent activities concerning climate change; 3) the delay between Dr. Luber’s detailing and the delivery of the NPR and subsequent proposed suspension; 4) the cursory nature of the analysis in the NPR and the proposed suspension;<sup>30</sup> and 5) its abrupt withdrawal under public scrutiny. The petty and demonstrably false charges were easily rebutted by Dr. Luber. Even if true, they are not of a nature to justify the treatment Dr. Luber received, including as a potentially violent threat who could not safely be allowed in his building and who might bring weapons to work; and cannot justify his removal from federal service.

First, courts have long recognized that conduct which is cited well after the employer was made aware of its occurrence is suggestive that the stated reason for a termination was pretextual. An agency’s “delay in addressing its alleged concerns undermines its claim that [the employee’s] behavior was unsafe or severe.” *Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Ath. Dep’t*, 510 F.3d 681, 692-93 (7th Cir. 2007). The agency’s “post hoc explanations, delay, exaggeration, and unusual conduct more than enough to create a question of fact concerning the legitimacy of its explanations.” *Id.* Here, the agency has relied on allegations of impropriety from as many as five years in the past, for which Dr. Luber was never cited, warned, or otherwise aware of. Their combined resurrection years after the fact suggests that the agency embarked on a fishing expedition for

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<sup>30</sup> See Exhibit B at 27-35 (discussion of whistleblower retaliation in response to proposed suspension).



wrongdoing to justify a wrongful termination.

Second, the agency marginalized and diminished Dr. Luber's role in public communications of CDC's mission long before it took the step of detailing him in response to the "troubling allegations" it claimed to have received in March 2018. Dr. Luber had been working diligently as the public face of CDC's research into threats to public health posed by climate change, with numerous public appearances detailed *supra* as well as outreach to universities to help design curricula to address the public health threats of climate change. His outreach to Yale was one of the specifications cited in his NPR. Despite his duty to engage with university researchers the climate change program collaborated with on studies, and his public role in communications about CDC's climate program, he was forbidden from speaking to the press and was not permitted to make any public statements after February 2017. This undermined the center's communications strategy, developed in concert with outside specialists after the 2015 GAO recommendation to improve public messaging as a key part of the agency's mission.<sup>31</sup> The agency's escalating attempts to silence Dr. Luber from February 2017 through his detailing clearly demonstrate the retaliatory nature of and impermissible political influence upon the personnel actions it took by detailing him and later proposing his removal.

Third, the long delay between his administrative leave, placement on the BOLO list at the office building his permanent office is in, detailing, and his eventual receipt of a demonstrably shallow proposed removal in 2018 and proposed suspension in 2019 is indicative that the agency had to search for every conceivable justification for his removal after it had already decided to remove him. This resulted first in a proposed removal which failed to include supporting evidence or a discussion of the factors identified in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), which was then withdrawn, and another seven month delay before the agency served him with a proposed

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<sup>31</sup> GOV'T ACCOUNTABILITY OFFICE, HHS COULD TAKE FURTHER STEPS TO ENHANCE UNDERSTANDING OF PUBLIC HEALTH RISKS, GAO-16-122, at 24-25 n.49 (Oct. 2015) (specifically citing Dr. Luber's work on the National Climate Assessment as the kind of communicating through reporting and outreach which should be expanded upon).

suspension in July 2019.

Finally, there is clear evidence that the ongoing investigation which led to both the 2018 and the 2019 proposed disciplinary actions was retaliatory in nature. The inciting piece of evidence the agency based the opening of its investigation on and which led to Dr. Lubber's placement on administrative leave in March 2018 was an email sent Friday, March 16, 2018 at 5:05 PM from Caroline St. Louis, to John Decker, John Tibbs, and Mattie Gilliam, who subsequently led the investigation to find cause for Dr. Lubber's removal. That email opened:

Recently, the Ethics and Compliance Activity was notified of alleged violations of the standards of conduct by George Lubber, an ONDIEH/ NCEH employee and your subordinate. Mr. Lubber, is alleged to have acted inappropriately in his official capacity. Specifically, this office received a complaint alleging that Mr. Lubber engaged in an outside activity without prior approval and directed a subordinate employee to use official time and resources for a non-Government purpose.<sup>32</sup>

This email, which referenced a report about wrongdoing connected with publication of a book 3 years prior, and which Dr. Lubber had worked on 4 to 6 years earlier, came at the end of the day on a Friday, just days after Dr. Lubber had taken over leadership of the newly formed Asthma and Community Health Branch and began raising objections to the way the climate program's appropriations were being blended with the former Asthma branch. The book in question was one which he had received ethical clearance to work on in 2012.<sup>33</sup>

Retaliation may be demonstrated by the existence of a retaliatory investigation as established in the MSPB's decision in *Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 323-25 (1997), which held that "[w]hen . . . an investigation is so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate, and the agency does not show by clear and convincing evidence that the evidence would have been gathered absent the protected disclosure, then the appellant [whistleblower] will prevail on his affirmative defense of retaliation for whistleblowing." *Id.* at 324. The Office of

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<sup>32</sup> CDC Evidence File for Charge 3 at 5, Doc. 2.

<sup>33</sup> CDC Evidence File for Charge 3 at 16, Doc. 4.

Special Counsel has added that “[r]etaliatory investigations can take many forms, such as unwarranted referrals for criminal or civil investigations or overly scrutinized reviews of time and attendance records.”<sup>34</sup> In both proposed actions, CDC based charges for falsifying timesheets solely on matching up the dates of his course syllabus to the days he took annual leave. It did not bother to verify whether the classes on the syllabus were actually taught, and several charges which appeared in the 2018 proposed removal but not the 2019 proposed suspension were easily disproven.

The evidence files prepared by CDC for the 2019 Proposed Suspension also demonstrate that all of Dr. Luber’s former subordinates who provided testimony or evidence against him did so in response to direct requests by NCEH to find any evidence that could plausibly support any disciplinary charge against him: the very model of a retaliatory investigation. In Kathryn Conlon’s March 22, 2018 email to Mattie Gilliam and John Tibbs delivering such evidence, she opens “Per our discussion yesterday morning, I looked into my emails and files about requests from George to give lectures in his Emory class(es).”<sup>35</sup> She concluded “I think this is what you needed,” referencing her superiors’ request for incriminating information about Dr. Luber. *Id.* The retaliatory nature of this investigation can also be inferred from the pay raises, promotions, or fellowship extensions which were granted to former subordinates who agreed to testify against him.<sup>36</sup>

Perhaps most tellingly, in one of the unsigned affidavits prepared in evidence against Dr. Luber, Kathryn Conlon supposedly stated that “**There's a culture of NCEH protecting itself.** When it comes down to it, people knew about George's inappropriate behavior and it was ignored. **I don't have a lot of faith in this system.**”<sup>37</sup> While this

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<sup>34</sup> CAROLYN N. LERNER & JASON M. ZUCKERMAN, THE U.S. OFFICE OF SPECIAL COUNSEL’S ROLE IN PROTECTING WHISTLEBLOWERS AND SERVING AS A SAFE CHANNEL FOR GOVERNMENT EMPLOYEES TO DISCLOSE WRONGDOING at 6 (2014), [https://osc.gov/Resources/OSC's%20Role%20in%20Protecting%20Whistleblowers%20\(5-19-14\).pdf](https://osc.gov/Resources/OSC's%20Role%20in%20Protecting%20Whistleblowers%20(5-19-14).pdf).

<sup>35</sup> Evidence for Charge 4, doc 5 at 42

<sup>36</sup> Saha, Evidence for Charge 4 at 106, 99. Conlon, March 23, 2018, Evidence for Charge 5, Doc 6 at 19

<sup>37</sup> Evidence for Charge 4 at 51 (emphasis added).

statement was made in regards to Dr. Lubber's alleged inappropriate behavior, it is telling that not only was this behavior not charged, but Dr. Lubber has become a victim of the "culture of NCEH protecting itself." As the U.S. EEOC has recognized in the employment discrimination context, where "evidence of wrongdoing was not simply unearthed during an investigation [ . . . ], but was deliberately sought to retaliate against [an employee] and to discourage similar charges" a reviewing court or official should limit the applicability of that evidence.<sup>38</sup> Use of an illegal retaliatory investigation to gather evidence colors how an adjudicator should consider that evidence, and "[a]n employer who chooses to wage a retaliatory investigation must lose the advantage of equities that would, absent the retaliation, favor that employer."

If Dr. Lubber's alleged misconduct was so widely known, it should be explained by the proposing official why no action was taken to provide guidance or training on any misconduct during the six years that this proposal spans before escalating immediately to proposing his removal in October 2018 and now proceeding with a request for a very substantial suspension more than seven months later. The evidence presented by the proposing official should also be viewed as highly suspect due to the nature of the underlying investigation and the motive for retaliation against Dr. Lubber by the proposing official due to Dr. Lubber's reporting of the proposing official's wrongdoing to Congress in the intervening period.

### **C. CDC's July 2019 Notice of Proposed Suspension was Retaliatory**

On July 2, 2019, Dr. Lubber was ordered to appear at the NCEH facility, which he was otherwise barred from entering on security grounds. When he arrived on July 3, 2019, he was personally given a hardcopy of a Notice of Proposed Disciplinary Action which sought a 120-day suspension on similar grounds to the prior Notice of Proposed Removal,

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<sup>38</sup> EEOC Notice 915.002 (Dec. 14, 1995), <https://www.eeoc.gov/policy/docs/mckennon.html>.

attached as Exhibit F.<sup>39</sup> The Notice contained 5 charges:

1. Absence Without Leave: 15 specifications
2. Submitting Time/ Attendance Records with Inaccurate Information: 15 specifications
3. Failure to Obtain Prior Approval to Engage in Outside Employment Activities: 3 specifications
4. Misuse of Position – Creating the appearance of a Conflict of Interest: 3 specifications
5. Misuse of Official Time: 2 specifications

The charges were largely recycled from the charges which had been withdrawn in December of 2018 under public scrutiny. The few modifications did not cure the proposed disciplinary action's retaliatory nature, but added new charges based on evidence compiled as part of a retaliatory investigation conducted as a punitive response to Dr. Luber's whistleblowing activity.

The only substantive change was a diminution from "*Falsification of Time/ Attendance Records*" in 2018 to "*Submitting Time/ Attendance Records with Inaccurate Information*" in 2019. (emphasis added). The alleged *mens rea* was diminished from "knowingly false, with intent to mislead" to "knew or should have known" for Dr. Luber's violation of timekeeping policies. To make up for this lessened severity regarding the first charge, CDC added a second charge with 15 counts of "Absent Without Leave" ("AWOL"), based on the same alleged conduct – teaching classes at Emory University, an activity that was known to and approved by the CDC. These first two charges also share the same 778 page evidence file, which does not delineate between which evidence is presented to establish facts necessary to which charge. These charges are based entirely on a reading of Dr. Luber's Emory course syllabi. A full discussion of these and the remaining charges and their retaliatory nature appears in Exhibit B, Dr. Luber's response

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<sup>39</sup> The evidence files prepared by Dr. Breyse in support of his Proposal and the exhibits to Dr. Luber's Response are exceptionally voluminous and have been provided to OSC separately from this document.

to the proposed suspension and its associated exhibits.

The third charge related to Dr. Luber's alleged failure to obtain prior ethics approval for a book two books, GLOBAL CLIMATE CHANGE AND HUMAN HEALTH: FROM SCIENCE TO PRACTICE (2015), and FOUNDATIONS OF GLOBAL HEALTH (2018), and to teach a seminar at Emory University between January 15, 2018 and April 30, 2018, allegedly in violation of 5 C.F.R. § 5501.106(d). As a part of CDC's evidence file it included what appears to be the ethics approval Dr. Luber had obtained for the 2015 volume, however the image quality of the pdf provided by CDC is so poor as to be totally illegible in many critical places, including several highlighted by the agency in yellow. The paucity of evidence is striking given that the agency submitted 552 pages of evidence for Charge 3, 504 pages of which are reproductions of ethics training slideshows from the last decade. At most, Dr. Luber is alleged to have failed to renew his annual ethics documentation for his work on these books. This is a farcical charge considering the agency's admissions that it simply lost Dr. Luber's ethics approval for the Emory course he taught in September 2015 which underlies the first specification of charges 1 and 2.

The supporting evidence for the fourth and fifth charges presented against Dr. Luber is lacking in substance and much of it would be inadmissible before any court or the MSPB<sup>40</sup> due to the overwhelming quantity of irrelevant and prejudicial content, including unsubstantiated nebulous accusations of drug and alcohol abuse, "racist" and "sexist jokes," and other personal attacks that are unrelated to the charged conduct and more easily understandable as character assassination.<sup>41</sup> Charge 4, regarding alleged misuse of

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<sup>40</sup> While the MSPB does permit the introduction of hearsay evidence that would be excluded under the Federal Rules of Evidence, relevance remains a requirement for admissibility.

<sup>41</sup> See, e.g. Charge 4 Evidence File, Document 6, *Adena Wright, sworn statement dated April 17, 2019*. This document, which purports to summarize "to the best of my recollection" an interview conducted more than two months prior on Feb. 12, 2019 with Kathryn Conlon, is used as a delivery vehicle for introduction of an unsigned and undated affidavit credited to the interviewee, labelled "Sworn Statement of Kathryn Conlon (*Unsigned Draft*)" (emphasis added). It does not contain a transcript of the discussion, complies with none of the formality requirements for affidavits or affirmations in GA Code § 24-9-902 or any other known requirements, and suggests improper practices for preservation of evidence

position, implies that Dr. Luber pressured subordinates to give guest lectures in his courses, but does not even provide a rule or provision of the Code of Federal Regulations or CDC policy which Dr. Luber is alleged to have violated. Dr. Luber responds that he did nothing improper but provided professional development opportunities for his subordinates at their requests. Charge 5 claims that Dr. Luber encouraged subordinates to use official time to work on a Yale University course and a book chapter, even though that work was not part of their official duties. Dr. Luber asserts that the work was entirely appropriate and part of these employees' official duties.

The ugliness and personal nature of these charges are strong evidence of retaliatory animus, in addition to a causal link between the charges and silencing an employee whose job duties were politically unpopular.

CDC's discussion of Dr. Luber's conduct in its evaluation of the *Douglas* factors which inform the reasonableness of a proposed disciplinary action is also troubling. The agency argues that the negative notoriety the CDC has received is as a result of "his own contacts with the press," explicitly citing a column by Karen Tumulty in the WASHINGTON POST titled *The administration tried to muzzle this scientist on climate change. But he won't go away*,<sup>42</sup> in its evaluation of *Douglas* factor 8.<sup>43</sup> First, this allegation is factually incorrect: Dr. Luber was not consulted by Tumulty in her preparation of the article and his quotes were taken from a public speech. Second, the speech was delivered while receiving the Hugh M. Hefner Foundation's First Amendment Award *in recognition of* his protected disclosures to the same management team that now seeks to suspend him. This is explicitly retaliatory.

The *Douglas* Factor discussion also is used as a backdoor for Director Breyse to include a large quantity of highly prejudicial and irrelevant material that alleges Dr. Luber had a poor character, as detailed below. The *Douglas* evaluation does not require specific

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or testimony. Similar concerns are repeated for *every witness statement* submitted by CDC in this matter.

<sup>42</sup> (May 22, 2019), [https://www.washingtonpost.com/opinions/the-administration-tried-to-muzzle-this-scientist-on-climate-change-but-he-wont-go-away/2019/05/22/66b0b684-7bd8-11e9-a5b3-34f3edf1351e\\_story.html](https://www.washingtonpost.com/opinions/the-administration-tried-to-muzzle-this-scientist-on-climate-change-but-he-wont-go-away/2019/05/22/66b0b684-7bd8-11e9-a5b3-34f3edf1351e_story.html)

<sup>43</sup> Exhibit F at 9.

evidentiary support, as it is just an analytical exercise to demonstrate that the factors were “considered” by the proposing official, so it is an improper vehicle to introduce what in effect are new charges against Dr. Luber. Furthermore, the line at the bottom of each evaluation checklist reads “I hereby certify that I have considered the twelve (12) Douglas factors as indicated above (with my initial next to each factor) in making my penalty determination.” None of the five Douglas Factor checklists were signed or initialed as they were supposed to be.

The claim under factor 4 that “it has been reported that he has made derogatory comments about women to the staff, disparaged employees in the presence of others, and generally engaged in abusive conduct toward subordinates” does not cite to any specific supporting evidence and is otherwise unsupported. If there were sufficient supporting evidence, then Director Breysse would have included a charge related to such misconduct, specifically “conduct unbecoming a federal employee” which would cover this kind of alleged misconduct. Including it in the *Douglas* checklist allows the Proposal to make this kind of inflammatory claim without having to provide legally sufficient (or any) proof, and forces Dr. Luber into having to prove a negative, i.e. that he did not engage in conduct about which no specifics are provided.

### **THE OFFICE OF SPECIAL COUNSEL SHOULD IMPOSE A STAY OF THE PROHIBITED PERSONNEL PRACTICES ALLEGED BY THIS COMPLAINT**

In his August 8, 2019 response to the proposed suspension, Dr. Luber includes specific discussion of the charges and why they are pretexts for retaliation, and asks that the deciding official, Ms. Shaunette Crawford, to refrain from making a decision on the proposal until the Office of Special Counsel had an opportunity to review this Complaint and determine whether it would issue a stay. Pursuant to the Office of Special Counsel’s Policy on Stays of Personnel Actions, petitioner George Luber, by and through undersigned counsel, hereby requests a stay of the following actions until a final decision is made regarding his employment: (1) his proposed suspension from employment, (2) the restriction on his ability to speak with members of the media and the public in his official



capacity, and (3) his involuntary reassignment to duties unrelated to his official position as a Supervisory Health Scientist.

OSC may request that an agency stay a personnel action against an employee when (1) OSC has reasonable grounds to believe the agency took, or will take, a personnel action constituting a prohibited personnel practice; and (2) absent a stay, the employee will be subjected to immediate and substantial harm.<sup>44</sup> Evidence of CDC's retaliatory motive thus far indicates the high likelihood of imminent and substantial harm by Dr. Luber's suspension, and Dr. Luber suffers ongoing harm by involuntary reassignment and restriction from making public comments in his official capacity. These practices have resulted in and continue to cause his official exclusion from academic developments related to climate change and public health, his inability to publish within his field, and psychological harms from the anxiety caused by knowledge that any day could be his final as a federal employee.

The evidence detailed above is sufficient for OSC to find reasonable grounds to believe that a prohibited personnel practice has been committed "on the basis of preliminary information." Accordingly, since - absent a stay - Dr. Luber will be subjected to immediate and substantial harm, OSC should request that CDC stay the pending decision on his proposed suspension and other professional restrictions while OSC investigates this matter further.

[signature and exhibit list on next page]

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<sup>44</sup> U.S. Office of Special Counsel's Policy Statement on Stays of Personnel Actions, available at: <https://osc.gov/Resources/2015%20IPD%20Policy%20Statement%20Stays.pdf>. OSC defines "reasonable grounds" as "sufficient evidence for a reasonable person, with the same information and knowledge of the applicable law, to believe that a prohibited personnel practice has been or will be committed." Because a stay is designed to provide OSC with time to conduct an investigation, OSC may request such a stay "on the basis of preliminary information." OSC "will promptly review the file" and will inform the complainant of its decision "as soon as practicable."

Respectfully Submitted,

Aug. 16, 2019



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Attached Exhibits:

- A. Detail Performance Review Ticket (August 2019)
- B. Response to Proposed Suspension (August 2019)
- C. Letter from Counsel notifying CDC of Representation (January 2019)
- D. Dr. Luber's Written Comments at the First Amendment Awards (May 15, 2019)
- E. Oversight Letter from House Energy Committee (July 2019)
- F. Proposal to Suspend (July 2019)
- G. Proposed Removal (October 2018)
- H. Response to Proposed Removal (November 2018)

Further evidence and exhibits supporting Exhibit B and Exhibit F have been delivered to OSC by alternate file transfer services due to their exceptional volume.