Nos. 14-cv-101, 14-cv-126

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Competitive Enterprise Institute, *et al.*,

Appellants,

v.

Michael E. Mann,

Appellee.

On Appeal from the Superior Court of the District of Columbia,
Civil Division, No. 2012 CA 008263 B
(The Honorable Natalia Combs Greene & Frederick Weisberg)

Brief of Appellants
Competitive Enterprise Institute and Rand Simberg

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RULE 28(a)(2) DISCLOSURE

The parties in the trial and appellate proceedings, and their respective counsel, are:

Plaintiff–Appellee Michael Mann, represented by John B. Williams of Williams Lopatto PLLC and Peter J. Fontaine and Catherine Rosato Reilly of Cozen O'Connor;

Defendants–Appellants Competitive Enterprise Institute and Rand Simberg, represented by David B. Rivkin, Jr., Mark I. Bailen, and Andrew M. Grossman of BakerHostetler LLP;

Defendant–Appellant National Review, Inc., represented by Michael A. Carvin and Anthony J. Dick of Jones Day;

Defendant Mark Steyn, represented by Michael J. Songer of Crowell & Moring LLP and Daniel J. Kornstein and Mark Platt of Kornstein Viesz Wexler & Pollard LLP;

Amicus Curiae District of Columbia, represented by Irvin B. Nathan, Attorney General for the District of Columbia; Ariel B. Levinson-Waldman, Senior Counsel to the Attorney General; Todd S. Kim, Solicitor General; and Loren L. Alikhan, Deputy Solicitor General;

Amici Curiae Reporters Committee for Freedom of the Press, Advance Publicans, Inc., Allbritton Communications Company, American Society of News Editors, Association of Alternative Newsmedia, Association of American Publishers, Inc., Dow Jones & Company, Inc., First Amendment Coalition, Freedom of the Press Foundation, Gannett Co., Inc., Investigative Reporting Workshop, McClatchy Company, MediaNews Group, Inc., National Press Club, National Press Photographers Association, National Public Radio, Inc., NBCUniversal Media, LLC, New York Times Company, News Corporation, Newspaper Association of America, North Jersey Media Group Inc., Online News Association, Politico LLC, Reuters, Seattle Times Company, Society of Professional Journalists, Student Press Law Center, Time Inc., and WP Company LLC (d/b/a The Washington Post), represented by Gregg P. Leslie and Cynthia A. Gierhart of the Reporters Committee for Freedom of the Press; and

Amicus Curiae American Civil Liberties Union of the Nation's Capital, represented by Arthur Spitzer of American Civil Liberties Union of the Nation's Capital.

Defendant–Appellant Competitive Enterprise Institute discloses that it has no parent corporation or subsidiaries and that no publicly held corporation owns more than 10 percent of its stock.

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INTRODUCTION

This case implicates nothing less than the District of Columbia's commitment to "the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" and public figures. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also Curtis Publishing Co. v. Butts*, 388 US 130, 155 (1967). Few debates are more consequential than that over the public-policy response to climate change. And underlying that debate is a scientific question: whether the Twentieth Century experienced anomalous warming, suggesting worse to come absent enormous reductions in greenhouse gas emissions, or whether it was within the range of normal, historical variation in temperature, suggesting that expensive remedial measures may cause more harm than good. Plaintiff Michael Mann asserts his research reconstructing historical temperatures from measurements of tree rings, ice cores, and the like puts that question to rest and makes the case for immediate and aggressive action. Many disagree, arguing that his and other climate scientists' statistical models are biased in favor of the catastrophic view. That criticism received substantial support from the "Climategate" scandal, which disclosed emails showing that Dr. Mann and other climate scientists used techniques that exaggerated the threat of global warming—including, most notoriously, a statistical "trick" devised by Dr. Mann to "hide the decline" in temperatures—and sought to blackball dissenting views within their field. Frustrated by Climategate's impact on the climate change debate, Dr. Mann's brought this lawsuit to, in his own words, "fight back against the attacks" by "groups seeking to discredit the case for concern over climate change."

Dr. Mann's lawsuit is premised on a fundamental misunderstanding of the nature of scientific progress and a misapplication of decades of constitutional and common law. He argues

that, because his research has supposedly been "exonerated" by the government, any vigorous challenge to it is false and defamatory. But that's not how science or the First Amendment works. Scientific progress depends on skepticism, the willingness to challenge received wisdom in search of truth. Likewise, "the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies." *Dennis v. United States*, 341 U.S. 494, 503 (1951). Thus, our progress depends on the free exchange of ideas, especially those ideas that may be unpopular or buck the "consensus" view. Mann's belief that once a "consensus" has been reached, or a view has been endorsed by the government, any disagreement with it is an illegitimate attack unworthy of First Amendment protection contradicts the history of scientific progress from the ancient Greeks to the present and our Nation's deeply held commitment to free expression as the means of achieving that progress.

Dr. Mann may be sincere in his calls for urgent political action to limit greenhouse gas emissions and his warnings that failure to act may spell catastrophe. But "[f]ear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears." *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). Or where those fears are rational, to confirm them. In the American system, speech is how we distinguish between the two. The Court should reaffirm that principle and dismiss this case.

ISSUES PRESENTED FOR REVIEW

1. Whether denial of a special motion to dismiss pursuant to the D.C. Anti-SLAPP Act, D.C. Code § 16-5502(b), is immediately appealable under the collateral-order doctrine.

2. Whether the challenged statements are actionable as libel or intentional infliction of emotional distress consistent with the First Amendment to the U.S. Constitution and the fair-comment privilege under District of Columbia law.

3. Whether hyperlinking to an allegedly defamatory statement, without repeating the statement, satisfies the "publication" requirement for libel.

4. Whether the Plaintiff has carried his burden to show that he is likely to succeed in proving, by clear and convincing evidence, that the Think Tank Defendants published the challenged statements with either subjective knowledge of the statements' falsity or reckless disregard for whether or not the statements were false.

STATEMENT OF THE CASE

On October 22, 2012, Dr. Mann filed this action for defamation and intentional infliction of emotional distress against the Competitive Enterprise Institute and its adjunct scholar Rand Simberg (the "Think Tank Defendants"), as well as National Review, Inc., and its writer Mark Steyn (the "Media Defendants"). He alleged that Defendants defamed and inflicted emotional distress on him in online commentary criticizing Penn State's failure to seriously investigate his research in the wake of the Climategate scandal. Both sets of Defendants moved to dismiss Mann's claims under the D.C. Anti-SLAPP Act and Rule 12(b)(6). While those motions were pending, Mann successfully moved to amend his complaint to retract his assertion that he is a Nobel Prize recipient and to add an additional claim alleging that the rhetorical quip "Mann could be said to be the Jerry Sandusky of climate science" was also defamatory.

On July 19, 2013, the Superior Court (Judge Natalia Combs Greene) denied Defendants' motions to dismiss in two substantially similar orders, one per each set of Defendants. Both sets of Defendants moved the court to reconsider and also to dismiss the additional claim added by

amendment. Judge Combs Greene denied both motions for reconsideration, with scant or (in the Think Tank Defendants' case) no reasoning.

Defendants, meanwhile, had appealed the Superior Court's denial of their anti-SLAPP motions. This Court consolidated the appeals and requested briefing on its jurisdiction under the collateral-order doctrine. That issue was addressed in briefing by all parties, as well as by three sets of *amici curiae* urging the Court to recognize collateral-order jurisdiction over interlocutory appeals of orders denying anti-SLAPP motions: the District of Columbia, the American Civil Liberties Union, and a coalition of the Reporters Committee for Freedom of the Press and 19 other media organizations. The Court, however, never reached the jurisdictional issue, instead dismissing the appeals without prejudice for mootness, in light of the still-pending motions to dismiss the amended complaint.

On remand, Judge Frederick Weisberg, who had taken over the case, denied those motions in a January 22, 2014 order adopting the reasoning of the Superior Court's previous orders. The Think Tank Defendants filed a notice of appeal on January 24, and National Review followed suit on January 30. This Court consolidated the appeals and requested briefing on its jurisdiction, and all parties, as well as the same three groups of *amici* supporting Appellants, again briefed the issue. On June 26, the Court ordered the parties to proceed to merits briefing.

FACTUAL BACKGROUND

A. Mann's "Hockey Stick" Research Sparks Controversy Over His Statistical Methods

Like the climate itself, scientific understanding of changes in the climate is dynamic, and it has regularly shifted in response to new research and theories. In an 1824 paper, the physicist Joseph Fourier argued that atmospheric gases could cause warming of the atmosphere. Over the next two centuries, scientists speculated that variations in atmospheric levels of carbon dioxide

could explain, to varying degrees, variation in climate, but their work achieved little consensus and received little notice.[1] By the mid-1970s, scientific support began to grow for the theory of global cooling. A 1975 *Newsweek* article, "The Cooling World," reported on research by climatologists and the government showing substantial declines in global temperatures that "may portend a drastic decline in food production—with serious political implications for just about every nation on Earth." Scientists were "pessimistic that political leaders will take any positive action to compensate for the climatic change, or even to allay its effects."[2]

Attention shifted to global warming in the 1980s. Political and scientific concern prompted the United Nations Environment Programme and the World Meteorological Organization to establish the Intergovernmental Panel on Climate Change ("IPCC") to review and report on the issue. Its first report, published in 1990, was inconclusive, stating that scientists "do not understand" prior instances of warming and therefore could not "attribute a specific proportion of the recent, smaller warming to an increase of greenhouse gases."[3] Moreover, data in the report showed that any recent warming was well within historical norms and, indeed, far less severe than the elevated temperatures of the Medieval Warm Period, from the 10th through the 13th centuries.[4]

That was the impression that Dr. Mann's "hockey stick" diagram sought to dispel. In a 1998 paper, Mann and two colleagues pieced together a dataset of dozens of proxies for historical temperature—things like tree rings, ice cores, pinecone dimensions, and coral growth—in an

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[1] *See generally* A.W. Montford, The Hockey Stick Illusion 19–40 (2010).

[2] Peter Gwynne, The Cooling World, Newsweek, Apr. 28, 1975, at 64.

[3] Working Group 1, Climate Change: The IPCC Scientific Assessment 199 (J.T. Houghton et al. eds., 2nd ed. 1991).

[4] *Id.* at 202.

attempt to reconstruct global temperature patterns from 1400 to the present. When combined with more recent temperature measurement data from about 1900 on, their statistical reconstruction of global temperatures over time showed little variation until 1900 and a sharp upswing thereafter—the iconic "hockey stick."[5] A 1999 paper by Mann and his colleagues extended their reconstruction back another 400 years, to 1000 A.D. Based on this research, they concluded that the 1990s were the warmest decade going back a millennium and that recent warming was, in fact, anomalous.[6] Mann's research and conclusions gained increased prominence when the "hockey stick" diagram was published on the cover of the World Meteorological Organization's 1999 Statement of Status of Global Climate and when it was prominently featured in the IPCC's 2001 report, of which Mann was a "lead author."[7]

Since publication of the 1998 paper, Mann's statistical methods and assumptions in piecing together the temperature record have drawn extensive criticism and controversy. In 1998, for example, climatologists expressed their concerns that reconstruction of the temperature record through proxies would never be "totally convincing" and that it may not be "valid simply to extend the proxy record by adding the last 150 years of thermometer measurements to it," which "would be a bit like juxtaposing apples and oranges."[8] And in a 2005 paper that attracted signifi-

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[5] Michael E. Mann, Raymond S. Bradley, & Malcolm K. Hughes, Global-Scale Temperature Patterns and Climate Forcing Over the Past Six Centuries, Nature Apr. 23, 1998, at 779, available at http://www.meteo.psu.edu/holocene/public_html/shared/articles/mbh98.pdf.

[6] Michael E. Mann, Raymond S. Bradley, & Malcolm K. Hughes, Northern Hemisphere Temperatures During the Past Millennium: Inferences, Uncertainties, and Limitations, Geophysical Research Letters, Mar. 15, 1999, at 759, available at http://www.ltrr.arizona.edu/webhome/aprilc/data/my%20stuff/MBH1999.pdf.

[7] World Meteorological Organization, WMO Statement on the Status of the Global Climate in 1999, WMO No. 913; IPCC, Climate Change 2001: The Scientific Basis 3 (2001).

[8] William Stevens, New Evidence Finds This Is Warmest Century in 600 Years, N.Y. Times, Apr. 28, 1998.

cant attention, Stephen McIntyre and Ross McKitrick demonstrated that Mann's 1998 research employed a statistical method that would, no matter the input data, result in a hockey stick-shaped graph—a point that Mann eventually conceded after initially dismissing it as politically motivated.[9]

These criticisms, in turn, prompted the House Committee on Energy and Commerce to commission reviews of Mann's "hockey stick" research by a team of academic statisticians led by Edward Wegman and by the National Research Council ("NRC"). Both identified significant shortcomings in Mann's "hockey stick" papers. Wegman's report found McIntyre and McKitrick's criticisms "to be valid and compelling" and flatly concluded that "Mann's assessments that the decade of the 1990s was the hottest decade of the millennium and that 1998 was the hottest year of the millennium cannot be supported by his analysis."[10] The NRC Report, while supporting aspects of Mann's research relating to recent temperatures, found that "[l]ess confidence can be placed in large-scale surface temperature reconstructions for the period from A.D. 900 to 1600" and that "[v]ery little confidence can be assigned to statements concerning the hemispheric mean or global mean surface temperature prior to about A.D. 900."[11] Overall, it found Mann's conclusions to be "plausible" but cautioned that there were many uncertainties and therefore room for disagreement and need for further research and analysis.[12]

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[9] Antonio Regalado, Face-Off About Validity Of 'Hockey Stick' Roils Global-Warming Debate, Wall St. J., Feb. 15, 2005, at A1 (reporting that Mann "agree[s] that his mathematical method tends to find hockey-stick shapes").

[10] Edward J. Wegman, David W. Scott, Yasmin H. Said, Ad Hoc Committee Report on the 'Hockey Stick' Global Climate Reconstruction, Science & Public Policy Institute 4–5 (2006), available at http://scienceandpublicpolicy.org/images/stories/papers/reprint/ad_hoc_report.pdf.

[11] National Research Council of The National Academies, Surface Temperature Reconstructions for the Last 2,000 Years, The National Academies Press 3 (2006), available at http://www.uoguelph.ca/~rmckitri/research/NRCreport.pdf.

[12] *Id.* at 4.

These criticisms continue to the present day in the academic literature. In a 2011 paper published in the *Annals of Applied Statistics* (a peer-reviewed journal), Blakeley McShane (Northwestern University) and Abraham Wyner (University of Pennsylvania) confirmed McIntyre and McKitrick's claims that Mann's statistical methods assume the hockey-stick result and that his temperature proxy data perform worse at temperature estimation than "fake" data run through similar methodologies. Their conclusion: "the long flat handle of the hockey stick is best understood to be a feature of regression [i.e., a product of Mann's statistical methodology] and less a reflection of our knowledge of the truth."[13] "Climate scientists," they say, "have greatly underestimated the uncertainty of proxy-based reconstructions and hence have been overconfident in their models."[14] They lament "that there are very few mainstream statisticians working on climate reconstructions" and identify Wegman's report as the only published "collaboration with university-level, professional statisticians" on temperature reconstructions prior to their own.[15]

B. Climategate Raises Further Questions Regarding Mann's Research

The controversy over Dr. Mann's research was inflamed by Climategate, in which an unknown person or persons obtained and publicly disseminated approximately 1,000 emails and thousands of other documents taken from a server at the Climatic Research Unit ("CRU") of the University of East Anglia ("UEA"). The leak was not at all flattering to the climate scientists whose private communications had been made public, including Mann.

The most notorious of the leaked documents was a 1999 email by UEA climate researcher Phil Jones in which he states, "I've just completed Mike's [i.e., Mann's] Nature trick of add-

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[13] Blakeley B. McShane and Abraham J. Wyner, A Statistical Analysis of Multiple Temperature Proxies: Are Reconstructions of Surface Temperatures Over the Last 1000 Years Reliable?, 5 Annals of Applied Statistics, no. 1, 2011, at 39.

[14] *Id.* at 40.

[15] *Id.* at 6, 39.

ing in the real temps to each series for the last 20 years (ie from 1981 onwards) amd [sic] from 1961 for Keith's to hide the decline."[16] Critics seized on this disclosure as further confirmation that mainstream climate scientists had chosen statistical methods that matched and reinforced their preconceived notion that the world was quickly warming. As explained in UEA's Independent Climate Change E-mails Review ("ICCER"), the "decline" is the gulf between reconstructed temperature estimates (such as those made by Mann) and more recent instrumental temperature data (e.g., thermometer measurements) that made it difficult to splice together the two types of data into a single diagram like the "hockey stick."[17] The "decline" could be interpreted to suggest either that temperatures had been higher in the past than indicated by the reconstructed estimates (and thus that any modern warming was routine, not anomalous) or that recent instrumental measurements were artificially high, as a result of increased urbanization (which traps heat and so skews measurements) or other phenomena. In either case, the "decline" undermines the case for catastrophic global warming.[18] The revelation that Dr. Mann and others had attempted to "hide" it by use of a statistical "trick" therefore appeared to confirm the earlier criticisms of Mann's "hockey stick" research, particularly that its statistical methods are biased to accentuate recent warming.

Another of the leaked emails, by Mann in response to several criticisms of his data, states that one of his critics "definitely overstates any singular confidence I have in my own (Mann et

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[16] Email from Phil Jones to Michael Mann, et al., Nov. 16, 1999, reproduced at Steve McIntyre, Climate Audit, JA 218–19.

[17] Sir Muir Russell, et al., The Independent Climate Change E-mails Review 59–60 (2010), available at http://www.cce-review.org/pdf/FINAL%20REPORT.pdf.

[18] *See generally* A.W. Montford, Hiding the Decline 83–93 (2012); Sir Muir Russell, Geoffrey Boulton, Peter Clarke, David Eyton, James Norton, The Independent Climate Change E-mails Review 60 (2010).

al.) series"—in other words, that Mann himself is not confident of his own reconstructed data.[19] Yet despite this uncertainty, in a third email Mann proposes that he and others "encourage our colleagues in the climate research community to no longer submit to, or cite papers in, this journal [*Climate Research*]," because it had published research that questioned his "hockey stick" conclusions.[20] In another email, UEA's Jones asked Mann to "delete any emails you may have had with Keith re [the IPCC's Fourth Assessment Report]" so as to stymie freedom of information requests for their communications and data.[21] These and many other emails revealed how leading climate scientists rejected out of hand any criticisms of their research, sought to hinder critical analyses of their research by limiting access to their data and models, and plotted to suppress research that would undermine the case for catastrophic warming.

C. Post-Climategate Investigations, Including Penn State's, Decline To Address Mann's Research

The Competitive Enterprise Institute played a leading role in analyzing the leaked emails and explaining their significance to policymakers and the public. It also led the charge for hearings and investigations into the disclosures, on the basis not only that there may have been outright scientific misconduct, but also that it was important, for public policy reasons, to determine whether the research at issue was biased or had been oversold.[22]

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[19] John P. Costella, Why Climategate Is So Distressing to Scientists, in Climategate Analysis 17 (2010), http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/26866.pdf.

[20] Juliet Eilperin, Stolen E-Mails Illustrate Venomous Feelings Beneath Climate Change Debate, Wash. Post., Nov. 22, 2009.

[21] Frank Warner, Penn State Scientist in Hot Seat over E-mails, Morning Call (Allentown, PA), Nov. 25, 2009.

[22] *See, e.g.*, Matt Patterson, Climategate Proves Scientists Are – Gasp! – Human (Dec. 11, 2011), http://cei.org/op-eds-articles/climategate-proves-scientists-are-gasp-human.

The investigations that followed—only two of which, by Penn State and the National Science Foundation, focused on Mann's conduct—glossed over or ignored that avenue of inquiry. Penn State, Mann's employer, conducted an inquiry and then an investigation, but disclaimed any intention of wading into a "bona fide scientific disagreement or debate."[23] Instead, it "synthesized" four allegations based on media reports—whether Mann had (1) suppressed or falsified data, (2) concealed or destroyed data, (3) misused privileged or confidential information, or (4) "seriously deviated from accepted practices within the academic community for proposing, conducting, or reporting research or other scholarly activities"—and then dismissed the first three after interviewing Mann, without further investigation.[24]

The fourth allegation was forwarded to an investigatory committee comprised of Penn State faculty, which focused its investigation mostly on Mann's reluctance to share certain data and computer code necessary to reconstruct his research and his wide circulation of prepublication manuscripts by other scientists, which are typically regarded as confidential.[25] It also found that Mann had "followed acceptable research practice within his field" on the bases that (1) his findings were not "well outside the range of findings published by other scientists"; (2) some "research published since [the early hockey stick papers] by Dr. Mann and by independent researchers has shown patterns similar to those [he] described"; (3) "[i]n some cases, other researchers…have been able to replicate Dr. Mann's findings"; and (4) "almost all of Dr. Mann's

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[23] Henry C. Foley, Alan W. Scaroni, Candice A. Yekel, RA-10 Inquiry Report: Concerning the Allegations of Research Misconduct Against Dr. Michael E. Mann, Department of Meteorology, College of Earth and Mineral Sciences 2, The Pennsylvania State University, Feb. 3, 2010.

[24] *Id.* at 2–3.

[25] Sarah M. Assmann, Welford Castleman, Mary Jane Irwin, Nina G. Jablonski, Fred W. Vondracek, RA-10 Final Investigation Report Involving Dr. Michael E. Mann, The Pennsylvania State University, June 4, 2010, at 17, JA 246.

work was accomplished jointly with other scientists."[26] While this limited inquiry did not turn up evidence of "Research Misconduct" (as narrowly defined by Penn State's regulations[27]), it was nowhere near the kind of critical reexamination of Mann's work that CEI and other skeptical voices had sought. Their disappointment was shared by many on the other side of the debate hoping to restore confidence in Mann's research.[28]

The National Science Foundation ("NSF") Office of Inspector General also conducted an investigation of Mann's conduct—in a manner of speaking. NSF sought only to determine whether Mann, a grant recipient, had engaged in plagiarism, fabrication, or falsification.[29] It relied largely on the record amassed by the Penn State investigation, but it faulted the University for dismissing the first allegation (suppression or falsification of data) without "interview[ing] any of the experts critical of [Mann's] research to determine if they had any information that might support the allegation."[30] As NSF explained, the "publicly released emails…contained language that reasonably caused individuals, not party to the communications, to suspect some impropriety on the part of the authors," including Mann.[31] Thus, it conducted an additional investigation.

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[26] *Id.* at 17–18, JA 246–47.

[27] Research Misconduct is defined, in relevant portion, as "fabrication, falsification, plagiarism or other practices that seriously deviate from accepted practices within the academic community for proposing, conducting, or reporting research or other scholarly activities." *See id.* at 2.

[28] *E.g.*, Clive Crook, Climategate and the Big Green Lie, The Atlantic (July 14, 2010), http://www.theatlantic.com/politics/archive/2010/07/climategate-and-the-big-green-lie/59709/ (lamenting that "[t]he climate-science establishment, of which these inquiries have chosen to make themselves a part, seems entirely incapable of understanding, let alone repairing, the harm it has done to its own cause").

[29] National Science Foundation, Office of Inspector General Closeout Memo at 2 ("NSF Memo"); *see also* 45 C.F.R. § 689.1 (defining research misconduct).

[30] NSF Memo at 2.

[31] *Id.* at 2–3.

While NSF's limited inquiry turned up no "direct evidence" of falsification, it did find "concerns...about the quality of the statistical analysis techniques that were used in [Mann's] research" and "concern about how extensively [Mann's] research had influenced debate in the overall research field"—in other words, concern that Mann's "hockey stick" diagram may have led scientists to brush off research that contradicted its confident message that recent warming was anomalous.[32] Despite raising these concerns, NSF declined to investigate them further:

> Much of the current debate focuses on the viability of the statistical procedures he employed, the statistics used to confirm the accuracy of the results, and the degree to which one specific set of data impacts the statistical results. These concerns are all appropriate for scientific debate and to assist the research community in directing future research efforts to improve understanding in this field of research. Such scientific debate is ongoing but does not, in itself, constitute evidence of research misconduct.[33]

Other investigatory reports following Climategate, while not focusing directly on Mann, raised similar concerns without resolving them. For example, ICCER declined to make any "statement regarding the correctness of any of these analyses in representing global temperature trends" or to "address any possible deficiencies of the method" employed by UEA researchers and Mann.[34] It did, however, conclude that some renditions of the "hockey stick" diagram were "misleading in not describing that one of the series was truncated post 1960 for the figure, and in not being clear on the fact that proxy and instrumental data were spliced together."[35] These two manipulations, it explained, related to the attempts mentioned in the Climategate emails to "hide the decline" through "Mike's Nature trick."[36] It also recognized that there are "multiple sources

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[32] *Id.* at 3.

[33] *Id.* at 3.

[34] ICCER, *supra*, at 49.

[35] *Id.* at 60.

[36] *Id.*

of uncertainty in respect of proxy temperature reconstructions," such as those by Mann, and that these "are the subject of an ongoing and open scientific debate" as to their correctness.[37]

Similarly, a UEA Scientific Assessment Panel conceded that, "[w]ith very noisy data sets," such as in proxy-based temperature reconstruction, "a great deal of judgment has to be used," and "[t]he potential for misleading results arising from selection bias is very great in this area...."[38] The panel lamented "that so few professional statisticians have been involved in this work because it is fundamentally statistical."[39] Yet it too declined to investigate the climate scientists' exercise of discretion and judgment—an omission that led to substantial criticism by Members of the British Parliament, who had hoped to see "an investigation into the science."[40]

In sum, not one of the post-Climategate investigations addressed concerns that the complex statistical models contrived by Dr. Mann and others were biased or whether the "hockey stick" figure had been oversold.

D. CEI and Simberg Criticize Penn State's Investigation of Mann and Call for an Evaluation of the Science

CEI and others skeptical of the case for catastrophic global warming continued to call for an independent inquiry into the science and statistical methods underlying the "hockey stick" figure. They took the opportunity to repeat that call in the summer of 2012, as public attention returned to Penn State due to another scandal. Jerry Sandusky, who served as defensive coordinator for years under football coach Joe Paterno, was convicted of multiple counts of sexual mis-

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[37] *Id.* at 57.

[38] Science Assessment Panel, Report of the International Panel Set Up by the University of East Anglia to Examine the Research of the Climatic Research Unit 3 (2010).

[39] *Id.*

[40] James Randerson, Oxburgh: UEA Vice-Chancellor Was Wrong to Tell MPs He Would Investigate Climate Research, The Guardian, Sept. 8, 2010, http://www.guardian.co.uk/environment/2010/sep/08/uea-emails-inquiry-science.

conduct with minors. The school commissioned former FBI Director Louis Freeh to conduct an independent investigation of its actions. Freeh's report, released on July 12, found that the University had made no serious attempt to investigate allegations regarding Sandusky, instead giving its powerful defensive coordinator the benefit of the doubt even as allegations and evidence of wrongdoing mounted.[41]

CEI adjunct scholar Rand Simberg saw Freeh's report as a news hook to revisit Penn State's similarly cursory investigation of its world-renowned climate scientist Michael Mann in the wake of Climategate. Simberg's commentary, published on CEI's Openmarket.org website the day after Freeh's report was released, draws a parallel between the University's inadequate investigation in the Sandusky case and what he and others believed to be its inadequate investigation following the release of the Climategate emails, reasoning that in both instances the University had put its own interests—protecting prominent campus figures, preventing the disruption of funding, and safeguarding its reputation—ahead of furthering the public interest through a thorough inquiry into the facts.[42]

Climategate, Simberg argues, raised red flags that should have prompted serious investigation of Mann's research. The "hide the decline" email and others, he explains, revealed that Mann and his colleagues "have been behaving in a most unscientific manner" and that Mann "had been engaging in data manipulation to keep the blade on his famous hockey-stick graph, which had become an icon for those determined to reduce human carbon emissions by any means necessary."

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[41] The Freeh Report on Pennsylvania State University (2012), http://thefreehreportonpsu.com.

[42] Rand Simberg, The Other Scandal In Unhappy Valley, Openmarket.org, July 13, 2012, JA 197–99.

These statements do not stand alone, but are supported by hyperlinks to other articles setting forth their factual basis. The phrase "shown to have been behaving in a most unscientific manner," for example, links to an earlier article by Simberg that discusses how the Climategate emails revealed that climate scientists had adjusted their theories and models to fit their "preconceptions" of catastrophic warming caused by industrial activity and resisted views skeptical of those preconceptions—contrary to the scientific ideal where researchers "continually adjust and refine their theories to conform to the data."[43] Likewise, the phrase "engaging in data manipulation" links to an article published on McIntyre's website addressing defenses of the "Mike's [i.e., Mann's] Nature trick" mentioned in the "hide the decline" email.[44] It describes the statistical method Mann and others used to splice together reconstructed historical temperature estimates with more recent temperature measurements, despite that the former were substantially lower than the latter (i.e., the "decline"), to avoid having the blade of the "hockey stick" figure point downwards, as it would do if the two data series were combined in other ways. A third linked article explains how UEA data released in the wake of Climategate actually undermines claims that other scientists' research corroborates Mann's "hockey stick" findings.[45]

Having set the stage by identifying several of the red flags revealed by Climategate, Simberg then recounts how Penn State committed to undertake its own investigation into Mann's research but failed to follow through on that promise in good faith. Simberg makes clear that the Penn State investigation "*declared him [Mann] innocent of any wrongdoing*" and actually links to the University's report for any reader to download and review. But Simberg notes critically

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[43] Rand Simberg, Climategate: When Scientists Become Politicians, PJ Media, Nov. 23, 2009, JA 208–10.

[44] Steve McIntyre, Mike's Nature Trick, Climate Audit, Nov. 20, 2009, JA 218–24.

[45] Rand Simberg, The Death of the Hockey Stick?, PJ Media, May 17, 2012, JA 204–06.

that the panel "was completely internal to Penn State," comprised entirely of tenured professors, "didn't bother to interview anyone except Mann himself," and "seemingly ignored the contents of the [Climategate] emails." As a result, "many in the skeptic community called it a white-wash."

In support of that characterization, Simberg links to and quotes a July 2010 article by Marc Morano, editor of the popular "Climate Depot" website.[46] In the portions quoted, Morano contends that the University "circled the wagons" to protect its funding and reputation and compares Mann's ability to obtain funding with Bernard Madoff's. Morano declares that, due to this cover-up, "Mann has become the posterboy of the corrupt and disgraced climate science echo chamber." Simberg also quotes a statement by Richard Lindzen, the Alfred P. Sloan Professor of Meteorology at the Massachusetts Institute of Technology, made shortly after the conclusion of Penn State's investigation: "Penn State has clearly demonstrated that it is incapable of monitoring violations of scientific standards of behavior internally." Lindzen, like Simberg and Morano, also concluded that the University's investigation was a "whitewash."[47]

Thus, Simberg reasons, "Mann could be said to be the Jerry Sandusky of climate science, except for instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet."[48] Penn

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[46] Marc Morano, Penn State Investigation Cited Mann's 'Level of Success in Proposing Research and Obtaining Funding' as Some Sort of Proof That He Was Meeting the 'Highest Standards', Climate Depot, July 2, 2010, JA 216.

[47] Mike Cronin, Penn State University Panel Clears Global-Warming Scholar, July 2, 2010, JA 264–65.

[48] Shortly after Simberg's commentary was published, and well prior to any complaint by Mann, CEI reviewed it and removed the sentence referring to Sandusky on the ground that its tone was "inappropriate" for its website. Compl. ¶ 27.

State's indifference has clear parallels with the Sandusky affair, Simberg explains, and raises serious questions about the University's investigation of Mann:

> Michael Mann, like Joe Paterno, was a rock star in the context of Penn State University, bringing in millions in research funding. The same university president who resigned in the wake of the Sandusky scandal was also the president when Mann was being ~~whitewashed~~ investigated. We saw what the university administration was willing to do to cover up heinous crimes, and even let them continue, rather than expose them. Should we suppose, in light of what we now know, they would do any less to hide academic and scientific misconduct, with so much at stake?[49]

Simberg concludes with a call to action: "It's time for a fresh, truly independent investigation."

National Review columnist Mark Steyn linked to and quoted Simberg's commentary in a post on *National Review's* "The Corner" website. Steyn observed that Simberg "has a point" and catalogued the similarities between Penn State's responses to allegations regarding Mann and Sandusky. Mann, Steyn quipped, "was the man behind the fraudulent climate-change 'hockey stick' graph, the very ringmaster of the tree-ring circus." "Whether or not he's the 'Jerry Sandusky of climate change,'" Steyn concluded, "he remains the Michael Mann of climate change, in part because his 'investigation' by a deeply corrupt administration was a joke."[50]

Steyn's commentary attracted significant attention, particularly among Mann's supporters, many of whom saw it as an opportunity to take climate change "deniers" to court.[51] Mann demanded a retraction and apology from *National Review*, which refused. In addition, *National Review* editor Rich Lowry published a column, entitled "Get Lost," arguing that Mann's threatened action was a meritless "nuisance suit." As to Mann's claim that Steyn has accused him of

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[49] Alteration in original.

[50] Mark Steyn, Football and Hockey, The Corner, National Review Online, July 15, 2012, JA 52–53.

[51] *E.g.*, Skeptical Science, Mann Fights Back Against Denialist Abuse, July 28, 2012, http://www.skepticalscience.com/mann-fights-back.html.

"academic fraud," Lowry explained that, "[i]n common polemical usage, 'fraudulent' doesn't mean honest-to-goodness criminal fraud," but "intellectually bogus and wrong." Mann, he concluded, should "go away and bother someone else."[52]

CEI received a nearly identical demand letter about a month after *National Review*. It, too, declined to retract its statements or apologize, and it published a press release on its website defending Simberg's commentary as "a valid commentary on Michael Mann's research" and the post-Climategate investigations and arguing that Mann's threatened lawsuit would be barred by the First Amendment's safeguarding of "public debate over controversial issues." The press release linked to (without quoting) Lowry's column, stating that it "expertly summed up the matter."[53]

E. Mann Retaliates Against CEI's Criticism with This Lawsuit

In the years since the release of his "hockey stick" diagram, Dr. Mann has become increasingly engaged in political activism and increasingly hostile to the participation in public debate of groups and individuals who disagree with his views on climate change. According to Mann, "[t]here is no room anymore to have a good faith discussion about whether the problem is real."[54] Such debate, he claims, has illegitimately preempted action on limiting greenhouse gas emissions.[55] He blames CEI, in particular, for this, claiming that CEI and its allies "were basical-

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[52] Rich Lowry, Get Lost, National Review Online, Aug. 22, 2012, JA 278–79.

[53] Press Release, Penn State Climate Scientist Michael Mann Demands Apology from CEI, Aug. 24, 2012, JA 97.

[54] Bill Blakemore, 'New McCarthyism' Described by Climate Scientist Michael Mann, ABC News (July 8, 2012), http://abcnews.go.com/blogs/technology/2012/07/climate-denialists-worse-than-tobacco-ceos-lying-under-oath-says-mann/.

[55] Michael Mann, The Hockey Stick and the Climate Wars 250 (2012).

ly successful in delaying action by 10 years."[56] And he has vowed to "fight back."[57] "We have a responsibility to the scientific community to not allow those looking to discredit us to be successful," Mann told *Popular Science*. "What they're going to see is that they've awakened a sleeping bear. We will counterpunch."[58] To that end, Mann has repeatedly threatened his opponents with lawsuits[59] and actually sued another climate scientist and think tank in Canada for libel.[60]

Mann filed this lawsuit on October 22, 2012. As to the Think Tank Defendants, Mann claims that he was defamed by Simberg's commentary and, in particular, four phrases in it: "data manipulation," "academic and scientific misconduct," "posterboy of the corrupt and disgraced climate science echo chamber," and "Jerry Sandusky of climate science."[61] He also claims that the Sandusky comparison was "extreme and outrageous" and caused him "extreme emotional distress." And he challenges CEI's press release for (he alleges) adopting and republishing Lowry's allegedly libelous statement that Mann's research is "intellectually bogus."

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[56] Lydia DePillis, About Climate Change: Never Mind, Slate, June 12, 2009, http://www.slate.com/articles/news_and_politics/politics/2009/06/about_climate_change_never_mind.html.

[57] *E.g.*, Michael Mann, Besieged by Climate Deniers, A Scientist Decides to Fight Back, Environment 360, Apr. 12, 2012, http://e360.yale.edu/feature/climate_scientist_michael_mann_fights_back_against_skeptics/2516/.

[58] Tom Clynes, The Battle Over Climate Science, Popular Science, June 21, 2012, http://www.popsci.com/science/article/2012-06/battle-over-climate-change?page=16%2C4.

[59] *See, e.g.*, Ed Barnes, Climate Scientist, Heated Up Over Satirical Video, Threatens Lawsuit, Fox News, Apr. 26, 2010, http://www.foxnews.com/scitech/2010/04/26/climate-scientist-heated-satire-threatens-lawsuit/.

[60] Notice of Civil Claim, *Mann v. Ball*, No. VLC-S-S-11191 (Sup. Ct. B.C. filed Mar. 25, 2011).

[61] This last one was added in Mann's Amended Complaint.

Since filing this lawsuit, Mann has been surprisingly candid that, although he was not injured by Simberg's and Steyn's commentary, he brought this lawsuit as retaliation against his opponents in the climate change debate. He explained as much in an interview with *The Atlantic*:

> Atlantic: What do you hope to achieve with this lawsuit?
>
> Mann: Ultimately, this is about saying, "enough is enough." For more than a decade, vested interests and those who work for them have been trying to discredit me in a cynical effort to discredit the science of climate change. They want to attack this iconic graph that my coauthors and I published more than a decade ago, and to go about it by going after me personally. I've developed a thick skin. But at a certain point, I think you have a responsibility to your fellow scientists, to the scientific community, to stand up against these sorts of dishonest assaults.[62]

Mann has been even more candid on his Facebook page, describing this lawsuit as part of a "larger battle…to fight back against the attacks" by "groups seeking to discredit the case for concern over climate change" and expressing his hope that his opponents will be "silenced."[63]

F. The Superior Court Denies the Defendants' Special Motions To Dismiss Under the D.C. Anti-SLAPP Act

Both sets of Defendants timely moved to dismiss Dr. Mann's claims under the D.C. Anti-SLAPP Act and Rule 12(b)(6). As relevant to this appeal, the Act requires dismissal of any claim that "arises from an act in furtherance of the right of advocacy on issues of public interest…unless the responding party demonstrates that the claim is likely to succeed on the merits." D.C. Code § 16-5502(b). Defendants argued that they met their *prima facie* Anti-SLAPP burden because Dr. Mann was a public figure and the speech at issue related to matters of public importance. Dr. Mann conceded as much and that the Act applied to his claims.[64]

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[62] Brooke Jarvis, Is It Time for Climate Scientists to Get Political?, The Atlantic (Nov. 6, 2012), http://www.theatlantic.com/national/archive/2012/11/is-it-time-for-climate-scientists-to-get-political/264636/.

[63] Michael E. Mann, Facebook Post, October 23, 2012; Michael E. Mann, Facebook Post, May 16, 2012.

[64] Pl.'s Opp. to CEI and Simberg's Motion to Dismiss, at 37 (D.C. Sup. Ct. filed Jan. 18, 2013).

Defendants argued that Dr. Mann failed to carry his burden of demonstrating that he is "likely" to succeed on the merits of the case because the challenged statements are protected statements of opinion and interpretation, phrased in the hyperbolic language typical of the public debate over global warming, which cannot be reasonably interpreted as stating facts about Dr. Mann. Defendants also argued that, in light of the widespread public criticism of his research and conduct, Dr. Mann was not "likely" to meet his burden under the First Amendment of demonstrating by clear and convincing evidence that the challenged statements had been made with actual malice—i.e., knowledge of their falsity or reckless disregard for their truth. As to Dr. Mann's emotional-distress claim, Defendants argued that the "Jerry Sandusky of climate science" statement was also not actionable under the First Amendment and was not outrageous. Finally, CEI argued that it cannot be held liable for libel on the basis of a hyperlink when it has not republished the allegedly defamatory statements. While Defendants' motions were pending, Dr. Mann amended his complaint to add an additional claim for defamation relating to the Jerry Sandusky reference.

On July 19, 2013, the Superior Court (Judge Natalia Combs Greene) denied Defendants' motions to dismiss in two substantially similar orders, one per each set of Defendants. Omnibus Order, *Mann v. Nat'l Review et al.*, 2012 CA 008263 (D.C. Sup. Ct.), JA 100, 124. As to the Think Tank Defendants, the court found that the Anti-SLAPP Act properly applied to Dr. Mann's claims as arising from covered acts in furtherance of the right of advocacy on an issue of public interest, climate change. *Id.* at 8. Nonetheless, even while acknowledging it was "a very close case," *id.* at 16 n.12, the court held that *all* of Plaintiff's claims should survive because they were all "likely to succeed on the merits"—a standard that the court equated with a mere "probability of prevailing." *Id.* at 10. The court incorrectly believed that the Think Tank Defendants had

labeled Mann's research as a "fraud" or "fraudulent," which (it reasoned) a reader would take literally to refer to academic or criminal fraud. *Id.* at 15. In its view, Defendants' statements are actionable because they "rel[y] on the interpretation of facts (the [Climategate] emails)," *id.* at 14, and because "[t]o call his [Dr. Mann's] work a sham or to question his intellect and reasoning is tantamount to an accusation of fraud." *Id.* at 16. Although the court recognized that other "[l]anguage such as 'intellectually bogus[,]' 'data manipulation[,]' and 'scientific misconduct' in the context of the publications' reputation and columns certainly appear [sic] as exaggeration and not an accusation of fraud," it nonetheless held that these statements were not rhetorical hyperbole "when one takes into account all of the statements and accusations made over the years [and] the constant requests for investigations of Plaintiff's work." *Id.* at 17.

The Superior Court also denied application of the fair comment privilege under D.C. law, on the ground that Simberg's commentary failed to report that "several reputably bodies have investigated Plaintiff's work...and Plaintiff's work has been found to be sound," *id.* at 19—a factual conclusion finding no support in the record, in light of the failure of the post-Climategate investigations to carefully scrutinize Mann's "hockey stick" research.

The Superior Court never found that Mann was "likely" to prevail in showing actual malice by clear and convincing evidence. To the contrary, it found that "the evidence before the Court does not amount to a showing of clear and convincing [evidence] as to 'actual malice.'" *Id.* at 21. But CEI, the court stated, should be aware of "the numerous findings that Plaintiff's work is sound" because of its engagement in the climate change debate. *Id.* Thus, in the court's view, while the evidence before it did not demonstrate actual malice, "further discovery" could conceivably uncover such evidence. *Id.* at 21–22.

Finally, the court found that Mann was "likely" to prevail on his emotional distress claim simply because the Plaintiff had presented "sufficient evidence...indicative of 'actual malice.'" *Id.* at 23. The court declined to address Defendants' other legal arguments, including CEI's point that it had never published certain of the statements Mann attributes to it. The court also did not address the additional claim presented in the amended complaint.

Following this Court's dismissal of Defendants' first appeal for mootness in light of the amended complaint, Judge Frederick Weisberg, who had taken over the case, denied the Defendants' pending motions to dismiss the additional claim in a January 22, 2014 order adopting the reasoning of the court's previous orders. Order, *Mann v. Nat'l Review et al.*, JA 161. The court held that it was enough that the statement at issue—"Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data"—was "capable of a defamatory meaning," which rendered it actionable under the First Amendment. *Id.* at 4. And as to actual malice, the court made no finding, only stating that it was compelled to "[v]iew[] the alleged facts in the light most favorable to plaintiff" in deciding a motion to dismiss, *id.*, notwithstanding the Anti-SLAPP Act's placing the burden on Mann to "demonstrate[] that the claim is likely to succeed on the merits." D.C. Code § 16-5502(b).

STANDARD OF REVIEW

This Court reviews *de novo* the Superior Court's denial of a special motion to dismiss under the D.C. Anti-SLAPP Act. *Doe No. 1 v. Burke* , 91 A.3d 1031, 1040 (D.C. 2014) (addressing special motion to quash under the Act); *Schwarzburd v. Kensington Police Protection & Community Services District Board*, 225 Cal. App. 4th 1345, 1350, 170 Cal. Rptr. 3d 899, 904 (2014); *cf. Franco v. District of Columbia*, 39 A.3d 890, 894 (D.C. 2012) (summary judgment).

ARGUMENT

I. The Collateral-Order Doctrine Provides Jurisdiction for This Appeal

Any possible doubt regarding this Court's jurisdiction over this appeal is resolved by the reasoning of *Doe v. Burke*, 91 A.3d 1031 (2014), which held that denial of a special motion to quash a subpoena under the D.C. Anti-SLAPP Act is immediately appealable under the collateral-order doctrine.

To qualify for immediate appellate review under the collateral order doctrine, a ruling denying a motion to dismiss must satisfy three conditions: "(1) it must conclusively determine a disputed question of law, (2) it must resolve an important issue that is separate from the merits of the case, and (3) it must be effectively unreviewable on appeal from a final judgment." *McNair Builders, Inc. v. Taylor*, 3 A.3d 1132, 1135 (D.C. 2010) (quotation marks omitted). In addition, denial of immediate review must "imperil a substantial public interest." *Id.* at 1137. Applying this standard, the Court has observed that "the denial of a motion that asserts an immunity from being sued is the kind of ruling that is commonly found to meet the requirements of the collateral order doctrine and thus to be immediately appealable." *Id.* at 1136 (quoting *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 340 (D.C. 2001)).

Burke recognizes that the D.C. Anti-SLAPP Act provides just such an immunity to anonymous speakers. First, denial of a motion to quash conclusively determines a disputed question of law because it "determine[s] the movant is ineligible for protection under the statute." 91 A.3d at 1038. Second, it resolves an important issue separate from the merits of the case because it addresses "whether the defendant is being forced to defend against a meritless claim," not "whether the defendant actually committed the relevant tort." *Id.* (quotation marks omitted). Third, it is effectively unreviewable because the statute "explicitly protects the right not to stand trial." *Id.* Finally, denial of immediate appeal would imperil a substantial public interest: "The

exercise of the statutorily protected right to anonymous speech would be substantially chilled if the denial of a special motion to quash were not immediately appealable." *Id.* at 1040.

The very same things could be said of speech on matters of public interest were denial of a special motion to dismiss not immediately appealable. As the D.C. Council recognized, abusive litigation forces defendants to "dedicate a substantial[] amount of money, time, and legal resources" to defend suits intended as "punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights." Council of the District of Columbia, Committee on Public Safety and the Judiciary, Committee Report on Bill 18-893, at 1, JA 167. For that reason, the Council sought to "[f]ollow[] the lead of other jurisdictions" that have "extended absolute or qualified immunity to individuals engaging in protected actions." *Id.* at 4. Just like a special motion to quash under the Act, a special motion to dismiss provides an immunity from further proceedings for any "act in furtherance of the right of advocacy on issues of public interest" by requiring dismissal unless the plaintiff demonstrates that he or she "is likely to succeed on the merits." *Compare* D.C. Code § 16-5502(b) (special motion to dismiss) *with* § 16-5503(b) (quash).

Notably, *Burke's* reasoning relies almost entirely on cases "apply[ing] the collateral order doctrine to special motions to dismiss." 91 A.3d at 1038 n.9. In fact, it confirms that denial of a special motion to dismiss satisfies the factors for collateral-order review because it "explicitly protects the right not to stand trial" and therefore "confers an immunity of a sort from suit." *Id.* at 1039. And it rejects the argument that the Act's lack of an express appeal provision defeats collateral-order jurisdiction, recognizing that the Council is subject to "limitations...under the Home Rule Act" that prevented it from including one. *Id.* at 1039 n.12.

Burke thereby holds what *McNair* suggested: "the public's interest in the full exercise of First Amendment rights to free speech and to petition for redress of grievances concerning matters of public significance" is one "worthy of protection on interlocutory appeal" under the collateral-order doctrine. 3 A.3d at 1138–39 (quotation marks omitted). Consistent with *Burke*, the Court should follow the lead of every other appellate court to have considered the issue[65] and hold that where, as here, the legislature intended to provide a substantive immunity from suit, the denial of an anti-SLAPP motion is appealable under the collateral-order doctrine.

II. Mann's Claims Against the Think Tank Defendants Must Be Dismissed

Dr. Mann seeks to hold the Think Tank Defendants liable for publishing their views on the Climategate scandal and its aftermath. But "a statement on matters of public concern must be provable as false before there can be liability under state defamation law." *Rosen v. Am. Israel Public Affairs Committee, Inc.*, 41 A.3d 1250, 1256 (D.C. 2012) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990)). The context, disclosed factual basis, language, and non-verifiability of the statements he challenges all confirm that those statements are not actionable assertions of fact that Mann engaged in literal fraud, but First Amendment-protected expressions of opinion and interpretation regarding the Climategate scandal and its aftermath. On that basis, his claims must be dismissed as a matter of law. *See Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 588 (D.C. 2000).

In addition, Mann cannot meet his burden under the First Amendment and the D.C. Anti-SLAPP Act to show that he is likely to prove by clear and convincing evidence that the Think Tank Defendants acted with actual malice. In fact, the very investigative reports he cites as "ex-

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[65] *See Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003); *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 147–151 (2d Cir. 2013); *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 174 (5th Cir. 2009); *Godin v. Shencks*, 629 F.3d 79, 85 (1st Cir. 2010); *Schelling v. Lindell*, 942 A.2d 1226, 1230 (Me. 2008); *Fabre v. Walton*, 781 N.E.2d 780, 784 (Mass. 2002).

onerating" him and thereby demonstrating actual malice paint a more complicated picture, providing support even for Mann's tendentious interpretation of the Think Tank Defendants' statements. That defeats any possible showing of actual malice. In other words, Dr. Mann has pleaded himself out of court.

A. Simberg's Commentary Is Absolutely Protected by the First Amendment and Fair Comment Privilege as a Matter of Law

1. Context Makes Clear That Simberg's Blog Post Is Protected Commentary on Climategate and Its Aftermath

"[I]f it is plain that a speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise..., the statement is not actionable." *Rosen*, 41 A.3d at 1256 (quoting *Guilford*, 760 A.2d at 597). Context, in turn, is "critical" to determine whether allegedly defamatory statements make factual assertions (and therefore may be actionable) or interpret and comment on the facts (and therefore are not). *See Guilford*, 760 A.2d at 597. In particular, "[c]ontext is critical because 'it is in part the settings of the speech in question that makes their nature apparent, and which helps determine the way in which the intended audience will receive them.'" *Farah v. Esquire Magazine*, 407 U.S. App. D.C. 208, 215, 736 F.3d 528, 535 (2013) (quoting *Moldea v. New York Times Co.*, 306 U.S. App. D.C. 1, 5, 22 F.3d 310, 314 (1994) ("*Moldea II*")).

Particularly in this instance, subject matter is a key part of context. *Greenbelt Cooperative Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970), for example, held that, "as a matter of constitutional law, the word 'blackmail' *in these circumstances* was not slander when spoken," due to the context of the heated public debate over a developer's hard dealing with a town over a property dispute and the statement's placement in an article that provided factual background. *Id.* at 16–17 (quotation marks omitted and emphasis added). Likewise, *Letter Carriers v. Austin*, 418 U.S. 264, 284–86 (1974), held that use of the word "traitor" to describe a union "scab" was not

actionable "in the context of this case," which concerned an article regarding a heated labor dispute published in a pro-union newsletter, because readers would have understood that word "to demonstrate the union's strong disagreement with the views of those workers who oppose unionization." 418 U.S. at 284. The court recognized that "such exaggerated rhetoric was commonplace in labor disputes" and so was not actionable in that context. *Id.* at 286. This Court, in turn, applied the same rule in *Guilford*, 760 A.2d at 597–98, explaining that it was critical that the challenged statements there were "made in the context of a labor dispute," which will "normally involve considerable differences of opinion and vehement adherence to one side or the other."

The context here—the contentious and often acrimonious debate over global warming—is no less charged. This debate is marked by strong opinions often expressed in hard, vituperative language. To Mann, individuals and groups who disagree with him are engaged in "pure scientific fraud," are "deeply unethical," publish "bogus" research, and "are essentially serving as shills for the fossil fuel industry, [] are doing the bidding of the fossil fuel industry, and are not engaging in good faith debate, good-faith discourse, but are simply looking for a way to malign the science and the scientists and to advance a policy agenda."[66] He pointedly refers to groups and individuals who are skeptical of his scientific and public policy conclusions as "deniers"[67]—

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[66] Adam Forrest, "We Need to Adapt.... Changes are Coming no Matter What": Michael Mann, the US scientist caught up in the 'Climategate' controversy, on why a new sense of urgency is needed, The Big Issue (April 3, 2012), at 1 ("pure scientific fraud" and "deeply unethical"); Environmental Protection Agency, 3 EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act (2010) (quoting email from Mann to Andy Revkin, reporter, N.Y. Times (Feb. 8, 2005)) ("The McIntyre and McKitrick paper is pure scientific fraud."), at 73; Michael E. Mann, The Hockey Stick and the Climate Wars 141 (2012) ("bogus research"); Rick Piltz, Michael Mann Interview: Denialists are waging "asymmetric warfare" against climate science, Climate Science Watch (Mar. 10, 2010) ("shills").

[67] Michael Mann, A Climate Scientist Fights Back, *Pittsburgh City Paper* (Mar. 21, 2012), http://www.pghcitypaper.com/pittsburgh/a-climate-scientist-fights-back/Content?oid=1504034.

a less-than-oblique reference to "Holocaust deniers"—and characterizes them as perpetrators of "crime[s] against humanity."[68] And to those, like U.S. Senator James Inhofe, who are skeptical that catastrophe is imminent, devices like Mann's "hockey stick" are a part of the "greatest hoax ever perpetrated on the American people."[69] In fact, Mann's recent book fairly well chronicles the tenor of the debate over global warming, describing it as a "war" or a "battle."[70]

In this context, forceful, highly opinionated language and hyperbole are not out of place; they are expected from advocates on both sides and signal that a statement is part of this "war" over the proper understanding of the climate and responses to changes in climate. Mann uses precisely this type of language when he describes CEI as dishonest, accuses it of being an "industry front group," and characterizes its work as "fraudulent."[71] That is, fortunately or not, the prevailing tone of the debate, and therefore such language falls well within the "breathing space" mandated by the Constitution. For that reason, this Court explained in *Guilford*, such statements "which on their face resemble statements of fact, may, depending on the circumstances, be treated as statements of opinion not subject to an action for libel." 760 A.2d at 597 (quotation marks omitted). Were the law otherwise, it would sweep up too much speech on matters of public interest, stifling free and open debate where it is most vital. *Id.*

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[68] Bill Blakemore, 'New McCarthyism' Described by Climate Scientist Michael Mann, ABC News (July 8, 2012), http://abcnews.go.com/blogs/technology/2012/07/climate-denialists-worse-than-tobacco-ceos-lying-under-oath-says-mann/.

[69] Andrew Revkin, Politics Reasserts Itself in the Debate Over Climate Change and Its Hazards, N.Y. Times, Aug. 5, 2003, at F2.

[70] *See, e.g.*, Mann, The Hockey Stick and the Climate Wars, at 233.

[71] Mann, The Hockey Stick and the Climate Wars, at 70, 110, 195, 249; Michael Mann, Climate Science Review, Climate Cover Up: A (Brief) Review, RealClimate, Oct. 20, 2009, http://www.realclimate.org/index.php/archives/2009/10/climate-cover-up-a-brief-review/.

The statements at issue here are not distinguishable from those at issue in *Guilford* in terms of their vehemence or implication of disapproval. In both cases, parties to heated debates selected language that they believed would be effective and meaningful in the context of those debates to convey their disapproval and criticism of the other side's conduct. The only relevant distinction is that, in this case, *both sides* of the debate—both Mann and the Defendants—use strong language and exaggerated rhetoric. But that only proves the point: no one could mistake that kind of rhetoric for an actionable allegation of crime or fraud in the context of this debate.

Genre is also an important part of context. "Some types of writing...by custom or convention signal to readers...that what is being read...is likely to be opinion, not fact. It is one thing to be assailed as a corrupt public official by a soapbox orator and quite another to be labeled corrupt in a research monograph detailing the causes and cures of corruption in public service." *Farah*, 736 F.3d at 535 (quoting *Ollman v. Evans*, 242 U.S. App. D.C. 301, 314, 750 F.2d 970, 983 (1984)). For example, *Guilford* considered it "critical...that the allegedly defamatory utterances in [that] case appeared in an Op–Ed column in which Wilner [the defendant] was commenting on matters of substantial public concern." 760 A.2d at 597. It explained that "the author of an Op–Ed column is entitled to protection at least as great as that which is provided to the employee with the denunciatory picket sign." *Id.* at 598. Were it otherwise, "[t]here would be little difference between the editorial page and the front page, between commentary and reporting, and the robust debate among people with different viewpoints that is a vital part of our democracy would surely be hampered." *Id.* at 599 (quoting *Partington v. Bugliosi*, 56 F.3d 1147, 1154 (9th Cir. 1995)); *see also Weyrich v. New Republic, Inc.*, 344 U.S. App. D.C. 245, 253, 235 F.3d 617, 625 (2001) (taking account of context of publication in "a magazine of political com-

mentary, a self-described 'Weekly Journal of Opinion'"); *Moldea II*, 306 U.S. App. D.C. at 6–7, 22 F.3d at 315–16 (taking account of the "book review context").

No less than book reviews, websites like CEI's and National Review's belong to "a genre in which readers expect to find spirited critiques…that they understand to be the reviewer's description and assessment of [events] that are capable of a number of possible rational interpretations" *Moldea II*, 306 U.S. App. D.C. at 2, 22 F.3d at 311. CEI's website, in particular, publishes highly opinionated commentary on a range of controversial subjects (including climate science), presenting a market-oriented view that is often critical of the status quo. Without knowing any more than that, readers of Simberg's commentary would have expected provocative, opinionated prose. *Compare with Weyrich*, 344 U.S. App. D.C. at 252, 235 F.3d at 625 (statement that politician suffered "paranoia" was non-actionable given "well-understood context" of magazine commentary). And that is exactly what they received.

Finally, the words and phrases challenged by Mann must be considered in the context of the work as a whole. *Farah*, 736 F.3d at 535. Just as the column at issue in *Guilford* reported that a federal agency had approved the plaintiff's actions, 760 A.2d at 599, Simberg's commentary reports that Mann was "declared innocent of any wrongdoing" by Penn State and was also cleared by the NSF's investigation. It even links to the University's report for readers to review for themselves and to an article favorable to Mann regarding the NSF report. Moreover, Simberg does not call for Mann to be fired—a call that would naturally follow an accusation of fraud—but for the University to commission "a fresh, truly independent investigation" of his research. As in *Guilford*, "[a]ny reasonable reader would understand that [Mann] took certain actions, that [the Think Tank Defendants] were apparently unenthusiastic about those actions, and that [inves-

tigating bodies] basically sustained them." 760 A.2d at 599. That "is not the stuff of which successful libel suits are made." *Id.*

2. Simberg's Disclosure of the Factual Basis of His Blog Post Confirms It Is Protected Commentary on Climategate and Its Aftermath

A reader need not guess as to the factual basis underlying Simberg's commentary, because Simberg expressly discloses the facts upon which he relies—facts regarding Climategate and its aftermath that are uncontroverted. Simberg's commentary is therefore not actionable.

"[W]hen an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment." *Partington v. Bugliosi*, 56 F.3d 1147, 1156–57 (9th Cir. 1995); *see also id.* (surveying case law and finding that "[t]he courts of appeals…have consistently" applied this standard following the Supreme Court's decision *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), which rejected blanket "opinion" immunity under the First Amendment). As this Court has held, a statement is protected as an interpretation when it "discloses" the general factual circumstances, "the critical historical facts are undisputed, and the reader is therefore free to draw his or her own conclusions." *Guilford*, 760 A.2d at 601. Likewise, under the District's common-law fair comment privilege, an author's comment on a matter of public interest based on facts available to the reader is not actionable, whether or not those facts are not disclosed in the publication itself. *Fisher v. Washington Post Co.*, 212 A.2d 335, 337 (D.C. 1965).

Under either doctrine, Mann's burden is to show that each challenged "statement is 'so obviously false' that 'no reasonable person could find that [its] characterizations were supportable interpretations' of the underlying facts." *Washington v. Smith*, 317 U.S. App. D.C. 79, 81, 80

F.3d 555, 557 (1996) (quoting *Moldea II*, 306 U.S. App. D.C. at 8, 22 F.3d at 317); *see also Fisher*, 212 A.2d at 337 (privilege applies where "opinions could differ"). This task is hopeless.

Simberg's commentary sets forth his interpretation of the facts regarding Climategate and the investigations that followed it. This is unambiguous. Simberg's statement that "the [Climategate] emails revealed [that Mann] had been engaging in data manipulation to keep the blade on his famous hockey-stick graph" is, on its face, an interpretation of those emails. Any possible doubt on that score is dispelled by the fact that the text "engaging in data manipulation" actually links to a detailed article that quotes the "Mike's Nature trick" email in its entirety and then walks the reader through the underlying statistics, complete with charts and links to additional background materials. Mann may disagree with Simberg's interpretation of this and other Climategate emails, but there can be no dispute that that is what Simberg offers: an interpretation.

So is the statement that Mann has "molested and tortured data in the service of politicized science." In addition to the "Mike's Nature trick" article, Simberg links to an article explaining how the Climategate emails revealed that climate scientists had adjusted their theories and models to fit their "preconceptions" of catastrophic warming caused by industrial activity and resisted views skeptical of those preconceptions. He also links to an article reporting on a reanalysis of proxy data from UEA in which "the twentieth-century hockey-stick blade *completely disappeared*." Simberg's view, as his blog post makes clear, is that the "blade" of Mann's "hockey stick" may be an artifact of the statistical methods selected by Mann and other climate scientists to match and reinforce their preconceived notion that the world is quickly warming. Again, Mann may believe that his statistical models are a fair reflection of the natural phenomena they purport to describe. And he is entitled to express that view, just as Simberg is entitled to express his contrary interpretation of the facts.

The statement that Mann "has become the posterboy of the corrupt and disgraced climate science echo chamber" also does not stand alone. Rather, it is a quotation from a linked statement by the editor of the Climate Depot website on Penn State's investigation. That article, in turn, links to, discusses, and quotes Penn State's report, presenting its view that the investigation was a "whitewash" driven by the University's financial interests. And that, it concludes, makes Mann the "posterboy" of the phenomenon of the insular world of academic climate science protecting its own. That is one view of the facts of Climategate and its aftermath—a compelling one. Of course, "the reader is...free to draw his or her own conclusions." *Guilford*, 760 A.2d at 601.

Simberg's questioning whether the University would "do any less to hide academic and scientific misconduct" is, on its face, an interpretation of Freeh Report's finding that Penn State swept under the rug serious allegations regarding Sandusky. To the extent that it could be read to imply that Mann engaged in "misconduct"—and Simberg's call for further investigation, rather than that Mann be fired, undermines such a reading—it finds support in the Climategate emails and their revelation that climate scientists, including Mann, employed statistical "tricks," suppressed criticism of their research, and coordinated to frustrate the work of researchers whose conclusions differed from their own. Critics may debate whether these things amount to "misconduct," but different subjective views on that question are certainly possible and allowed.

All of these materials, and others, provide the factual basis for the statement that "Mann could be said to be the Jerry Sandusky of climate science." Taken in context, this comparison underscores the similarities in Penn State's lackadaisical responses when red flags meriting serious investigation were brought to its attention in both cases. But even if taken as a comment on Mann himself, as suggesting that he acted wrongfully or breached the public trust, those views are supportable interpretations of the underlying facts of Climategate that Simberg discloses and

links to. That includes Penn State's investigatory report, which Simberg describes as declaring Mann "innocent of any wrongdoing," and a summary of the NSF report, which Simberg states "was also purported to exonerate [Mann]." Simberg also voices criticisms of Penn State's investigation. What's critical is that readers "were invited to draw their own conclusions from the mixed information provided," which negates any reading of Simberg's commentary as accusing Mann of literal fraud, rather than as offering an interpretation of the facts. *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 731 (1st Cir. 1992); *see also Guilford*, 760 A.2d at 601.

3. Simberg's Hyperbolic and Metaphorical Language Confirms That His Blog Post Is Protected Commentary on Climategate and Its Aftermath

The hyperbolic language and tone of the statements challenged by Mann only reinforce that they convey the Defendants' opinion of Mann's research (negative) and their interpretation of the Climategate disclosures (as revealing confirmation bias run amok in climate science), not any accusation of literal fraud. "[T]he use of loose, figurative or hyperbolic language...preclude[s] an impression that the author was seriously maintaining a provable fact." *White v. Fraternal Order of Police*, 285 U.S. App. D.C. 273, 283, 909 F.2d 512, 522 (1990) (citation and quotation marks omitted). "This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 53–55 (1988)). The statements at issue here, whether considered individually or as a whole, plainly partake of that tradition.

"Mann could be said to be the Jerry Sandusky of climate science" Metaphorical comparisons are a quintessential statement of pure opinion and therefore protected by the First Amendment. A metaphorical comparison denotes not factual equivalence but only some kind of "likeness or analogy" that must be inferred from context. *Parks v. LaFace Records*, 329 F.3d 437,

454 (6th Cir. 2003) (quoting *Webster's Third New International Dictionary* 1420 (1976)). It cannot be true or false, only apt or inapt. *See Potts v. Dies*, 77 U.S. App. D.C. 92, 93, 132 F.2d 734, 735 (1942) ("The 'Nazi Trojan Horse' metaphor, like most metaphors, is not a proposition of fact."). Even Judge Robinson's *Ollman* dissent, which forcefully rejected the majority's conclusion that the statements at issue there were non-actionable opinion, recognized as much: "metaphorical language is also allied to pure opinion. When context makes it apparent that a word is being used figuratively or imaginatively without any intention to rely on its literal meaning, the labels 'true' and 'false' are inapposite." *Ollman v. Evans*, 242 U.S. App. D.C. 301, 353, 750 F.2d 970, 1022 (1984) (en banc) (Robinson, C.J., dissenting) (footnote omitted). Accordingly, "these types of statements seem clearly to fall within the ambit of the constitutional opinion privilege." *Id.*

Metaphorical comparisons like the one at issue here signal hyperbolic expression—consider the frequency of non-literal comparisons to Hitler, Bernard Madoff, and (of late) Jerry Sandusky—and are therefore consistently held to be protected statements of opinion not actionable as libel. *E.g.*, *Williams v. Town of Greenburgh*, 535 F.3d 71, 77 (2d Cir. 2008) ("Junior Mussolini"); *Novecon Ltd. v. Bulgarian-Am. Enter. Fund*, 338 U.S. App. D.C. 67, 190 F.3d 556, 567, 569 n.6 (1999) (plaintiff's project proposal was a "veritable Brooklyn Bridge of misrepresentations"); *Dunn v. Ganett N.Y. Newspapers, Inc.*, 833 F.32d 446, 454 (3d Cir. 1987) (Hitler and Castro); *Koch v. Goldway*, 817 F.2d 507–510 (9th Cir. 1987) (comparison to Nazi war criminal); *Buckley v. Littell*, 539 F.2d 882, 893–94 (2d Cir. 1976) ("'fascist,' 'fellow traveler' and 'radical right'"); *Medifast, Inc. v. Minkow*, No. 10-382, 2011 WL 1157625, at *12 (S.D. Cal. Mar. 29, 2011) (Bernard Madoff); *Bryant v. Cox Enters., Inc.*, 715 S.E.2d 458, 469 (Ga. Ct. App. 2011) (comparison to "convicted child serial killer" "cannot form the basis of a defamation action"

where "no reasonable person would believe [it] presented facts"); *Jordan v. Lewis*, 247 N.Y.S.2d 650, 651 (N.Y. App. Div. 1964) (Hitler and Eichman, as well as the characterization of the plaintiff as a "criminal"); *Yeager v. Local Union 20*, 453 N.E.2d 666, 667, 669 (Ohio 1983) (description of plaintiff as a "Little Hitler," as operating "a Nazi concentration camp," and as using "Gestapo" tactics); *Rizzo v. Welcomat, Inc.*, 1986 WL 501528, 14 Phila. Co. Rptr. 557, 562 (Pa. Com. Pl., Phila. Cnty. Sept. 17, 1986) (Hitler).

No less than in those cases, a statement comparing Mann to convicted child molester Jerry Sandusky is so overblown, if read to convey anything like a literal equivalence in the two men's conduct, that "even the most careless reader must have perceived [it to be] no more than rhetorical hyperbole." *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970). Taken in context, the obvious point of the comparison is to emphasize Penn State's failure in both cases to undertake serious investigation after being informed of red flags, not to accuse Mann of any particular fraud or crime. That is not actionable as libel.

"[H]e has molested and tortured data in the service of politicized science." The terms "molest" and "torture," particularly as applied to data and statistical analysis, are classic hyperbole, and their non-literal usage is apparent from their use in that context. *Cf. Ollman*, 242 U.S. App. D.C. at 312 n.20, 750 F.2d at 981 n.20 (explaining that, although "fascist" could be taken literally in certain contexts, it could not in the realm of political debate); *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 301 (4th Cir. 2008) (holding statement that anyone wishing to torture, kill, or murder should go to work for military contractor was "a permissible hyperbolic characterization of the work contractors would perform in Iraq"). Indeed, opinionated criticism of statistical analysis is routinely couched in such terms. For example, there is Nobel laureate economist Ronald Coase's famous quip, "If you torture the data long enough, it will confess."

Gordon Tullock, A Comment on Daniel Klein's "A Plea to Economists Who Favor Liberty," Eastern Economic Journal, Spring 2001, at n.2. Similar examples abound in publications criticizing statistical analysis.[72] Such criticism amounts to disagreement over assumptions and interpretations—that is, matters of opinion on what constitutes the proper understanding of observed phenomena and most appropriate statistical techniques—not an accusation of literal fraud, such as making up data. Reinforcing that usage, Simberg's commentary links to and discusses detailed criticisms of Mann's statistical method that produces a hockey stick-shaped diagram from nearly any input and his controversial "trick" of splicing together different data series. Simberg's shorthand reference to "molest[ing] and tortur[ing] data" merely restates the longstanding criticism of Mann's "hockey stick" research: that it is based on flawed assumptions and statistical methods that serve to exaggerate recent warming. Expressing that view is not actionable as libel.

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[72] *See, e.g.,* Terence M. Davidson & Christopher P. Guzelian, Evidence-Based Medicine: The Only Means for Distinguishing Knowledge of Medical Causation from Expert Opinion in the Courtroom, 47 Tort Trial & Ins. Prac. L.J. 741, 779 (2012) ("There is always some twist or spin that can be put on studies. Torture data enough and they will confess to anything."); E. Donald Elliott, Only a Poor Workman Blames His Tools: On Uses and Abuses of Benefit-Cost Analysis in Regulatory Decision Making About the Environment, 157 U. Pa. L. Rev. 178, 180 (2009) ("[Y]ou lawyers torture the epidemiological data until they *scream*."); Daniel J. Rohlf, Lessons from the Columbia River Basin: Follow the Blueprint But Avoid the Barriers, 19 Pac. McGeorge Global Bus. & Dev. L.J. 195, 206 (2006) ("[T]here inevitably will be attempts to frame scientific questions in a manner that supports a favored policy outcome, or attempts to manipulate the science itself to reach pre-ordained conclusions. One long-time advocate for salmon restoration calls this phenomenon 'torturing the data until it confesses what the powers-that-be want to hear.'"); Walter R. Schumm, Empirical and Theoretical Perspectives from Social Science on Gay Marriage and Child Custody Issues, 18 St. Thomas L. Rev. 425, 437 (2006) ("[R]esearchers tend to see what they want to see and once they have found it, they quit, rather than trying to test their results from an oppositional perspective. For example..., [a]fter torturing the data for some time...."); Jonathan Kahn, From Disparity to Difference: How Race-Specific Medicines May Undermine Policies To Address Inequalities in Health Care, 15 S. Cal. Interdisc. L.J. 105, 121 (2005) ("VaxGen's race-based claims, however, were quickly shot down by the medical and scientific communities as being a deeply flawed, even tortured reading of the data...."); Frank B. Cross, Lawyers, the Economy, and Society, 35 Am. Bus. L.J. 477, 504 (1998) ("Magee's findings may merely illustrate the aphorism of statistics that if you torture the data enough, nature will always confess.").

"[H]ad been engaging in data manipulation to keep the blade on his famous hockey-stick graph." The phrase "data manipulation," taken literally, refers to any use of statistical methods. *See infra* n.74. But even taken in its pejorative sense, to accuse one of "manipulating" data is simply to criticize a statistical analysis as biased toward confirming some particular intuition or preconception. *See, e.g.*, David N. Kinsey, The Growth Share Approach to Mount Laurel Housing Obligations: Origins, Hijacking, and Future, 63 Rutgers L. Rev. 867, 874–75 (2011) (criticizing regulations as "based on manipulated data and tortured explanations that unsuccessfully attempt to justify a bold decision to artificially reduce municipal housing obligations"); Jonathan Kahn, From Disparity to Difference: How Race-Specific Medicines May Undermine Policies To Address Inequalities in Health Care, 15 S. Cal. Interdisc. L.J. 105, 115 (2005) (criticizing "manipulations of statistical data to make it appear as if the race-specific character of [a drug's] development was driven more by medicine than by commerce").

In context, the gravamen of this criticism is clear: the words "data manipulation" are hyperlinked to an article describing "Mike's Nature trick" to splice together data series without reducing or eliminating the blade of the "hockey stick." Neither that article nor Simberg's contends that Mann manufactured data or the like, only that he adopted an agenda-driven statistical methodology that confirmed the preconceived notion of catastrophic warming. Arguing as much is not actionable; if it were, scientific discourse would be all but impossible.

"Mann has become the posterboy of the corrupt and disgraced climate science echo chamber." The word "posterboy" gives it away that what follows is not an accusation of crime or fraud, but a strongly-worded criticism of mainstream climate science, in which Mann has assumed a leading role. *Compare with 600 West 115th Street Corp. v. Von Gutfeld*, 603 N.E.2d 930, 937 (N.Y. 1992) (holding that statement that deal "*smells* of bribery and corruption" was

not literal accusation of crime) (emphasis added). So does the context. As Simberg's commentary and those he links discuss, Climategate revealed that climate scientists, including Mann, had been acting in what Simberg calls "a most unscientific manner" by blackballing scientists skeptical of catastrophic climate change, employing statistical "tricks" to fit their preconception of a warming planet, and suppressing their own doubts about their research showing anomalous recent warming. In the view of Simberg and other skeptics, this conduct is corrupt because it is a betrayal of the scientific ideal where researchers "continually adjust and refine their theories to conform to the data."[73] Instead, these scientists constructed an "echo chamber" to keep out dissenting views.

Even the most tortured reading of Simberg's commentary could not conclude that this statement accuses mainstream climate scientists, in general, and Mann, in particular, of literal corruption. Instead, the term is used in its commonly understood hyperbolic sense to imply "moral criticism of objectives and methods." *Okun v. Superior Court*, 629 P.2d 1369, 1379 (Cal. 1981); *see also Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284, 1293–94 (9th Cir. 2014) (holding blogger's accusations that bankruptcy trustee engaged in "fraud, corruption, money-laundering, and other illegal activities" to be hyperbolic). And Mann surely understands this; after all, one leading analysis of the Climategate scandal is A.W. Montford's *The Hockey Stick Illusion: Climategate and the Corruption of Science*. This kind of criticism is not actionable as libel.

"Should we suppose, in light of what we now know, they [Penn State's administrators] would do any less to hide academic and scientific misconduct, with so much at stake?" On its face, the language of this statement rebuts any claim that it says anything at all about Mann. In-

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[73] Rand Simberg, Climategate: When Scientists Become Politicians, PJ Media, Nov. 23, 2009, JA 208–10.

stead, it expresses an opinion regarding University leaders, questioning whether they would cover up even serious misconduct if bringing it to light threatened the University's interests. This is apparent from the surrounding text, which is critical of the University, not Mann, and questions its motives in both the Sandusky and Mann affairs.

Moreover, this question does not make an assertion that "could be false," but "invite[s] the public to ask." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1096 (4th Cir. 1993). "This invitation, rather than a libel, is the paradigm" of the free expression protected by the First Amendment. *Id.* Raising questions in this manner—even critical, pointed questions—is not actionable as defamation. *See, e.g.*, *Partington*, 56 F.3d at 1157 (question did not "impl[y] a false assertion of fact"); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 195–96 (8th Cir. 1994) (question "was not a false statement of fact, nor could it reasonably be read as such"); *Volm v. Legacy Health Sys., Inc.*, 237 F. Supp. 2d 1166, 1178 (D. Or. 2002) (statement in the form of a "rhetorical question" was not "an assertion of objective fact" and "not capable of being proven true or false"). "The First Amendment is served not only by articles…that purport to be definitive but by those articles that, more modestly, raise questions and prompt investigation or debate." *Ollman*, 242 U.S. App. D.C. at 314, 750 F.2d at 983. Simberg's commentary is precisely that, concluding in the very next sentence with a call for "a fresh, truly independent investigation" of Mann's research.

"In common polemical usage, 'fraudulent' doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong." Lowry's statement that Mann's work is "intellectually bogus" would not, to a reasonable reader, mean or imply criminal fraud any more than the statement the term "intellectually bankrupt" implies insolvency. A word like "bogus" is precisely the kind of colorful language used to express outrage and disagreement, as opposed to stat-

ing cold, hard facts. *See Cooke v. United Dairy Farmers, Inc.*, No. 04AP-817, 2005 WL 736246, at *6 (Ohio Ct. App. Mar. 31, 2005) (rejecting claim that "bogus" implied fraud and finding instead that it "suggests opinion."); *cf. Dilworth v. Dudley*, 75 F.3d 307, 310 (7th Cir. 1996) ("'scab,' 'traitor,' 'amoral,' 'scam,' 'fake,' 'phony,' 'a snake-oil job,' 'he's dealing with half a deck,' and 'lazy, stupid, crap-shooting, chicken-stealing idiot'"). On that same basis, many courts have held that even use of the word "fraud" or "fraudulent" was, in context, only hyperbole, not an assertion of fact. *E.g., Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1104 (N.D. Cal. 1999); *Beattie v. Fleet Nat'l Bank*, 746 A.2d 717, 727 (R.I. 2000); *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 729 (1st Cir. 1992); *600 W. 115th Street Corp. v. Von Gutfeld*, 603 N.E.2d 930, 937 (N.Y. 1992); *Henry v. Halliburton*, 690 S.W.2d 775, 778 (Mo. 1985). In that vein, "bogus" is a rather obvious example of the kind of strong but "imaginative expression," *Coles v. Washington Free Weekly, Inc.*, 881 F. Supp. 26, 32 (D.D.C. 1995), that is meant to signal disagreement and disdain, not criminality or the like.

4. The Subjective, Non-Verifiable Nature of Simberg's Statements Confirms That They Are Protected Commentary

The statements that Mann challenges are exactly the kind of "general characterizations" that this Court has held are not "concrete enough to reveal 'objectively verifiable' falsehoods" that could possibly be the subject of a defamation claim. *Rosen v. Am. Israel Public Affairs Comm., Inc.*, 41 A.3d 1250, 1259 (D.C. 2012) (footnote omitted). *Rosen* held that an employer's statement that its employee had been dismissed for actions regarding the use of classified information that differed from "the standards that AIPAC expects and requires of its employees" was "too subjective, too amorphous, too susceptible of multiple interpretations…to make any of them susceptible to proof of particular, articulable content." *Id.* at 1260. Because "standards" is "a word of aggregation" at a "high[] level of generality" and "could have meant many things, none

self-evident," the statement that the plaintiff had not followed "standards" could not be "provably false." *Id.* It was therefore not actionable.

Rosen, in turn, relied on and approved of two cases demarking the limits of verifiability. *Id.* at 1258–59. *McClure v. Am. Family Mut. Ins. Co.*, 223 F.3d 845, 853 (8th Cir. 2000), concerned press statements made by an insurer that two fired agents had "engaged in 'disloyal and disruptive activity,'" had not understood the "'value of loyalty and keeping promises,'" had acted "'against the best interests of the insurance buying public,'" "'were in direct violation of their agreements,'" and had engaged in "'conduct unacceptable by any business standard.'" *Id.* *McClure* concluded that these "remarks on a subject lending itself to multiple interpretations cannot be the basis of a successful defamation action because as a matter of law no threshold showing of 'falsity' is possible in such circumstances." *Id.* (internal quotation marks omitted). Similarly, *Gibson v. Boy Scouts of Am.*, 360 F. Supp. 2d 776, 781 (E.D. Va. 2005), held that a statement that an individual was "unfit to be a Scoutmaster and in Scouts" was too general to "contain a provably false factual connotation" and so was "merely the expression of the speaker's opinion." *Id.*; *see Rosen*, 41 A.2d at 1259.

So too here. It is anybody's guess what verifiable factual assertion could be implied by the Sandusky comparison, particularly since Simberg makes clear that Mann did not "molest[] children." The comparison surely is pejorative, but it is also, as with the statements in *Rosen*, made at a "high level of generality" and "could have meant many things, none self-evident." In other words, it is a statement of pure opinion that cannot be proven true or false.

The statements that Mann "molested and tortured data" and "had been engaging in data manipulation" are general terms subject to multiple meanings, some technical, some critical,

many benign—taken literally, "data manipulation" refers to any statistical undertaking.[74] They state no one thing that is provably false. Instead, taken in context, they state an opinion: Simberg disapproves of the agenda-driven statistical methods Mann has chosen for his climate model.

The same is true of the statement that "Mann has become the posterboy of the corrupt and disgraced climate science echo chamber." Moreover, it is not apparent to what verifiable facts this statement could refer, because it is a characterization of a field of research and its political supporters (the "climate science echo chamber") and of how others view Mann within that field ("the posterboy"). Mann asserts that this statement explicitly accuses him of "corruption," as if using the words "Mann" and "corrupt" in the same sentence were itself unlawful, but the statement neither sets forth nor implies any particular instance of corruption testable at trial.

Likewise, the rhetorical question asking whether Penn State would "hide academic and scientific misconduct" does not assert anything about Mann at all, but about his employer, Penn State. Even if construed as a comment on Mann, this language is substantially more amorphous than the statements at issue in *Rosen* (violated "standards"), *McClure* ("were in direct violation of their agreements" and engaged in "conduct unacceptable by any business standard"), and *Gibson* ("unfit to be a Scoutmaster and in Scouts"). If those statements are beyond the bounds of verifiability, then Simberg's reference to hypothetical "academic and scientific misconduct" *in a rhetorical question* is not even close.

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[74] *See, e.g.*, Adam Belz, Health Care Creates New State Jobs Boom, Star Tribune, Dec. 9, 2012, at A1 ("Allina has added 45 full-time employees who manipulate data from electronic medical records…to figure out which patients need the most attention."); Victor Zapana, Web Site Aims for More Transparency, Wash. Post, Dec. 6, 2012, at B3 ("residents can even search and manipulate data using spreadsheets"); Marcia Pledger, Small Businesses Drawn to the 'Cloud' Need to Weigh Advantages and Risks Off-site Servers Facilitate Work, but Reduce Control, Plain Dealer, Dec. 2, 2012, at D1 ("Tapping into the cloud allows companies using online software to input, edit and manipulate data stored on servers….").

Finally, Mann's challenge to Lowry's statement that his work is "intellectually bogus" also fails. This statement is plainly the kind of "general characterization[]" that is not "concrete enough to reveal 'objectively verifiable' falsehoods" that could support a defamation claim. *Rosen*, 41 A.3d at 1259. So unspecific, it could not be viewed by an ordinary reader as making an assertion of fact.

B. CEI Cannot Be Held Liable for Statements That It Never Published

Dr. Mann is not "likely to succeed on the merits" of his claim against CEI for republication of *National Review* editor Rich Lowry's allegedly defamatory statement because CEI only hyperlinked to Lowry's column and never repeated Lowry's statement.

Under D.C. law, "a cause of action for defamation requires proof of publication *of the defamatory statement* to a third party." *Oparaugo v. Watts*, 884 A.2d 63, 73 (D.C. 2005) (emphasis added); *see also* Restatement (Second) of Torts § 558(b) (1979) (publication required). Yet Mann does not contend that CEI's press release itself contained any defamatory statement, only that it linked to an allegedly defamatory statement on *National Review*'s website. Compl. ¶¶ 34, 84. In fact, CEI did not repeat any part of Lowry's column containing the allegedly defamatory statement. *See* JA 97. Mann having failed to show that CEI ever published Lowry's allegedly defamatory statement, Mann's attempt to hold CEI liable for it must fail.

Mann's suggestion that a hyperlink to allegedly defamatory materials, without presenting them directly, is sufficient to support liability has been rejected by every court to consider it. The problem with Mann's logic is that, "while a reference may call the existence of the article to the attention of a new audience, it does not present the *defamatory contents* of the article to the audience. Therefore, a reference, without more, is not properly a republication." *In re Phila. Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012) (quotation marks omitted); *see also Shepard v. TheHuffingtonPost.com, Inc.*, No. 12-1513, 2012 WL 5584615 at *2 (D. Minn. Nov. 15, 2012);

U.S. ex rel. Klein v. Omeros Corp., No. 09-1342, 2012 WL 4874031, at *11 (W.D. Wash. Oct. 15, 2012); *Haefner v. New York Media, LLC*, 918 N.Y.S.2d 103, 104 (App. Div. 1st Dep't 2011); *Salyer v. Southern Poverty Law Ctr., Inc.*, 701 F. Supp. 2d 912, 916–18 (W.D. Ky. 2009); *Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.*, No. 02–02258, 2007 WL 935703, at *7 (S.D. Cal. Mar. 7, 2007); *Churchill v. State of N.J.*, 378 N.J. Super. 471, 876 A.2d 311 (2005).

This is hardly a novel proposition. *See Goforth v. Avemco Life Ins. Co.*, 368 F.2d 25, 29 n. 7 (5th Cir. 1966) (holding, in a case involving typewritten letters, that "a mere reference to another writing which contains defamatory matter does not constitute an actionable repetition or republication of that libelous material."). Were the law otherwise, every major Internet service, from Google to Facebook, would face staggering liability in the District for their hyperlinks, to say nothing of the litigation risk that newspapers and magazines would face merely for referencing allegedly defamatory books, recordings, etc.

Finally, CEI's comment that Lowry "expertly summed up the matter" could not and did not convert its hyperlink into republication. "Under traditional principles of republication, a mere reference to an article, regardless how favorable it is as long as it does not restate the defamatory material, does not republish the material." *Phila. Newspapers*, 690 F.3d at 175. Mann's claim therefore fails.

C. Mann Has Failed To Meet His Burden To Show that the Think Tank Defendants Acted with Actual Malice

Under the First Amendment and D.C. Anti-SLAPP Act, Dr. Mann's burden at this stage is to show he is likely to succeed on the merits of proving by clear and convincing evidence that the Think Tank Defendants made each challenged statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). To do so, he must present "sufficient evidence to permit the conclusion that the de-

fendant[s] in fact entertained serious doubts as to the truth of the publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Here, however, that showing is impossible because Simberg's and Lowry's commentary present "one of a number of possible rational interpretations' of an event 'that bristled with ambiguities," which defeats any claim that they acted with actual malice. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984) (quoting *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971)).

Even if the Court accepts Mann's construction of those articles as accusing him of "academic fraud," the very reports that Mann says "exonerate" him actually paint a more complicated picture. For example, the NSF investigation—one of only two that specifically addressed Mann's conduct—found that the Climategate emails "contained language that reasonably caused individuals, not party to the communications, to suspect some impropriety on the part of the authors," including Mann, and expressly raised "concerns…about the quality of the statistical analysis techniques that were used in [Mann's] research." Moreover, the NSF Inspector General specifically declared Penn State's inquiry—the other that addressed Mann's conduct—to be incomplete and inadequate, explaining that "the University did not adequately review the [data falsification] allegation" and "did not interview any of the experts critical of [Mann's] research[.]" The Independent Climate Change Email Review, in turn, concluded that some renditions of the "hockey stick" figure were "misleading," and the UEA Scientific Assessment Panel acknowledged that "[t]he potential for misleading results arising from selection bias is very great in this area[.]" There are ample grounds for suspicion of Mann's research in the reports he cites in his favor.

Furthermore, as Mann himself concedes, the various investigations that he cites only "found that there was no evidence" of fraud. Compl. ¶ 24. At the same time, they raised substantial concerns regarding "misleading" practices and identified events suggesting possible "impro-

priety." Merely pointing to investigative reports that take no ultimate position on Mann's conduct cannot show that anyone knew Mann to be "exonerated" of all wrongdoing or that these Defendants, in particular, entertained any doubt as to the truth of their statements or even had reason to.

And all of this is to say nothing of the heated, years-long debate over Mann's research and the many articles, books, and websites dedicated to proving Mann's "hockey stick" research to be false. In these circumstances, online commentary surmising that Mann had engaged in some manner of wrongdoing is certainly "one of a number of possible rational interpretations" that a writer could draw. *See Bose*, 466 U.S. at 512. For that reason, Mann cannot meet his burden of showing he is likely to demonstrate by clear and convincing evidence that the Think Tank Defendants knew their statements to be false or entertained serious doubts about their truth.

D. Mann's Intentional Infliction of Emotional Distress Claim Falls with His Libel Claims

The First Amendment's limitations on actions for defamation apply with equal force to claims for intentional infliction of emotional distress. Public figures "may not recover for the tort of intentional infliction of emotional distress by reason of publications…without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'" *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). On that basis, the Supreme Court held non-actionable an article purporting to be an interview with the plaintiff, a well-known minister, "in which he states that his 'first time' was during a drunken incestuous rendezvous with his mother in an outhouse." *Id.* at 48. Because the jury had decided against the plaintiff's libel claim—finding that the parody could not be reasonably understood as an assertion of fact—his emotional distress claim necessarily failed. *Id.* at 57. *See also Clawson v. St. Louis Post-Dispatch, L.L.C.*, 906 A.2d 308, 317 (D.C. 2006) (same).

So too here. As shown above, the Sandusky comparison is not actionable because it cannot be reasonably interpreted as stating a provably false fact about Mann—the statement is a metaphor, not an accusation of a crime or fraud. Moreover, as even the Superior Court acknowledged, *see* JA 120, Mann has come nowhere near showing that he is likely to meet his burden of proving by clear and convincing evidence that the Think Tank Defendants made that statement with knowledge of its falsity or reckless disregard for its truth. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989). Accordingly, this claim must be dismissed.

Mann also fails to state a proper emotional-distress claim because he has failed to identify any "extreme and outrageous conduct on the part of the defendant." *Minch v. District of Columbia*, 952 A.2d 929, 940 (D.C. 2008). "Outrageous" does not call for subjective assessment, but refers to conduct "'atrocious and utterly intolerable in a civilized community.'" *Id.* at 941 (quoting *Waldon v. Covington*, 415 A.2d 1070, 1076 (D.C. 1980)). A police officer's conduct belittling and harassing a rape victim may qualify, *see id.* (discussing *Drejza v. Vaccaro*, 650 A.2d 1308 (D.C.1994)), but unflattering comments published on the Internet, stated in language common for that forum and for the climate-change debate, surely do not. This is independent grounds for dismissal of Mann's emotional-distress claim.

CONCLUSION

The decisions of the Superior Court denying the Think Tank Defendants' special motions to dismiss should be reversed and the case remanded with instructions for the Superior Court to award reasonable attorney fees and costs to the Think Tank Defendants pursuant to D.C. Code § 16-5504(a).

Respectfully submitted,

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ADDENDUM

D.C. Code § 16-5501: Definitions

For the purposes of this chapter, the term:

(1) "Act in furtherance of the right of advocacy on issues of public interest" means:

(A) Any written or oral statement made:

(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or

(ii) In a place open to the public or a public forum in connection with an issue of public interest; or

(B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

(2) "Claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief.

(3) "Issue of public interest" means an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

(4) "Personal identifying information" shall have the same meaning as provided in § 22-3227.01(3).

D.C. Code § 16-5502: Special motion to dismiss

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.

(b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

(c)

(1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.

(2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

D.C. Code § 16-5503: Special motion to quash

(a) A person whose personal identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with a claim arising from an act in furtherance of the right of advocacy on issues of public interest may make a special motion to quash the discovery order, request, or subpoena.

(b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personal identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

D.C. Code § 16-5504: Fees and costs

(a) The court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees.

(b) The court may award reasonable attorney fees and costs to the responding party only if the court finds that a motion brought under § 16-5502 or § 16-5503 is frivolous or is solely intended to cause unnecessary delay.

D.C. Code § 16-5505: Exemptions

This chapter shall not apply to any claim for relief brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is:

(1) A representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services; and

(2) The intended audience is an actual or potential buyer or customer.

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2014, I caused a copy of the foregoing Brief of Appellants Competitive Enterprise Institute and Rand Simberg to be served by first-class mail, postage prepaid, upon:

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