SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., et al., Defendants.	Case No. 2012 CA 008263 B Judge Natalia Combs Greene Next event: Initial Scheduling Conference January 25, 2013

DEFENDANTS COMPETITIVE ENTERPRISE INSTITUTE AND RAND SIMBERG'S SPECIAL MOTION TO DISMISS PURSUANT TO THE D.C. ANTI-SLAPP ACT

Pursuant to the District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5502(a) ("the D.C. Anti-SLAPP Act" or "the Act"), Defendants Competitive Enterprise Institute and Rand Simberg ("CEI Defendants") respectfully move for an order dismissing the Complaint's claims against them with prejudice.

As set forth in the accompanying memorandum, the CEI Defendants' commentary on Plaintiff Michael E. Mann's research and Penn State's investigation of his research is protected by the D.C Anti-SLAPP Act because it is unquestionably an "act in furtherance of the right of advocacy on issues of public interest," D.C. Code § 16-5502(a), and Mann cannot demonstrate that his claims are "likely to succeed on the merits," D.C. Code § 16-5502(b). In the event that this Motion is granted, the CEI Defendants reserve the right to file a motion seeking an award of the costs of this litigation, including attorneys' fees, pursuant to D.C. Code § 16-5504(a).

WHEREFORE, the CEI Defendants respectfully request that the Court grant their Special Motion to Dismiss and enter judgment in their favor dismissing the Complaint's claims against Defendants Competitive Enterprise Institute and Rand Simberg with prejudice.

Rule 12-I(a) Certification

Pursuant to Rule 12-I(a), counsel for the CEI Defendants consulted with counsel for Plaintiff on December 12, 2012, to ascertain whether Plaintiff consents to the relief herein requested. Plaintiff does not consent.

Oral Hearing Requested

Pursuant to D.C. Code § 16-5502(d) and Rule 12-I(f), the CEI Defendants respectfully request that the Court hold an expedited hearing on this Motion, as the D.C. Anti-SLAPP Act requires.

Dated: December 14, 2012

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS COMPETITIVE ENTERPRISE INSTITUTE AND RAND SIMBERG'S SPECIAL MOTION TO DISMISS PURSUANT TO THE D.C. ANTI-SLAPP ACT

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In support of their Special Motion To Dismiss Pursuant to the D.C. Anti-SLAPP Act, D.C. Code § 16-5502(a), Defendants Competitive Enterprise Institute ("CEI") and Rand Simberg (collectively "CEI Defendants") respectfully submit this Memorandum of Points and Authorities:

INTRODUCTION

The Plaintiff, Professor Michael Mann, has argued for years that groups and individuals who are skeptical of his views on man-made global warming—perhaps best illustrated in his controversial "hockey stick" diagrams of temperature trends—are illegitimate and should have no voice in the public debate over climate change. He pointedly refers to groups and individuals who are skeptical of his scientific and public policy conclusions as "deniers"[1]—a less-than-oblique reference to "Holocaust deniers"—and characterizes them as perpetrators of "crime[s] against humanity."[2] In the months before filing this lawsuit, Mann stated repeatedly that he was engaged in a "battle" and a

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[1] *See, e.g.*, 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, Ex. 1 ("That term ["skeptic"] has been, frankly, misappropriated by many who claim to be skeptics but are nothing of the sort. [Those are] the folks that I refer to as contrarians, or if they're denying mainstream science, I'll call them 'deniers.' I'll call a spade a spade. They don't like that term."). The Defendants respectfully request that this Court take judicial notice pursuant to Rule 43(e) of this and other factual information available in the public domain cited and described herein and attached to this Memorandum as Exhibits 1 through 35. *See Mody v. Center for Women's Health, P.C.,* 998 A.2d 327, 336 (D.C. 2010) (taking notice of online article); *Christopher v. Aguigui*, 841 A.2d 310, 311 n.2 (D.C. 2003) (discussing notice in general). In addition, the Court may consider at this stage factual materials referenced in Mann's Complaint. *Drake v. McNair*, 993 A.2d 607, 616 (D.C. 2010). These include Exhibits (and attachments) 6, 18, 22, 23, 24.

[2] *See, e.g.*, 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/, Ex. 2; Adam Forrest, "We Need To Adapt . . . Changes Are Coming No Matter What," Big Issue, Apr. 3, 2012, http://www.bigissue.com/features/interviews/833/we-need-adapt-changes-are-coming-no-matter-what, Ex. 3; Paul Dechene, I Won, We Lost, Planets Magazine, July 26, 2012, Ex. 4.

"street fight" against these groups and persons and that he would "fight back" against them.[3] But rather than counter speech with speech, he chose to sue, first bringing defamation claims against a Canadian climate scientist and think tank and now seeking to silence another policy organization, CEI, with which he has clashed for years over matters of climate science and policy.

Since filing this lawsuit, Mann has been surprisingly candid that his aim is not to redress any injury that may have been caused by Simberg's post on CEI's weblog ("the Blog Post").[4] In fact, he denies suffering any real injury. Rather, his goal is to harass his ideological opponents, whom he believes are engaged in an underhanded conspiracy to discredit his work by disputing its merits. He explained as much in a recent 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

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[3] *See, e.g.*, Michael E. Mann, *The Hockey Stick and the Climate Wars* 233 (2012); Ex. 3 ("[E]ither we allow ourselves to be misrepresented or we fight back, and I've chosen to fight back."); Suzanne Goldenberg, *The Inside Story on Climate Scientists Under Siege*, (Feb. 17, 2012, 07:28 EST), http://www.guardian.co.uk/environment/2012/feb/17/michael-mann-climate-war, Ex. 5 ("[T]he scientific community is in a street fight with climate change deniers and they are not playing by the rules of engagement of science. The scientific community needed some time to wake up to that."); *id.* ("I think you are now going to see the scientific community almost uniformly fighting back against this assault on science . . . . [M]y fellow scientists and I are very ready to engage in this battle.")

[4] Rand Simberg, The Other Scandal in Unhappy Valley, CEI Openmarket.org (July 13, 2012), http://www.openmarket.org/2012/07/13/the-other-scandal-in-unhappy-valley/, Compl., att. A. Exhibit 6 is a copy of the text of the Blog Post, with hyperlinked documents included as attachments and one sentence that is challenged by Mann restored. *See* Compl. ¶27; *infra* n.69.

> point, I think you have a responsibility to your fellow scientists, to the scientific community, to stand up against these sorts of dishonest assaults.[5]

Mann has been even more candid on his Facebook page (which is open to the public), 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 such groups will be "silenced."[6]

Specifically intended to silence his critics, Mann's lawsuit is precisely the kind of abuse of legal process that the District of Columbia's Anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq.*, was intended to stop in its tracks. Indeed, as the Council's Committee on Public Safety and the Judiciary explained when it reported the bill, the Anti-SLAPP Act exists to put a swift end to lawsuits such as this one, where "the goal . . . is not to win . . . but punish the opponent and intimidate them into silence"—in other words, cases in which "*litigation itself* is the plaintiff's weapon of choice." Committee Report on Bill 18-893 (Nov. 18, 2010), Ex. 8, at 4 (citation and quotation marks omitted). That is this case.

Moreover, the "Blog Post" that Mann challenges is in the heartland of speech on matters of public interest that is protected by the First Amendment and District of Columbia law. The debate over global warming has long been marked by strong opinions and strong language, not least by Mann. The Blog Post is in that tradition. It vigorously expresses the CEI Defendants' opinion that Penn State's investigation into Mann's research following Climategate's disclosure of emails

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[5] 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/, Ex. 7.

[6] Michael E. Mann, Facebook Post, October 23, 2012, Ex. 9; Michael E. Mann, Facebook Post, May 16, 2012, Ex. 10.

suggesting research improprieties and bias by Mann was woefully inadequate. It does so by way of analogy to another instance in which the same university chose to bury its head in the sand rather than investigate potentially damaging truths—the Sandusky affair. While describing and even hyperlinking to the results of the Penn State investigation of Mann's work, it argues that the university's inquiry was a "cover up and whitewash," based on critical analyses of Mann's work and the contents of the Climategate emails. Given their language, context in the global warming debate, and lack of verifiability (i.e., whether a statement is even capable of being proven true or false), the challenged statements are expressions of pure opinion and hyperbole, not assertions of fact—something that any reasonable reader would instantly recognize. For that reason, and others, they are protected speech.

Because the CEI Defendants' opinion commentary on Mann's research and Penn State's investigation of the allegations surrounding his research is unquestionably protected by the First Amendment and D.C. law, Mann's claims arising from that commentary are without merit and would have to be dismissed in the normal course of litigation. But the D.C. Anti-SLAPP Act mandates that they be dismissed *now*, before Mann is able to impose substantial litigation costs on his ideological opponents and achieve his stated goal of chilling speech on a major issue of public policy. Only if Mann were able to carry the heavy burden of demonstrating that his claims against the CEI Defendants are "likely to succeed on the merits" could those claims be permitted to proceed, but that result is precluded by the basic First Amendment principle "that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

At bottom, this case is not about global warming, and its resolution does not depend on whether Mann or the CEI Defendants are ultimately proven correct on that issue. Rather, it is about the First Amendment's application to controversies of science, a field where "uninhibited, robust,

and wide-open" debate is essential to the progress and welfare of our entire society. The Court should not allow itself to be used to facilitate Mann's attempt to muzzle opposing points of view through the chill of drawn-out litigation. Instead, it should carry out the purpose of the D.C. Anti-SLAPP Act by dismissing his claims against the CEI Defendants.

FACTUAL BACKGROUND

Professor Mann acknowledges, and CEI Defendants agree, that "[t]here is a larger context" for his lawsuit against them than just the Blog Post.[7] That context is the vigorous public debate over the extent and severity of man-made global warming, a debate in which both Mann and CEI are prominent participants. Mann has long been frustrated that groups and individuals whom he believes to be wrong are able to voice their opinions in this public debate, and he believes that such groups and individuals are engaged in a nefarious conspiracy to persecute him through their criticism of his work. That context provides a necessary backdrop to Simberg's opinion commentary and reveals the true gravamen of Mann's claims.

A. Mann Produces His Controversial "Hockey Stick" Diagram

Like the climate itself, scientific understanding of changes in the climate is dynamic, constantly shifting in response to new research and new arguments. Scientists and natural philosophers have researched and speculated on the mechanics of long-term shifts in temperatures—i.e., climate change—since at least the early 19th century. In an 1824 paper, Joseph Fourier (principally known as a mathematician) argued that atmospheric gases could cause warming

[7] Ex. 9.

of the atmosphere.[8] 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. Indeed, in 1975, *Newsweek* published an alarmist article, entitled "The Cooling World," reporting 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."[9] The magazine noted that scientists were "pessimistic that political leaders will take any positive action to compensate for the climatic change, or even to allay its effects."[10]

Beginning with a series of conferences in the mid-1980s, attention shifted to global *warming*. By the end of the decade, James Hanson, a NASA scientist, had testified before Congress on the link between carbon dioxide emissions and temperatures.[11] Politicians' concern prompted the United Nations and the World Meteorological Organization to establish the Intergovernmental Panel on Climate Change ("IPCC") to 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."[12] Moreover, data in the report showed that any recent warming was well within

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[8] *See generally* A.W. Montford, *The Hockey Stick Illusion* 19-40 (2010) (presenting a brief history of climate science).
[9] Peter Gwynne, *The Cooling World*, Newsweek, Apr. 28, 1975, Ex. 11, at 64.
[10] *Id.*
[11] *See* Montford, *supra* n.8, at 21.
[12] Working Group 1, Climate Change: The IPCC Scientific Assessment 199 (J.T. Houghton et al. eds., 2nd ed. 1991).

historical norms and, indeed, far less severe than the elevated temperatures of the Medieval Warm Period, from the 10th through the 13th centuries.[13]

That was the impression that Mann's controversial "hockey stick" diagram sought to dispel. 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 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—in other words, the "hockey stick."[14]

Criticism of the diagram and Mann's methodology was immediate. An otherwise positive *New York Times* article, for example, quoted a climatologist's concern that limits in data meant that reconstruction of temperature through proxies would never be "totally convincing."[15] Another, in the newspaper's paraphrase, "questioned whether it was valid simply to extend the proxy record by adding the last 150 years of thermometer measurements to it. He said that would be a bit like juxtaposing apples and oranges."[16] Nonetheless, Mann and his colleagues stuck to their

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[13] *Id.* at 202.
[14] 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
[15] William Stevens, *New Evidence Finds This Is Warmest Century in 600 Years*, N.Y. Times, Apr. 28, 1998, Ex. 12.
[16] *Id.*

methodology, publishing another paper in 1999 extending their reconstructed temperature estimates back another 400 years, to 1000 A.D.[17]

These publications landed Mann a prominent role as one of eight Lead Authors of the "Observed Climate Variability and Change" chapter of the IPCC's third report, published in 2001, and that report sealed his fame with multiple depictions of the "hockey stick" illustrationdiagram, including in the influential Summary for Policy Makers.[18] (Mann has achieved recognition within his field. But contrary to the Complaint's repeated allegations that he is "a Nobel prize recipient," ¶5; *see also* ¶¶2, 17, the Nobel Committee denies that it has awarded him any prize.[19]) The "hockey stick" had become, as Mann describes it, an "icon." Its virtue, he says, is that "it was very simple. You didn't need to understand the physics of how a theoretical climate model works to understand the picture that our hockey stick was telling about the unprecedented nature of climate change."[20]

But that was also its danger. To critics, the "hockey stick" diagram may have been simple and convincing, but it was also wrong, or at least inadequately supported.[21]

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[17] Michael E.Mann, Raymond S. Bradley, & Malcolm K. Hughes, *Northern Hemisphere Temperatures During the Past Millenium: 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.

[18] IPCC, Climate Change 2001: The Scientific Basis 3 (2001).

[19] Charles C. W. Cooke, *Michael Mann's False Nobel Claim*, National Review Online (Oct. 26, 2012), http://www.nationalreview.com/corner/331738/michael-manns-false-nobel-claim-charles-c-w-cooke, Ex. 13. (providing a transcript of an inquiry to the Nobel Committee).

[20] Andrew C. Revkin, *A Student's Conversation With Michael Mann on Climate Science and Climate Wars*, N.Y. Times (May 3, 2012), *available at* http://dotearth.blogs.nytimes.com/2012/05/03/a-students-conversation-with-michael-mann-on-climate-science-and-climate-wars/, Ex. 14.

[21] Indeed, the Blog Post makes this very point, linking to another article by Simberg that challenges Mann's "hockey stick" methodology and concludes that the evidence is far less conclusive than the "hockey stick" suggests. Rand Simberg, The Death of the Hockey Stick, PJ Media, May 17, 2012, Ex. 6, att. B.

B. CEI and Others Criticize Mann's "Hockey Stick" Diagram

As Mann's "hockey stick" gained prominence, public criticism of it within the scientific and policymaking communities blossomed, drawing Mann's ire. Among the papers taking issue with the diagram and Mann's methods were two by Stephen McIntyre and Ross McKitrick. The first, published in 2003, argued that Mann's 1998 paper contained various data errors[22], a charge which Mann sharply denied in a pugnacious response[23] before (some time later) acknowledging it had some merit and issuing a correction.[24] Their second, published in 2005, argued that the 1998 paper 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.[25]

In response to this criticism, the House Committee on Energy and Science launched an investigation into Mann's research. Congress requested reviews of Mann's research by a team of academic statisticians led by Edward Wegman and by the National Research Council ("NRC"). Both found 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

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[22] Stephen McIntyre & Ross McKitrick, *Corrections to the Mann et al. (1998) Proxy Data Base and Northern Hemispheric Average Temperature Series*, 14 Energy & Environment 751 (2003), *available at* http://www.uoguelph.ca/~rmckitri/research/MM03.pdf.

[23] Michael E. Mann, Raymond S. Bradley, & Malcolm K. Hughes, *Note on Paper by McIntyre and McKitrick in "Energy and Environment",* 2003, available at http://www.climateaudit.info/pdf/mann/EandEPaperProblem.pdf.

[24] Michael E. Mann, Raymond S. Bradley, & Malcolm K. Hughes, *Corrigendum: Global-Scale Temperature Patterns and Climate Forcing Over the Past Six Centuries*, Nature, July 1, 2004, at 105, http://www.meteo.psu.edu/holocene/public_html/shared/articles/MBH98-corrigendum04.pdf.

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

was the hottest year of the millennium cannot be supported by his analysis."[26] The NRC Report, while supporting aspects of Mann's research relating to recent centuries' 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."[27] 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.[28]

The public policy community also joined in the criticism of Mann's "hockey stick" diagram, with the Competitive Enterprise Institute playing a leading role. CEI was founded in 1984 as a non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. As such, it supports market-based approaches to matters of public policy, and is generally wary of the need for and benefit of government intervention. Like other think tanks, CEI produces original research. It also participates more directly in policy development, by engaging in advocacy through media, grassroots education, and occasionally litigation. As a result of its work on climate science and policy, led by Myron Ebell, CEI has been at the forefront of the political and scientific debate over global warming.

CEI was an early and consistent critic of Mann's research—which it considered to be overconfident in its conclusions—as part of its effort to educate policymakers and the public on the

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

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

[28] *Id.* at 4.

risks of committing to enormously expensive policies for what may prove to be a minor or nonexistent problem. In a 2003 article, for example, a CEI analyst discussed McIntyre and McKitrick's criticisms of the "hockey stick" research and reported that Mann had dismissed those criticisms as a "political stunt" without really addressing them. The article drew a comparison to the then-recent Michael Bellesiles controversy, in which a computer engineer demonstrated that a prize-winning historian's research on gun ownership was based on fabricated data. While acknowledging that these particular errors in Mann's data appeared to be accidental, it questioned "how far the proponents of strong action on climate change go to defend the data," in light of their political biases, and how that would affect the course of the climate change debate.[29]

Another CEI article from 2005 reported on congressional investigations into Mann's research and faulted him for refusing to share all of his data and methods.[30] A 2006 press release commented on the NRC Report on Mann's research, explaining that "the report finds that the proxy evidence does not support the conclusions that the twentieth century was the warmest or that the 1990s was the warmest decade or that 1998 was the warmest year in the past 1000 years, claims which were originally made in papers by Professor Michael Mann, et al . . . ."[31] Other CEI

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[29] Iain Murray, *Hockey Stick Slapped: Climate Change's Bellesiles?*, Competitive Enterprise Institute (Nov. 02, 2003), http://cei.org/op-eds-and-articles/hockey-stick-slapped-climate-changes-bellesiles

[30] Steven J. Milloy, Tree Ring Circus, Competitive Enterprise Institute (July 31, 2005), http://cei.org/op-eds-and-articles/tree-ring-circus-steven-j-milloy

[31] Myron Ebell, *Statement on the National Research Council's Surface Temperature Report*, Competitive Enterprise Institute, (June 22, 2006), http://cei.org/op-eds-and-articles/statement-national-research-council%E2%80%99s-surface-temperature-report

publications, particularly its fortnightly "Cooler Heads" newsletter, regularly reported on Mann's research and its critics.[32]

Rather than respond directly to CEI's criticisms, Mann chose to engage in *ad hominem* attack of CEI: "I've never seen any evidence that they have any interest in being intellectually honest."[33]

C. Mann Becomes a Prominent Figure in the Climategate Controversy

In November 2009, unknown persons took a trove of documents from a server at the Climatic Research Unit ("CRU") of the University of East Anglia ("UEA") and uploaded them to various websites, from which they were widely distributed. The event became known as "Climategate" for the inflammatory materials that it revealed concerning, among others, Mann.

Perhaps the most notorious of the 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 adding in the real temps to each series for the last 20 years (i.e. from 1981 onwards) and from 1961 for Keith's to hide the decline."[34] The "decline," well-known to those familiar with the climate science literature, 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." 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

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[32] *See, e.g.*, Myron Ebell, *Vol. VII, No 22,* Competitive Enterprise Institute, (Nov. 02, 2003) http://cei.org/news-letters-cooler-heads-digest/volvii-no-22.

[33] Michael Shnayerson, *A Convenient Untruth*, Vanity Fair, May 2007, *available at* http://www.vanityfair.com/politics/features/2007/05/skeptic200705, Ex. 16.

[34] Juliet Eilperin, *Hackers Steal Electronic Data From Top Climate Research Center*, Wash. Post, Nov. 21, 2009, Ex. 17.

that recent instrumental measurements were artificially high, as a result of increased urbanization (which traps heat near the surface and thereby inflates temperature measurements) or other phenomena.[35] In either case, the "decline" undermines the case for recent global warming, making any attempt to "hide" it by use of a "trick" appear (to say the least) suspicious.

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 al) series"—i.e., that he has less than full faith in his own reconstructed data.[36] And 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 researched that questioned his "hockey stick" conclusions.[37] In another email that raised red flags among public research institutions, 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.[38]

D. Climategate Investigations Decline To Address the Science

CEI 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

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[35] *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), Ex. 18.

[36] John P. Costella, *Why Climategate Is So Distressing to Scientists*, *in* Climategate Analysis 17 (Science & Pub. Pol. Inst., 2010), *available at* http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/26866.pdf.

[37] Juliet Eilperin, *Stolen E-Mails Illustrate Venomous Feelings Beneath Climate Change Debate*, Wash. Post., Nov. 22, 2009, Ex. 19.

[38] Frank Warner, *Penn State Scientist in Hot Seat over E-mails*, Morning Call (Allentown, PA), Nov. 25, 2009, Ex 20.

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 ascertain whether the research at issue was biased or had been oversold.[39]

The investigations that followed—several focusing on Mann—tended to gloss over or ignore this second question. 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."[40] 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 an interview of Mann, without further investigation.[41] 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 over-sharing of prepublication manuscripts by other scientists, which are typically regarded as confidential.[42] 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

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[39] *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, Ex. 21.

[40] 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, Ex 22.

[41] *Id.* at 2-3.

[42] 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, Ex. 6, att. G.

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 work was accomplished jointly with other scientists."[43] While Mann was not found to have committed "Research Misconduct" (as narrowly defined in Penn State's regulations[44]), needless to say, this was nowhere near the kind of critical reexamination of Mann's work that CEI and other skeptical voices had sought. And their disappointment was shared by many hoping to restore confidence in the consensus view of global warming.[45]

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.[46] 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."[47] 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

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[43] *Id.* at 17-18.

[44] 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.

[45] *See, 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/ ("I had hoped, not very confidently, that the various Climategate inquiries . . . would have been a first step towards restoring confidence in the scientific consensus. But no, the reports make things worse.").

[46] National Science Foundation, Office of Inspector General Closeout Memo at 2; *see also* 45 C.F.R. § 689.1 (defining research misconduct), Ex. 23.

[47] *Id.* at 2.

authors," including Mann.[48] Thus, it conducted an additional investigation, interviewing "[Mann], critics, and disciplinary experts."[49]

While NSF found 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 and data that contradicted its confident message that recent warming was anomalous.[50] 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.[51]

Other investigatory reports following Climategate, while not focusing directly on Mann, raised similar concerns, without resolving them. For example, the Independent Climate Change Email Review ("ICCER"), convened by UEA, 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.[52] 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

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[48] *Id.* at 2-3.
[49] *Id.* at 3.
[50] *Id.* at 3.
[51] *Id.* at 3.
[52] *See* Ex. 18 at 49.

and instrumental data were spliced together."[53] These two manipulations, it explained, related to the attempts mentioned in the Climategate emails to "hide the decline" through "Mike's [i.e., Mann's] Nature trick."[54] It also recognized that there are "multiple sources 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.[55]

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…."[56] The panel lamented "that so few professional statisticians have been involved in this work because it is fundamentally statistical."[57] 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 wanted to see "an investigation into the science."[58]

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[53] *Id.* at 60.
[54] *Id.*
[55] *Id.* at 57.
[56] 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), Ex. 24.
[57] *Id.*
[58] 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, Ex. 26.

E. CEI and Simberg Call for a Truly Independent Investigation

Disappointed that neither Penn State nor the NSF investigation into Mann's conduct addressed the scientific basis of his Mann's "hockey stick" research, CEI called for additional inquiries.[59] In a November 2010 press release, one year after the release of the emails, Ebell charged that the serious questions regarding climate research raise by Climategate still had not been answered, and he proposed a solution to put the issue to rest, once and for all: "What is clearly needed now is a thorough audit by independent statisticians and scientists of the data and methodologies underlying the major scientific claims underlying global warming alarmism."[60]

That call was to no avail. For that reason, CEI and other groups filed a FOIA request with Mann's former employer, the University of Virginia, seeking records regarding climate research, including those generated by Mann.[61] Although CEI did not appeal the university's denial of this request, other parties (including Virginia's Attorney General) did continue to seek these records, and Mann intervened to block their release. The Virginia Supreme Court ultimately ruled in Mann's favor.[62]

Defendant Rand Simberg, an adjunct fellow of CEI who focuses on space policy, also sought to inform policymakers and the public that the Climategate controversy shad not been

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[59] Other investigations, not targeting Mann, also declined to review the science, much to CEI's disappointment. *See, e.g.*, Iain Murray, *Climategate Inquiry Glosses Over the Facts*, Sept. 20, 2010, http://cei.org/op-eds-and-articles/climategate-inquiry-glosses-over-facts (describing how another panel "handed down a short report which did not examine the quality of the science at all").

[60] Christine Hall, *ClimateGate Scandal One Year Later, Many Questions Remain*, Competitive Enterprise Institute (Nov. 18, 2010), http://cei.org/news-releases/climategate-scandal-one-year-later-many-questions-remain

[61] Christopher C. Horner, *University of Virginia Freedom of Information Act Request*, Competitive Enterprise Institute (May 21, 2010), http://cei.org/outreach-legal-briefs/university-virginia-freedom-information-act-request

resolved and that the investigations into Mann's work, in particular his "hockey stick," were inadequate. In a November 2009 article (to which the Blog Post links), Simberg argued that the Climategate emails, then only recently disclosed, demonstrated that mainstream climate science was at odds with the scientific method. Rather than "continually adjust and refine their theories to conform to the data," the climate scientists who took part in the emails (including Mann, although he is not mentioned in the article) were revealed to have adjusted their theories to fit their "preconceptions" of catastrophic warming caused by industrial activity. This showed that climate "scientists are human, with human failings," such that their research cannot be blindly trusted as a basis for public policy. The article calls for fewer claims that "the science is settled" and greater skepticism and transparency: "*Every* theory should be subject to challenge on a scientific basis. *Every* claim of a model's validity should be accompanied by the complete model and data set that supposedly validated it, so that it can be replicated."[63]

In a May 2012 article (to which the Blog Post also links), Simberg argues that Mann's "hockey stick" diagram may be on its last legs, due to a recent critical reexamination by McIntyre. The article provides a detailed discussion of the decade-long scientific controversy over the "hockey stick" diagram and the data underlying it. As it explains, a major criticism of Mann's research was that his statistical "methodology would generate a hockey stick almost independently of the data input." In response, his Mann's defenders claimed that his results had been independently confirmed by CRU's research, which employed a different methodology. But CRU had never disclosed its underlying data, making it impossible for skeptical scientists to analyze the CRU model.

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[63] Rand Simberg, *Climategate: When Scientist Become Politicians*, PJ Media (Nov. 23, 2009) http://pjmedia.com/blog/global-warminggate-the-science-is-unsettled/, Ex. 6, att. C.

But in the wake of the Climategate scandal, CRU was finally forced to disclose this data, which McIntyre then analyzed reviewed. He found that CRU had been selective in its choice of data, dropping datasets that would cause its results to deviate from the hockey stick shape; when that data was added back in, the stick's blade disappeared.

"What does this all mean?," asked Simberg. "[L]et's state what it doesn't mean. It doesn't mean that we know that the planet isn't warming, and it doesn't mean that if it is, that we can be sure that it is not due to human activity." What was necessary, concluded Simberg, was a "major housecleaning" in the field of climate science.[64]

F. The Blog Post Furthers CEI and Simberg's sCall for a Truly Independent Investigation

Simberg expressly drew on this background in the Blog Post to argue that Penn State's investigation of Mann's research was a "whitewash."[65] The news hook for this commentary was former FBI Director Louis Freeh's report finding that the university had made no serious attempt to investigate allegations of sexual improprieties by a former football coach, Jerry Sandusky. Simberg drew 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 and dispassionate inquiry into the facts.

Accordingly, the Blog Post's criticism is principally directed at the conduct of Penn State's post-Climategate investigation of Mann's work, which it characterizes as a "cover up and

[64] Ex. 6, att. B.
[65] Ex. 6.

whitewash" due to its lack of independence, failure to consider relevant material, and limited scope. *See* Compl., Att. A. As it explains, the leaked emails raised concerns about potentially improper conduct and bias by climate scientists, including Mann, to overstate the case for catastrophic global warming.

In particular, Simberg argued that the "hide the decline" email and others revealed that Mann and his colleagues "had been behaving in a most unscientific manner" and "had been engaging in data manipulation to keep the blade on his famous hockey-stick graph." In support of these characterizations, the Blog Post links to Simberg's November 2009 article on whether climate scientists had abused the scientific method[66] and another 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.[67] This latter article describes the statistical method Mann 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" diagram point downwards, as it would do if the two data series were combined in other ways. (This is the same technique that the Independent Climate Change Email Review—cited by Mann as an "exoneration" in the Complaint, Compl. ¶21—found to be "misleading."[68]) The Blog Post explains that this "data manipulation" allowed Mann "to keep the blade on his famous hockey-stick graph, which had become an icon for those determined to reduce human

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[67] Steve McIntyre, *Mike's Nature Trick*, Climate Audit (Nov. 20, 2009, 9:59am), http://climateaudit.org/2009/11/20/mike%E2%80%99s-nature-trick/, Ex. 6, att. E.
[68] *See* Ex. 18 at 59-60.

carbon emissions by any means necessary." Thus, Mann "could be said to be the Jerry Sandusky of climate science" for having "molested and tortured data in the service of politicized science."[69]

The Blog Post explains that this impression of bias was confirmed by McIntyre's recent analysis of CRU data, described in Simberg's May 2012 article. Simberg links to that article in the Blog Post as support for its criticism of Mann's and others' "hockey-stick deceptions."[70]

The Blog Post then recounts how, as a result of the concerns raised by Climategate's disclosures, Penn State committed to undertake its own investigation into Mann's research but, in the view of many observers, failed to follow through on that promise in good faith. As Simberg expressly states, the Penn State investigation "*declared him [Mann] innocent of any wrongdoing*," and Simberg links to the university's report for any reader to download and review.[71] But Simberg also critically notes 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 whitewash." In support of that characterization, the Blog Post links to and quotes a July 2010 article by Marc Morano, editor of the "Climate Depot" website.[72] In the portions quoted, that article contends that the university "circled the wagons" to protect its funding and reputation and

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[69] Shortly after Simberg published the Blog Post, 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 the OpenMarket site. Complaint ¶27.

[70] Ex. 6; Ex. 6, att. B.

[71] Ex. 6; Ex. 6, att. G.

[72] 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 02, 2010, http://www.climatedepot.com/a/7182/Investigation-cited-Manns-level-of-success-in-proposing-research-and-obtaining-funding-as-some-sort-of-proof-that-he-was-meeting-the-highest-standards, Ex. 6, att. J.

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."[73] The Blog Post 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."[74]

Penn State's indifference has clear parallels with the Sandusky affair, the Blog Post 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?[75]

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

G. Mann Vows to "Fight Back" Against His Critics

Over the years since the release of his "hockey stick" diagram, Mann has become increasingly engaged in political activism and increasingly hostile to groups and individuals who disagree with his views on global warming. Such groups, he has repeatedly said, should have no place in the global warming debate. And lately, he has lashed out fiercely and personally at anyone

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[73] So far as the CEI Defendants are aware, Mann has not alleged that this article (published two years before the Blog Post) caused him any injury and has not brought suit against Climate Depot's publisher or Morano.

who disagrees with him. In his recent book, he asks, "Will we hold those who have funded or otherwise participated in the *fraudulent* denial of climate change similarly accountable—those individuals and groups who both *made* and *took corporate payoffs* for *knowingly lying* about the threat climate change posed to humanity, those who willfully have led the public and policy makers astray, and those politicians and media figures who have sought to intimidate climate scientists using McCarthyite tactics?"[76] Mann specifically identifies CEI as among these groups.[77]

Mann has often expressed his frustration that groups such as CEI that do not agree with his views on global warming are permitted to participate in public debate. In a blog post, for example, Mann faulted the *Washington Post* for *even quoting* CEI's Ebell in rebuttal to claims made by climate scientists.[78] In another post, he accused CEI of being an "industry front group[]" and of engaging in a "disinformation campaign."[79] He complains that, with respect to "politically-controversial scientific issues such as global climate change," the illegitimate views of groups such as CEI receive comparable coverage:

> While giving equal coverage to two opposing sides may seem appropriate in political discourse, it is manifestly inappropriate in discussions of science, where objective truths exist. In the case of climate change, a clear consensus exists among mainstream researchers . . . . There are only a handful of "contrarian" climate scientists who continue to dispute that consensus. To give these contrarians equal time or space in public discourse on climate change out of a sense of need for journalistic "balance" is as indefensible as, say, granting the Flat Earth Society an

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[76] *See* Mann, *The Hockey Stick and the Climate Wars*, at 259 (emphasis added).
[77] *See, e.g.*, *id.* at 70, 110, 195.
[78] Michael Mann & Gavin Schmidt, *Climate Change Disinformation*, RealClimate, Dec. 11, 2004, http://www.realclimate.org/index.php/archives/2004/12/a-us-senator-on-climate-change-disinformation/, Ex. 27.
[79] 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/, Ex. 28.

> equal say with NASA in the design of a new space satellite. It's plainly inappropriate.[80]

To Mann, "There is *no room anymore* to have a good faith discussion about whether the problem is real."[81] Such debate, he claims, has illegitimately preempted action on limiting greenhouse gas emissions.[82] He blames CEI, in particular, for this, claiming that "[CEI's] Ebell and his ilk were basically successful in delaying action by 10 years."[83]

Of late, Mann has come to believe that he is being persecuted by the "attacks" of an organized movement of global warming "deniers," of which CEI is a part. In a recent interview, he refers to criticisms of his work as "harken[ing] back to the days of McCarthyism," and argues that climate change skeptics are part of an organized conspiracy, funded by "vested interest groups," "to subject scientists like me to all sorts of personal attacks and criticisms, hoping I think that we'll withdraw from the public debate."[84] These "attacks" largely consist of "unfavorable coverage in sort of contrarian-leaning news outlets" and email messages taking issue with his work.[85] This is, he says, "the most organized and most carefully orchestrated smear campaign against science in modern history," and he is its target.[86]

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[80] Michael Mann, Climate Science Review, *The False Objectivity of "Balance"*, RealClimate, Nov. 18, 2005, http://www.realclimate.org/index.php/archives/2005/11/the-false-objectivity-of-balance/, Ex. 29.
[81] Ex. 2.
[82] *See* Mann, *The Hockey Stick and the Climate Wars*, at 250.
[83] Lydia DePillis, About Climate Change: Never Mind, Slate, June 12, 2009, Ex. 30.
[84] Ex. 2.
[85] Ex. 1.
[86] Conversations From Penn State, Episode #405: Michael Mann, at 3; *see also* Michael E. Mann, The Hockey Stick and the Climate Wars xii, 150, 200-201 (2012), Ex. 31 (alleging that "deniers" are engaged in a "Serengeti strategy" to pick off climate scientists one at a time).

Perceiving himself as the victim of this nefarious conspiracy, Mann has recently vowed to "fight back" by engaging in the same kinds of unprincipled tactics that he attributes to his ideological enemies. "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."[87]

H. Mann Retaliates Against CEI's Advocacy with This Lawsuit

Mann filed this lawsuit to punish and intimidate CEI, as demonstrated by the Complaint's dismissive tone toward what it calls "resistance" to "Dr. Mann's research and conclusions" coming from "those with economic interests and political agenda . . . with respect to climate policy." Compl. ¶18. In this way, the Complaint acknowledges what is obvious in context: that its claims are motivated by policy disputes—a point that Mann also concedes in his interview with *The Atlantic*, quoted in the Introduction, *supra*. Along the way, Mann acknowledges that his work and conduct have routinely been subject to subject to criticism and investigation—to the point that his life's research was in need of what he describes as an "exoneration," Compl. at p. 8—and that he himself has routinely been subject to "invective and personal attacks." Compl. ¶¶20, 18. Mann has threatened lawsuits in the past[88], and actually sued another climate scientist and policy group in Canada for libel.[89]

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[87] Tom Clynes, The Battle, in The Future of The Environment 36(July 2012), Ex. 32.

[88] *See, e.g.*, Ed Barnes, *Climate Scientist, Heated Up Over Satirical Video, Threatens Lawsuit*, Fox News, Apr. 26, 2010, *available at* http://www.foxnews.com/scitech/2010/04/26/climate-scientist-heated-satire-threatens-lawsuit/, Ex. 33 (reporting on Mann's legal threats to a skeptic group that created a video featuring "a cat with a guitar, a talking tree, and a dancing figure sporting the image of Professor Mann").

[89] In that lawsuit, Mann sued Dr. Timothy Ball and the Frontier Centre for Public Policy. Ball had been asked, in an interview published by Frontier, whether "anyone will be prosecuted for fraud"

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The central conceit of Mann's complaint seems to be that the CEI Defendants' criticisms of Mann and his work are different than previous criticism and are actionable because of his alleged "exoneration" by several investigations following Climategate. Compl. ¶¶21-24. According to the Complaint, these investigations demonstrate that "there was no evidence of any fraud, data falsification, statistical manipulation, or misconduct of any kind by Dr. Mann," Compl. ¶24, and therefore any suggestion that his research may be biased is actionable defamation.

On that basis, Mann identifies four portions of the Blog Post (in italics below) as allegedly defamatory:

1. "[P]erhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions since. *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."

2. "[M]any of the luminaries of the 'climate science' community were shown to have been behaving in a most unscientific manner. *Among them were Michael Mann, Professor of Meteorology at Penn State, whom the email revealed 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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for having "whitewashed the Climategate scandal so far." Mann alleges that Ball's response was defamatory:

> There is a move amongst the Attorney Generals in the States to start prosecuting. For example, Michael Mann at Penn State should be in the State Pen, not Penn State. In England as well there are inquiries triggered by three things. One thing was what information was in those leaks. Second one was the cover-up by the so-called panels charged to investigate. Third was the complete failure of the UK weather office and their weather forecasting because they had been working with these people where the e-mails were leaked from. They were linked together. So those three things have kept the politicians looking at it. You're going to see a lot more investigations.

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

3. "*Mann has become the posterboy of the corrupt and disgraced* climate science echo chamber. No university whitewash investigation will change that simple reality."

4. "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?"[90]

Finally, Mann challenges a statement concerning Mann's legal threats, by *National Review* editor Rich Lowry, that he alleges CEI "adopted and republished" by linking to it in a press release, although without quoting or paraphrasing it. Compl. ¶84; *see* Compl., att. D. *National Review* had published a separate blog post by Mark Steyn that had quoted a portion of Simberg's Blog Post and also described Mann as "the man behind the fraudulent climate-change 'hockey-stick' graph."[91] Shortly thereafter, after receiving a demand letter from Mann, Lowry wrote—

> In common polemical usage, "fraudulent" doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong. I consider Mann's prospective lawsuit fraudulent. Uh-oh. I guess he now has another reason to sue us.[92]

Lowry was prescient: the Complaint alleges that Lowry's use of the phrase "intellectually bogus" "falsely imputes to Dr. Mann academic corruption, fraud and deceit as well as the commission of a criminal offense." Compl. ¶84.

Mann alleges that each of these five statements is false and defamatory, and that each constitutes libel per se. Compl. ¶¶34-46, 47-58, 83-94. Mann additionally alleges that the sentence describing him as the "Jerry Sandusky of climate science" was "extreme and outrageous," caused

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[90] Compl. ¶26 (emphasis in Complaint). The Complaint's quotation of the Blog Post omits its hyperlinks, which are discussed above and shown with attachments in Exhibit 6.

[91] Mark Steyn, *Footbal and Hockey*, The Corner (July 15, 2012), http://www.nationalreview.com/corner/309442/football-and-hockey-mark-steyn, Compl., att. B.

[92] Compl., Att. C.

him "extreme emotional distress," and therefore constitutes the tort of intentional infliction of emotional distress. Compl. ¶¶95-100.

SUMMARY OF THE ARGUMENT

This lawsuit is a classic attempt to stifle the expression of opposing viewpoints through litigation. Because Mann cannot show that his claims against CEI are "likely to succeed on the merits," the D.C. Anti-SLAPP Act requires that they be dismissed with prejudice.

I. The D.C. Anti-SLAPP Act applies to each of Mann's claims against the CEI Defendants. The Blog Post, from which those claims arise, was "an act in furtherance of the right of advocacy on issues of public interest" because it comments on issues under consideration by the organs of government, including global warming, public entities' response to the Climategate scandal, and publicly financed scientific research. In addition, the Blog Post is a public communication relating to "environmental, economic, or community well-being" and "a public figure," Mann, which also triggers the Act's protections. Accordingly, the CEI Defendants are entitled, without any further action on their part, to dismissal of Mann's claims against them unless Mann is able to carry the heavy burden imposed on him by the Anti-SLAPP Act: successfully demonstrating that his claims are "likely to succeed on the merits."

II. Mann can come nowhere close to carrying that burden, because the challenged statements are plainly constitutionally protected expressions of opinion, not assertions or implications of fact. In the context of the heated public debate over global warming, any reasonable reader would recognize them as such, and they are no more heated in their language than the exchanges Mann describes as routine in his recent book and, indeed, than Mann's *own characterizations of CEI* and its work. In this way, the Blog Post is simply fair comment on publicly available facts, the type of expression entitled to the strongest possible protections under the First Amendment and D.C. law. That it contains rhetorical hyperbole only reinforces this point, and one would no more

take literally all of its language than Mann's statement that Members of Congress are engaging in "inquisitions." Far from "likely to succeed on the merits," Mann's claims are destined to fail.

ARGUMENT

I. The CEI Defendants Are Entitled to the D.C. Anti-SLAPP Act's Protections Against Mann's "Attempted Muzzling of Opposing Points of View"

Professor Mann's lawsuit against his ideological opponents is precisely the kind of attempt to chill speech on issues of public concern that the D.C. Council intended to target when it passed the Anti-SLAPP Act. As the Committee on Public Safety and the Judiciary explained in its report on the Act—

> Such lawsuits, often referred to as strategic lawsuits against public participation—or SLAPPs—have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights.

Committee Report on Bill 18-893, at 1 (Nov. 18, 2010). To combat this evil, the Act "provides a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation aimed at preventing their engaging in constitutionally protected actions on matters of public interest." *Id.* at 4. In this way, the Act "ensures that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates" and thereby "prevent[s] the attempted muzzling of opposing points of view." *Id.*

A. The D.C. Anti-SLAPP Act Applies To Mann's Claims Against the CEI Defendants

In light of its overriding purpose, the D.C. Anti-SLAPP Act provides for early and efficient dismissal, with the most minimal burden on SLAPP defendants:

> (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.

D.C. Code § 16-5502. Accordingly, by the Act's terms, a defendant's burden is only to make a *prima facie* showing that the plaintiff's claims arise out of the type of advocacy protected by the Anti-SLAPP Act—i.e., "an act in furtherance of the right of advocacy on issues of public interest."

Moreover, reflecting the broad degree of protection that the Council intended to provide for opposing points of view, the statute defines that term with considerable breadth. *See Farah v.Farah v. Esquire Magazine, Inc.*, 863 F.Supp.2d 29, 36 (D.D.C. 2012) ("The Act is broad . . . ."). An "[a]ct in furtherance of the right of advocacy on issues of public interest" includes "[a]ny 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 . . . ." D.C. Code § 16-5501(1)(A). A catch-all provision reaches "[a]ny 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." D.C. Code § 16-5502(1)(B). An "issue of public interest," in turn, is any "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." D.C. Code § 16-5502(3).

There can be no question that the D.C. Anti-SLAPP Act applies here. The Blog Post is an "[a]ct in furtherance of the right of advocacy on issues of public interest" because it comments, broadly, on the incidence and projected impact of global warming, and, more specifically, on Mann's widely-cited research on those topics (particularly his infamous "hockey stick" graph) and the investigation of two public entities, Penn State and NSF, into that research in the wake of the Climategate scandal.

This commentary is "[i]n connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." D.C. Code § 16-5501(1)(A)(i). *See, e.g., Coalition for Responsible Regulation v. U.S. E.P.A.*, No. 09-1322 (D.C. Cir. filed Dec. 23, 2009) (challenge to EPA's greenhouse gas "endangerment finding"); 77 Fed. Reg. 22,392 (Apr. 13, 2012) (proposing Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units); Center for Climate and Energy Solutions, Bills of the 112th Congress Concerning Climate Change, at http://www.c2es.org/federal/congress/112/climate-change-legislative-proposals (describing each of the "[m]ore than 100 bills, resolutions, and amendments focusing on climate change [that] have been introduced in the U.S. Congress during its current term (2011–2012)"). As such, the Blog Post per se concerns an "issue of public interest" and triggers application of the D.C. Anti-SLAPP Act.[93]

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[93] In fact, the Blog Post was published to two categories on CEI's OpenMarket website: "Global Warming" and "Transparency," and each of these category pages, in turns, contains posts discussing legislation and other government action relating to the category. *See* OpenMarket, Global Warming, at http://www.openmarket.org/category/environment/globalwarming/ (discussing, *inter alia*, greenhouse gas "cap and trade" legislation); OpenMarket, Transparency, at http://www.openmarket.org/category/regulation/transparency-regulation/ (discussing, *inter alia*, transparency legislation and government whistleblower lawsuits).

For these same reasons, the Blog Post also falls squarely within the statute's alternative definitions. *See* D.C. Code §§ 16-5501(1)(A)(ii), (1)(B), (3). It is, of course, a written statement published in a place open to the public—CEI's OpenMarket weblog. And by the terms of the statute, it is "in connection with an issue of public interest," relating both to "environmental, economic, or community well-being"[94] and "a public figure," Mann. *See Farah*, 863 F.Supp.2d at 36-37 (applying "public interest" definition according to its terms). Global warming, of course, is the subject of a decades-long debate spanning matters of science, statistics, public policy, the environment, and the proper role of government, and both CEI and Mann are prominent participants in various aspects of this debate. Moreover, Mann not only acknowledges that he is a public figure in that debate, he actually touts that status[95] and has embraced his role as a political activist for public policies to limit greenhouse gas emissions.[96] "Having become such [a] well-known proponent[] of one position on the issue, Plaintiff[] cannot complain that the very intensity of [his] advocacy also became part of the public debate. Those who speak with loud voices cannot be surprised if they become part of the story." *Farah*, 863 F. Supp.2d at 37.

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[94] Indeed, global warming is an issue of such intense public interest that other courts have offered it as an example of unquestionably protected speech on matters of public concern. *E.g.*, *U.S. v. Strandlof*, 667 F.3d 1146, 1156 (10th Cir. 2012) (rejecting argument that upholding Stolen Valor Act against First Amendment challenge would lead down slippery slope allowing legislatures to criminalize, *inter alia*, "climate change criticism"), *vacated on other grounds*, 684 F.3d 962 (10th Cir. 2012); *One World One Family Now v. City of Key West*, 852 F. Supp. 1005, 1007 (S.D. Fl. 1994) (enjoining application of municipal regulation that would have prevented nonprofit from selling t-shirts bearing messages relating to global warming and other issues).

[95] *See* Michael E. Mann, *The Hockey Stick and the Climate Wars,* at 253=("I became a public figure . . . ."); Ex. 2 (Mann identifies himself as "a public figure in this debate" on global warming and states that he has "actually learned to embrace the role."); Ex. 31 (2012) (Mann identifies himself as a "public figure in this larger debate about climate change.").

[96] *See, e.g.*, Michael E. Mann, *Get the Anti-Science Bent Out of Politics*, Washington Post, Oct. 8, 2010, Ex. 34 (opinion article by Mann arguing that readers should vote against candidates who disagree with his views on global warming); Ex. 7 (Mann discusses his recent political activism).

Accordingly, because the Blog Post is "[a]ct in furtherance of the right of advocacy on issues of public interest," the Act applies to each of Mann's claims against the CEI Defendants.

B. Mann's Claims Against the CEI Defendants Must Be Dismissed Unless He Can Show They Are "Likely To Succeed on the Merits"

Because the D.C. Anti-SLAPP Act applies, the CEI Defendants are entitled, without any further action on their part, to dismissal of Mann's claims against them unless Mann is able to carry the heavy burden imposed on him by the Anti-SLAPP Act: successfully demonstrating that his claims are "likely to succeed on the merits." D.C. Code § 16-5502(b).

To further the Act's purpose of protecting the exercise of public advocacy from harassing litigation, the Act mandates expeditious action to terminate offending claims. It provides that the "[t]he 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 § 16-5502(d). In other words, once a defendant has made a *prima facie* showing that the plaintiff's claims arise from "an act in furtherance of the right of advocacy on issues of public interest," the Anti-SLAPP Act *requires* that those claims be dismissed *with prejudice*. *See Farah*, 863 F.Supp.2d at 38 (dismissing claims); *Lehan v. Fox Television Stations, Inc.*, No. 2011 CA 004592 B (D.C. Sup. Ct. Nov 30, 2011) (dismissing claims). The sole exception is where the plaintiff is able to meet the burden of proving that a claim "is likely to succeed on the merits." D.C. Code § 16-5502(b).

This is a heavy burden, one unique among anti-SLAPP statutes. To defendants' knowledge, no other state employs in an anti-SLAPP statute a standard requiring a plaintiff to demonstrate that he or she is "*likely* to succeed on the merits." In so doing, the Council intended to impose a heavy, meaningful burden on SLAPP plaintiffs, perhaps the strictest burden of any jurisdiction, as the common definition of the term "likely" illustrates. *See, e.g.*, Merriam-Webster Dictionary (online ed. 2012) (defining "likely" as "having a high probability of occurring or being true", "very probable,"

"in all probability"). Particularly given the stated intent of the Council to give defendants who, like CEI and Simberg, are engaged in "grassroots advocacy" the "substantive rights to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest," Committee Report at 4, the Act's statutory language must be construed to effectuate this purpose, consistent with its plain meaning. *See, e.g., Hutchison Bros. Excavation Co. v. Dist.Hutchison Bros. Excavation Co. v. Dist. Of Columbia*, 278 A.2d 318, 321 (D.C. 1971) ("in construing an act with broad remedial purposes, a court should give a liberal interpretation to protective provisions while narrowly interpreting exceptions from such provisions"); *McCree v.McCree v. McCree*, 464 A.2d 922, 928 (D.C. 1983) (following "the general rule of statutory construction, which dictates that a remedial statute should be construed liberally in order to effectuate the purposes for which it was enacted").

Accordingly, Mann's burden is daunting, as well it should be, in light of his lawsuit's threat to "the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.*, 376 U.S. at 270. And because he is, as a matter of law, unable to carry it, the CEI Defendants are entitled to the protection of the D.C. Anti-SLAPP Act and dismissal of Mann's claims against them.

II. Mann Cannot Carry His Heavy Burden Under the D.C. Anti-SLAPP Act of Showing He "Is Likely To Succeed on the Merits" of His Claims

"The First Amendment protects debate on matters of public concern, including scientific matters." *McMillan v. Togus Regional Office, Dept. of Veterans Affairs*, 294 F.Supp.2d 305, 316 (E.D.N.Y. 2003) (citing U.S. Const. amend. I).U.S. Const. amend. As the Supreme Court has recognized, "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 50, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). Freedom of expression needs "breathing space" to survive, *see New York Times Co.,* 376 U.S. at 271–72, and this principle applies with equal force "in

the areas of academic and scientific debate," *McMillan*, 294 F.Supp.2d at 316. *See also Sweezy v. State of N.H. by Wyman,* 354 U.S. 234, 250 (1957) (noting that "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust"). Courts have described speech concerning scientific inquiry as lying at the "heartland" of discourse protected by the First Amendment. *See, e.g.*, *U.S. v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 858 F.2d 534, 542 (9th Cir. 1988).

For that reason, Mann bears an exceedingly heavy legal burden: "[t]o prevail in a defamation suit, Plaintiff must prove that the statements complained of are i) defamatory; ii) capable of being proven true or false; iii) 'of and concerning' the Plaintiff; iv) false; and v) made with the requisite degree of intent or fault." *Coles v. Coles v. Wash. Free Weekly, Inc.*, 881 F. Supp. 26, 30 (D.D.C. 1995), *aff'd,* 319 U.S. App. D.C. 215, 88 F.3d 1278 (1996). And because Mann is a public figure and the challenged statements relate to matters of public interest, his burden is even heavier: he must prove by clear and convincing evidence that the CEI Defendants acted with "actual malice," that is, "with knowledge" that the challenged statements were false or that they "entertained serious doubts as to the truth" of the statements. *New York Times Co.*, 376 U.S. at 279-80; *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Under the D.C. Anti-SLAPP Act, Mann must prove that he is likely to succeed on *each* of these elements. If he is unable to do so with respect to any one of them, his claims must be dismissed.

Mann cannot carry his burden as a matter of law. As any reasonable reader would grasp, the statements in question (quoted in § H of the CEI Defendants' Factual Background) consist of opinions on issues of intense public debate and rhetorical hyperbole, not actionable assertions of fact, and are therefore non-actionable. Mann's intentional infliction of emotional distress claim fails for the same reasons. Far from being "likely to succeed on the merits," Mann's claims will inevitably fail, as a matter of law. Accordingly, under the D.C. Anti-SLAPP Act, the CEI Defendants are entitled to dismissal, with prejudice, of Mann's claims against them.

A. The Statements Express Pure Opinion, Not Actionable Assertions of Fact

"Sound scientific studies are essential to our legal foundations as well as to individual justice." *McMillan*, 294 F.Supp.2d at 317 (citing Justice Stephen Breyer, *Introduction, Federal Judicial Center, Reference Manual on Scientific Evidence* (2d ed. 2000) (Reference Manual)). "As in political controversy, *science is, above all, an adversary process*. It is an arena in which ideas do battle." *Id.* (emphasis added, citation omitted). For that reason, courts have "cautioned against the potential chilling effect that litigation can have on scientific inquiry," *id.,* and give considerable breathing room to parties engaged in controversies with "serious public impact." *See Reuber, Inc. v. Food Chemical News, Inc.*, 925 F.2d 703, 715 (4th Cir. 1991). As the Fourth Circuit has emphasized, "[i]n the hurly burly of a political and scientific debate, some false (or arguably false) allegations fly." *Id.* at 717. However, if burdens on that speech were "imposed through the law of defamation . . . the free exchange of views would be diminished to the public detriment." *Id.* (citing *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 772-73 (1986)). The question of whether a statement is reasonably understood as one of actionable fact is one of law for the court. *Guilford Transp. Indus. v. Guilford Transp. Indus. v. Wilner*, 760 A.2d 580, 588 (D.C. 2000); *Coles*, 881 F. Supp. at 32, n.5; *Moldea v. New York Times Co.,* 22 F.3d 310, 315-*Moldea v.* 316 (D.C. Cir. 1994) (*Moldea II*).

1. The Language, Context, and Verifiability of the Statements Demonstrate that They Are Non-Actionable Expressions of Opinion

In distinguishing assertions or implications of fact from pure opinions, courts consider the totality of the circumstances, including four factors: "the specific language of the challenged statement," the statement's verifiability (*i.e.*, whether it is capable of being proven true or false), the "full context of the statement" (i.e., "the entire article or column"), and the "broader context or setting." *See Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc). These factors speak to whether statements can "reasonably be interpreted as stating actual facts about an individual" and could possibly be "provable as false," both of which are required for statements to be

actionable. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *see also Guilford Transp. Industries, Inc. v. Wilner*, 760 A.2d at 582-83. "[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 v. American Israel Public Affairs Committee, Inc.*, 41 A.3d 1250, 1256 (D.C. 2012) (quoting *Guilford*, 760 A.2d at 597).

a. *The Setting*

"Some types of writing or speech by custom or convention signal to readers or listeners that what is being read or heard is likely to be opinion, not fact." *Id.* at 983. Thus, that statements are "found in a column on the Op-Ed page suggests . . . that the statements would be understood by the reasonable reader as opinion." *Id.* at 985. This is so because the "reasonable reader . . . is fully aware that the statements found there are not 'hard' news like those printed on the front page." *Id.* at 986. In addition to *genre*, the context of a particular *issue* or *dispute* may lead a reasonable reader to recognize a statement as opinion. On that basis, the Supreme Court has held that words like "scab" and "traitor" "cannot be construed as representations of fact" in the charged context of a labor dispute, where such words are used in a "figurative sense" to demonstrate "sharp disagreement." *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 284 (1974).*Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v.*

The context here—the contentious and often acrimonious debate over global warming—is no less charged. As described in the Factual Background, *supra*, this debate is marked by strong opinions expressed in strong, vituperative language. To those, like Mann, who fear catastrophic warming, his opponents are guilty of "crime[s] against humanity," are "deeply unethical," 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."[97] To those, like 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."[98] In fact, Mann's recent book fairly well chronicles the heated debate over global warming, often describing it as a "war" or a "battle."[99] In this context, forceful, highly opinionated language and hyperbole are not out of place; they are expected, from advocates on both sides. 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." 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.

In addition, a reasonable reader recognizes that commentary on a weblog often takes an irreverent and opinionated approach to subjects of public concern. Indeed, stripped of colorful language and strong opinion, a weblog would be a gray space, hardly a weblog at all. *Cf. Moldea II,* 22 F.3d at 311 (noting that book reviews are "a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer's description and assessment of texts that are capable of a number of possible rational interpretations"). CEI's OpenMarket.org, in particular, publishes highly opinionated posts on a range of controversial subjects (including climate science), presenting a market-oriented view that is often critical of the status quo. Without knowing

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[97] Ex. 3.
[98] Andrew Revkin, *Politics Reasserts Itself in the Debate Over Climate Change and Its Hazards*, N.Y. Times, Aug. 5, 2003, at F2.
[99] *See, e.g.*, Mann, *The Hockey Stick and the Climate Wars,* at 233.

any more than that, readers of the Blog Post would have expected provocative, opinionated prose. *See Weyrich v.Weyrich v. New Republic, Inc.*, 344 U.S. App. D.C. 245, 252, 235 F.3d 617, 625 (2001) (statement that politician suffered "paranoia" was non-actionable opinion when published in a venue, *The New Republic*, "known to be a magazine of political commentary"). And that is exactly what they received.

b. *The Specific Language*

A court considers the specific language of an allegedly defamatory statement to determine whether it "has a precise meaning and thus is likely to give rise to clear factual implications." *Ollman*, 750 F.2d at 980. "[S]tatements that are 'loosely definable' or 'variously interpretable' cannot in most contexts support an action for defamation." *Id.* Thus, accusing a prominent conservative of being a "fellow traveler of fascists" was not actionable; given that the plaintiff and defendant "embraced widely different definitions of 'fascism,'" such expressions "'cannot be regarded as having been proved to be statements of facts, among other reasons, because of the tremendous imprecision of the meaning and usage of these terms in the realm of political debate.'" *Id.* (quoting *Buckley v. Littell*, 539 F.2d 882, 893 (2d Cir. 1976)).

So too here. *See* Compl. ¶26. The first challenged statement proposes that "Mann could be said to be the Jerry Sandusky of climate science" for the ways that "he has molested and tortured data in the service of politicized science." As an initial matter, the phrase "could be said" clearly indicates that what follows is a statement of opinion or conjecture, or is offered in the subjunctive mood, and is therefore not a verifiable statement of fact. The statement is also, in part, a metaphor, a figure of speech used not to denote 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 (Phillip Babcock Gove, ed. 1976)). Mann concedes that this is a "comparison," Compl. ¶4, and such comparisons—even arguably more

offensive ones, such as to Mussolini's Italy, Nazi Germany, and Adolph Hitler—are consistently held to be protected opinion. *Williams v. Town of Greenburgh*, 535 F.3d 71, 77 (2d Cir. 2008) (holding that a statement condemning a public official as a "Junior Mussolini" was protected speech and citing cases).

As to the statement that Mann "molested and tortured data in the service of politicized science," its ambiguity renders it even less susceptible to being taken as a statement of fact than "fascist," a term that is at least capable of precision in certain contexts. *Ollman*, 750 F.2d at 981 n.20. It obviously cannot be taken literally: the mind strains to imagine how one might literally molest or torture a datum.[100] By contrast, opinionated criticism of statistical analysis is regularly couched in such terms as contained in the challenged statement. For example, there is (actual) 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 usages abound.[101] Such criticism amounts to

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[100] That said, this statement could not plausibly be read to imply fraud, as apart from just bad science and statistical practice.

[101] *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 (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

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disagreement over assumptions and methodology—that is, matters of opinion on what constitutes good science and solid statistical technique—not an accusation of literal fraud, e.g., making up data. Indeed, the Blog Post links to detailed criticisms of Mann's statistical method that produces a hockey stick-shaped diagram from nearly any input and his controversial method of splicing together different data series.[102] Thus, this statement merely restates the longstanding criticism of Mann's "hockey stick" diagram: that it is based on flawed assumptions and statistical methods that serve to exaggerate recent warming.

The same is true of the second challenged statement, which states that "Mann had been engaging in data manipulation to keep the blade on his famous hockey stick graph . . . ." Again, this statement, if taken as one of fact, is subject to no single, certain meaning; in fact, "data manipulation" is commonly used to refer descriptively to the practice of statistics.[103] Taken as

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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 . . . ."); Erica Beecher-Monas, The Heuristics of Intellectual Due Process: A Primer for Triers of Science, 75 N.Y.U. L. Rev. 1563, 1602-03 (2000) ("Judges, like scientists, should question whether the data was 'trimmed' to favor a certain outcome and make sure that the results 'were not the product of overenthusiastic data torture.'"); 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.").

[102] Ex. 6; Ex. 6, att. E.

[103] *E.g.*, Adam Belz, *Health Care Creates New State Jobs Boom*, Star Tribune, Dec. 9, 2012, at A1 ("Over the past year, Allina has added 45 full-time employees who manipulate data from electronic medical records—blood pressure, lab tests, socioeconomic status and medication use—to figure out which patients need the most attention."); Victor Zapana, *Web Site Aims for More Transparency*, Wash. Post, Dec. 6, 2012, at B3 (Montgomery County's "new site puts [County information] all in one place, and residents can even search and manipulate data using spreadsheets"); Marcia Pledger, *Small Businesses*

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opinion, to accuse one of "manipulating" data is simply to criticize a statistical analysis as biased toward reaching some particular result. *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 the article on McIntyre's website describing "Mike's Nature trick" to splice together data series without reducing the "hockey stick" diagram's blade.[104] Neither that article nor the Blog Post argues that Mann contrived data, only that he adopted a particular statistical methodology that led to a particular result.

The third challenged statement, which calls Mann "the posterboy of the corrupt and disgraced climate science echo chamber," is self-evidently a statement of opinion comprised, as described below, of rhetorical hyperbole and not reasonably read in its literal sense. But even taken literally, it reflects nothing more than the low esteem in which skeptics hold Mann and his work.

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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 . . . .").

[104] Ex. 6; Ex. 6, att. E.

The fourth challenged statement, a rhetorical question asking to what lengths Penn State would go to "hide academic and scientific misconduct," expresses an opinion regarding the university, not Mann. This opinion is, of course, the core of the Blog Post: that Penn State puts its own interests ahead of ferreting out inconvenient truths. 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. Regardless, as explained below, a rhetorical question of this sort is not an actionable assertion of fact. *See infra* § II.A.3.

Finally, the challenged statement by Lowry also clearly expresses an opinion, albeit one that the CEI Defendants never published. *See infra* § I.C. Lowry's article states that, in rhetorical usage, "fraudulent" (a word used by Defendants *National Review* and Mark Steyn to describe Mann's "hockey stick" diagram) "means intellectually bogus and wrong" and that Lowry "consider[s] Mann's prospective lawsuit [i.e., this one] fraudulent." The term "intellectually bogus" certainly does not denote literal fraud any more than the term "intellectually bankrupt" denotes insolvency; it indicates only a perceived lack of merit. *See, e.g.*, Editorial, A Leading Japanese Politician Espouses a 9/11 Fantasy, Washington Post, Mar. 8, 2010 (describing the ideas of a 9/11 conspiracy theorist as "too bizarre, half-baked and intellectually bogus to merit serious discussion"). In other words, the statement expresses an opinion critical of Mann's ideas, assumptions, and methodology.

Mann has described CEI's work as "fraudulent," and the Blog Post responds in kind (albeit using somewhat more restrained language), describing Mann's work as "decepti[ve]" and the product of "molested and tortured data." In either case, the message is effectively the same: my opponent's position is illegitimate because it is biased and based on assumptions or methodology that I believe to be incorrect. A reasonable reader would recognize the Blog Post's language and tone as conveying strongly-held opinion, not straight-down-the-middle reportage, in the same way such a reader would regard Mann's heated statements as conveying disagreement.

c. *The Publication as a Whole*

"The degree to which a statement is 'laden with factual content' or can be read to imply facts depends upon the article or column, taken as a whole, of which the statement is a part." *Ollman*, 750 F.2d at 982. Speech must be analyzed in context because "the general tenor of the entire work [may] negate[] the impression that the defendant was asserting an objective fact." *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995). For example, when a statement is phrased as a question, that "put[s] the reader on notice that what is being read is opinion and thus weaken[s] any inference that the author possesses knowledge of damaging, undisclosed facts." *Ollman*, 750 F.2d at 983 (citing *Pease v. Telegraph Publishing Co.*, 121 N.H. 62, 426 A.2d 463, 465 (1981)).

Here, consideration of the context in which the statements were presented and would be regarded by a reader—i.e., the Blog Post taken as a whole—only reinforces that they are expressions of opinion. The passages were posted on a weblog that discusses provocative issues of public concern and expressly presents a free-market bent—indeed, the weblog declares its purpose to "make the uncompromising case for economic freedom."[105] The principal message of the Blog Post actually does not concern Mann directly, but Penn State, which the Blog Post argues (on the basis of the Freeh Report and the university's parochial interests) cannot be trusted to conduct a fair, thorough, and impartial investigation into the allegations raised by the Climategate affair. This is plainly an opinion message, and the remainder of the Blog Post is in service of it. *Afro-American Pub.*

Taken as a whole, the Blog Post's citation of other materials confirms that this is so. It links to a wide range of information, including Penn State's investigatory report, so that readers would have a basis for its commentary on those facts. Such contextual citation of facts "make[s] it clear

[105] Openmarket.org, at http://www.openmarket.org/about/.

that a statement is being used in a metaphorical, exaggerated or even fantastic sense." *Ollman*, 750 F.2d at 982. For example, where a "local newspaper . . . had described the substance of the land developer's negotiating proposals, the use of the term 'blackmail' to characterize those proposals was quite plainly to be seen as an expression of opinion." *Id.* (discussing *Greenbelt Cooperative Publishing Assoc. v. Greenbelt Cooperative Publishing Assoc. Bresler*, 398 U.S. 6, (1970)); see also *Moldea II*, 22 F.3d at 317; *Partington*, 56 F.3d at 1156-57; *Agora, Inc. v Axxess, Inc.,* 90 F. Supp. 2d 697, 704 (D. Md. 2000). In the same way, the Blog Post directs readers to articles analyzing the statistical methods and data underlying the "hockey stick" diagram, as well as documents on Climategate and subsequent investigations. That it also characterizes those things—quite negatively, in the case of Mann's research—is clearly opinion.

Mann cannot, of course, argue that those pure opinions are actionable because he believes them to be false. "Under the First Amendment there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

d. *Verifiability*

Finally, the challenged statements are plainly not subject to verification in the manner of actionable assertions of fact because they are not "objectively capable of proof or disproof." *Ollman*, 750 F.2d at 981. For example, calling someone a "Marxist" or a "fascist" is not verifiable, because each of those terms is "unmistakably a loosely definable, variously interpretable statement of opinion made inextricably in the contest of political, social or philosophical debate." *Id.* (quotation marks omitted). Claims that Mann "molested and tortured data," has a political agenda (a fact to which he readily admits), acted in an "unscientific manner," engaged in "data manipulation," and is the "posterboy of the corrupt and disgraced climate science echo chamber" use, if anything, looser language than "Marxist" and "fascist," particularly in the context of a fierce debate where the warring sides barely agree on anything. Whether these insulting terms are warranted or not depends

entirely on one's view of climate science, and not any accepted fact or certain standard. They can therefore be regarded only as opinion.

2. The Statements Are Expressions of Opinion Based on True Facts and Therefore Protected By the First Amendment and the Fair Comment Privilege

As a matter of First Amendment law, opinions that are based on truthful facts are non-actionable. *See Liberty Lobby, Inc. v. Dow Jones Co., Inc.*, 838 F.2d 1287, 1300 (D.C. Cir. 1988) ("While the stated facts underlying an opinion may support a libel action if they themselves are false and defamatory, an opinion itself never can."). As long as the author puts forth a "supportable interpretation" of the facts, the statement is not actionable. *Moldea II*, 22 F.3d at 315 ("The proper analysis would make commentary actionable only when the interpretations are *unsupportable by reference*" to the underlying facts.). On that basis, the *Moldea II* court held that a book review's claim that a book by a journalist contained "too much sloppy journalism" was not an actionable assertion of fact. *Id.* at 318-19. "Because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation." *Id.* at 317. (citing *Moldea v. New York Times Co.,* 15 F.3d 1137, 1144-45 (D.C. Cir. 1994) (*Moldea I).*

Similarly, under the District of Columbia's common law fair comment privilege, an author's comment on a matter of public interest's based on facts available to the reader, is not actionable, even if the facts are not disclosed in the publication itself. *See Fisher v. Washington Post Co.*, 212 A.2d 335, 337 (D.C. App. 1965) ("So long as the comment is the speaker's actual opinion, based on fact, about a matter of public interest, the words are protected . . . ."). And where the author goes even further and discloses facts from which a range of different conclusions may be drawn, the challenged statements are even less likely to support a defamation claim. *See Chapin v Knight-Rider, Inc.*, 993 F.2d 1087, 1096 (4th Cir. 1993) (noting that answer allegedly implied by challenged question

"was certainly *within the wide range of possibilities*, which is precisely why we need and must permit a free press to ask the question") (emphasis added); *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 730 (1st Cir. 1992)(noting that journalist "not only discussed all the facts underlying his views but also gave information from which readers might draw contrary conclusions"). Such facts may be disclosed in the article itself or through hyperlinks to source materials. *Jankovic v Int'l Crisis Grp.*, 593 F.3d 22, 26 (C.A.D.C. 2010); *Agora*, 90 F. Supp. 2d at 704-05; *Redmond v Gawker Media, LLC*, 2012 WL 3243507, at *6 (Cal.App. 1 Dist. Aug. 10, 2012); *Sandals Resorts Int'l, Ltd. V Google, Imc.,* 925 N.Y.S.2d 407, 409, 416 (2011). Application of the fair comment privilege is a question of law for the court. *Fisher*, 212 A.2d at 337-338.

Mann's complaint fails to note that the Blog Post links to a wealth of factual materials that provide a basis for its commentary. *See* Compl. ¶26 Each of the challenged statements, in turn, is commentary on those disclosed facts and other facts readily available to the public.

The first challenged statement—that Mann has engaged in "hockey-stick deceptions" and "molested and tortured data in the service of politicized science"—itself links to Simberg's January 2012 article discussing McIntyre's statistical reanalysis of the CRU's "hockey stick" diagram that calls into question whether the stick actually has a "blade" at all and suggests that data was selectively included in order to artificially create the impression of recent warming.[106] The Blog Post also links to the article on McIntyre's website that disputes claims that the "Mike's [*i.e.*, Mann's] Nature trick" mentioned in the "hide the decline" email was innocuous.[107] That article criticizes the statistical methods used to splice together reconstructed historical temperature estimates with more recent

[106] Ex. 6, att. B.
[107] Ex. 6; Ex. 6, att. E.

temperature measurements—a questionable maneuver because the former were substantially lower than the latter (i.e., the "decline"). Importantly, the Independent Climate Change Email Review—cited by Mann as an "exoneration," Compl. ¶21—found this technique to be "misleading."[108] Finally, the Blog Post also quotes and links to the Penn State investigation's report (which Simberg expressly describes as "declar[ing] him [Mann] innocent of any wrongdoing")[109] and links to another blog post describing the NSF investigation's report (in terms sympathetic to Mann) and linking to it.[110] Based on all of these factual materials, which are fully and prominently disclosed in the article, the CEI Defendants offered their opinion on Mann's "hockey stick" research, which they believe to be biased and based on faulty assumptions and methodology. Readers, however, have the factual basis (through links and access to other publicly available materials) to draw their own conclusions as to whether they agree or disagree with Simberg and CEI.

The same is true of the second challenged statement, regarding "data manipulation." It links to the article on McIntyre's website described above and is a comment on Mann's methodology, which the CEI defendants believe to be faulty.[111] Again, readers have ready access to the facts (e.g., Mann's articles[112] and descriptions of the statistical techniques employed in those articles) to draw their own conclusion.

The third challenged statement, referring to the "corrupt and disgraced climate science echo chamber," is a quote from an article by Marc Morano, editor of the "Climate Depot" website, which

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[108] Ex. 18, at 59-60 (2010).
[109] Ex. 6; Ex. 6, att. G.
[110] Ex. 6; Ex. 6, att. L.
[111] Ex. 6; Ex. 6, att. E.
[112] Michael Mann: Research, http://www.meteo.psu.edu/holocene/public_html/Mann/research/research.php.

is linked to in the Blog Post.[113] This characterization of mainstream climate science as "corrupt" and "disgraced" is a comment on the revelations contained in the Climategate emails and what many skeptics viewed as Penn State's inadequate investigation into Mann's research and conduct. Again, the facts (e.g., the emails, the Penn State report, etc.) are available for readers to reach their own conclusions.

The fourth challenged statement, a rhetorical question asking to what lengths Penn State would go to "hide academic and scientific misconduct," comments on the facts disclosed in the Freeh report on the Sandusky affair, as well as the university's conduct of its investigation of Mann's research. The Blog Post links to reports on both investigatory reports.[114]

Finally, the challenged statement by Mr. Lowry was never republished by the CEI Defendants. *See infra* § II.C. But even assuming republication, it simply describes that research as "intellectually bogus"—an archetypical fair comment on materials available to the public, Mann's publications.[115] *See Fisher*, 212 A.2d at 337 (fair comment where newspaper described art gallery's show as "badly hung").

"There is a long and rich history in our cultural and legal traditions of affording reviewers latitude to comment on literary and other works," and that such commentary, where critical, "necessarily has the effect of injuring an author's reputation" does not deprive it of First

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[113] 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 02, 2010, http://www.climatedepot.com/a/7182/Investigation-cited-Manns-level-of-success-in-proposing-research-and-obtaining-funding-as-some-sort-of-proof-that-he-was-meeting-the-highest-standards .
[114] Ex. 6; Ex. 6, atts. G, L.
[115] *See* Michael E. Mann: Research Home, http://www.meteo.psu.edu/holocene/public_html/Mann/research/research.php (collecting Mann's research).

Amendment protection. *Moldea II*, 22 F.3d at 315. The Blog Post, while certainly critical of Mann's research, is a protected opinion based on truthful facts, offering fair comment on that research and Penn State's investigation of it following the disclosure of the Climategate emails, while providing a factual basis (in addition to the wealth materials that are otherwise readily available to the public) for readers to draw their own conclusions. Accordingly, the statements challenged by Mann are not actionable.

3. Because the Statements Raise Questions Regarding Mann's Research and the Penn State Investigation, They Are Not Actionable Assertions of Fact

Finally, the challenged passages are not actionable because they raise questions, rather than making factual assertions capable of "being proved true or false." *See Milkovich v. Lorain Journal Co.*, 497 U.S. at 21. Taken as a whole, the Blog Post invites the reader to ask questions. The Blog Post's criticism is principally directed at the investigations into Mann's research, characterizing Penn State's investigation as a "cover up and whitewash" due to its lack of independence, failure to consider relevant material, and limited scope.[116] But rather than a declarative conclusion, it ends with a question: whether, in light of Penn State's failure to investigate the allegations against Sandusky because of the revenues generated by its football program, the university would "do any less to hide academic and scientific misconduct, with so much at stake?"[117] This question, which is the Blog Post's penultimate line, does not make an assertion that "could be false"; rather, it is "invit[ing] the public to ask." *Chapin*, 993 F.2d at 1096. "This invitation, rather than a libel, is the paradigm" of the free expression protected by the First Amendment. *Id.*

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[116] Ex. 6.

Courts across the country have employed similar reasoning in holding that raising questions does not support defamation actions. *See, e.g.*, *Partington v. Bugliosi*, 56 F.3d at 1157 (question did not "impl[y] a false assertion of fact"); *Beverly Hills Foodland, Inc. v.Beverly Hills Foodland, Inc. 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"); *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d at 730 *Phantom Touring, Inc.* (question "reasonably could be understood only as [the author's] personal conclusion about the information presented, not as a statement of fact"); *Volm v.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"); *Carani v.Carani v. Meisner*, No. 08-cv-02626-MSK-CBS, 2010 WL 3023805, at *3 (D. Colo. Jul. 30, 2010) ("The question does not imply the existence of a fact that can be proven to be true or false, and thus, cannot be defamatory."); *Eisenstein v. WTVF-TV*, No. M2011-02208-COA-R3-CV, 2012 WL 3090307, at *5 (Tenn. Ct. App. Jul. 30, 2012) (question was "'not equivalent to a direct charge'" but rather "invite[d] an answer of 'yes,' 'no,' or 'I don't know'") (quoting *McCluen v. Roane Cnty. Times, Inc.*, 936 S.W.2d 936, 940 (Tenn. Ct. App. 1996)).

The Blog Post's comments on Mann's research—comments that must, of course, be considered in the context of the Blog Post as a whole, *Afro-American Pub. Co.*, 366 F.2d 649, 655 (1966) —offer opinions on scientific controversies with "serious public impact." *See Reuber, Inc.*, 925 F.2d,ata 715 (4th Cir. 1991). Climate science is a subject of intense public debate. So, too, is Mann's research. And like many other persons, including the Virginia Attorney General and Members of Congress, the CEI Defendants question Mann's research and Penn State's investigation of his research. Rather than simply insulting Mann, they discussed Climategate and the resulting investigations and specifically noted that Penn State's investigation "declared him innocent of any wrongdoing." They provided a hyperlink to the university's report, but at the same time they

questioned the conclusiveness of that investigation in light of other criticisms of Mann's work.[118] By raising these issues and asking questions, they invited their readers to do the same.

Taken as a whole, the Blog Post is "constructed around questions, not conclusions," and merely raising questions is "insufficient to sustain a defamation suit." *Chapin*, 993 F.2d at 1098. Indeed, "[t]he 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*, 750 F.2d at 983 (emphasis added). The Blog Post is such an article.

B. The Statements Are Non-Actionable Rhetorical Hyperbole

The "First Amendment provides protection for statements that cannot reasonably be interpreted as stating actual facts about an individual.'" *Weyrich*,*New Republic, Inc.*, 344 U.S. App. D.C. at 252 (citation and quotation marks omitted); *see also, e.g., Washington v. Smith*, 317 U.S. App. D.C. 79, 80-81, 80 F.3d 555, 556-57 (1996) (same). This principle "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." *Coles*, 881 F. Supp. at 32 (citations and quotation marks omitted). In particular, it "is intended to protect the use of loose, figurative or hyperbolic language which would preclude an impression that the author was seriously maintaining a provable fact." *White v.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).

Put differently, there are some statements that, if taken literally, could be actionable assertions of fact, but which, because of the nature of the language used and when viewed in context, would not actually be so understood by a *reasonable* reader. *See Mink v. Knox*, 613 F.3d 995,

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[118] Ex. 6; Ex. 6, att. G.

1007 & n.10 (10th Cir. 2010) (citing cases applying the reasonable-reader standard and finding challenged statements to be non-actionable hyperbole or opinion). Courts have applied this principle time and again to dismiss defamation claims arising from speech that signaled to reasonable members of the audience that they should approach what was being said in other than a purely literal sense.

In one such case, for example, the Supreme Court held that an allegation of "blackmail," although on its face an accusation of criminal conduct provable as true or false, was rendered non-actionable when used in a context that signaled its hyperbolic nature. *Greenbelt Coop. Publ'g Ass'n v. Bresler,* 398 U.S. at 13-14 (in context of articles reporting on public controversy concerning development plans, "even the most careless reader must have perceived that the word ["blackmail"] was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the real estate developer's] negotiating position extremely unreasonable"); *see also Jenkins v. Snyder*, No.*Jenkins v.* 00CV2125, 2001 WL 755818, at *5 (E.D. Va. Feb. 2, 2001) (statement that groundskeepers were "trying to kill the players with their crappy field" was hyperbolic and "cannot be understood in its literal sense").

As both the Court of Appeals and the D.C. Circuit have emphasized, in addition to examining the specific language used for signals to the audience that a non-literal interpretation is appropriate, an examination of the context in which the challenged statement appeared is key: "it is in part the *settings* of the speech in question that makes their hyperbolic nature apparent, and which helps determine the way in which the intended audience will receive them." *Moldea II*, 22 F.3d,at 314 (fact that allegedly defamatory statements were in book review would cause readers to expect subjective criticism of subject, not objective news reporting); *Guilford Transp.*, 760 A.2d at 588 (where allegedly defamatory statements about corporation appeared in op-ed column, context signaled to

readers they were likely to encounter opinions, not statements of fact); *Ollman*, 750 F.2d at 990 (same).

Of course, Mann is himself no stranger to rhetorical hyperbole. For example, in his recent book, he accuses Members of Congress of engaging in "inquisitions" and using "McCarthyist" tactics in the climate change debate. Mann, *The Hockey Stick and the Climate Wars*, at 245-48, 256. And as the book's title indicates, Mann likens the climate science debate to "war." He even declares the work of CEI to be "fraudulent," *id.* at 63—a hypocritical characterization, given his lawsuit's allegations. *See, e.g.*, Compl. ¶35 (accusing Defendants of libel per se for "accusing Dr. Mann of . . . fraud," a word that, unlike in Mann's book, was not used in the Blog Post).

This kind of rhetoric is permissible because it "cannot reasonably [be] interpreted as stating actual facts . . . ." *Weyrich*, 344 U.S. App. D.C. at 252 (quotation omitted). Mann is simply expressing his frustration that some disagree with him and have the temerity to say so. However, a reasonable person understands that his "loose, figurative [and] hyperbolic language" is not offered as a provable fact. *See White*, 285 U.S. App. D.C. at 283. Rather, reasonable readers would understand that Mann is not engaged in a literal "war," that Members of Congress are not leading the "Inquisition" or a state-sponsored search for Soviet agents, and that CEI is not attempting to "defraud" any person of their money or property. Mann's rhetoric reflects the intensity of the climate science debate and the strong disagreement between those who take different sides in it. Even though his language is colorful, it is protected by the First Amendment.

So, too, is the Blog Post. No reasonable reader of the Blog Post would conclude that Mann committed any of the criminal acts for which Sandusky was convicted. Indeed, reading the Blog Post, no reasonable person could conclude that Mann has been accused of committing acts remotely similar to those of Sandusky—the comparison between the two men's deeds is metaphorical, not literal. In this way, just like Mann in his book, the CEI Defendants commented on a subject of

intense public debate, using "imaginative expression" and "rhetorical hyperbole" to make their point. *See Coles*, 881 F. Supp. at 32; *White*, 285 U.S. App. D.C. at 283. A reasonable reader would understand that the Blog Post makes a highly rhetorical comparison between the Penn State cover-up of the Sandusky scandal and the possibility of a similar whitewashing at the same institution by the same leadership in its investigation into Mann's research following Climategate's disclosure of unseemly emails concerning Mann's work.

Coming after that comparison, the CEI Defendants' other comments, which state that Mann has engaged in "data manipulation" and is the "posterboy of the corrupt and disgraced climate science echo chamber," Compl. ¶26, are also obviously likewise rhetorical hyperbole. A reasonable reader would not think that Mann was being accused of fraud in any literal criminal sense. Again, the language used in the Blog Post (like that used in Mann's book) reflects the intensity of the climate science debate. The CEI Defendants questioned Mann's conclusions on climate science as intellectually suspect, and they did so using "rhetorical hyperbole, a vigorous epithet" to express their concerns. *See Greenbelt Coop. Publ'g Ass'n,* 398 U.S. at 13-14. Like Mann's own language in his book, the language used in the Blog Post is vigorous, but is nonetheless protected by the First Amendment.

C. The CEI Defendants Cannot Be Liable for *National Review's* Comments

Mann's claim that CEI "adopted and republished" an allegedly defamatory statement published by *National Review* fails as a matter of law because CEI did not itself publish or republish that statement, only hyperlinking to it. *See* Compl. ¶¶33, 84.

A hyperlink to allegedly defamatory materials, without more, is insufficient to support a libel claim. As the Third Circuit explained in holding that a hyperlink did not serve to republish an allegedly defamatory article: "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 Philadelphia Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012) (emphasis in original, 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); *Salyer v. Southern Poverty Law Center, Inc.*, 701 F.Supp.2d 912 (W.D. Ky. 2009); *Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.*, No. 02–02258, 2007 WL 935703 (S.D. Cal. Mar. 7, 2007); *Churchill v. State of N.J.*, 378 N.J.Super. 471, 876 A.2d 311 (2005); *Goforth v.Shepard v. TheHuffingtonPost.com, Inc.*,*U.S. ex rel. Klein v. Omeros Corp.*,*Wash.* Oct. *Salyer v. Southern Poverty Law Center, Inc.*,*Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.*, 02–02258, 2007 WL 935703 (S.D. Cal. Mar. *Churchill v. Goforth v. Avemco Life Ins. Co.*, 368 F.2d 25, 29 n. 7 (5th Cir. 1966) ("[A] mere reference to another writing which contains defamatory matter does not constitute an actionable repetition or republication of that libelous material.").

Here, 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. And Mann does not contend that CEI presented any part of the *National Review* statement, *see* Compl. ¶¶34, 84, and, in fact, it did not. *See id.* Accordingly, Mann fails to state a claim against CEI with respect to that statement because he has failed to allege, as required, that CEI ever published it. *See* Restatement (Second) of Torts § 558(b) (publication required); *LeFande v. District of Columbia*, 864 F. *LeFande v.* Supp.2d 44, 51 (D.D.C. 2012) (Under D.C. law, "a cause of action for defamation requires proof of publication . . . .").

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

Mann's final claim, for intentional infliction of emotional distress, must fail alongside his various claims for libel. The United States Supreme Court has made clear that 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*, at 56. Such a standard, the Court explained, "is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.* On that basis, the 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) (affirming dismissal of false light and intentional infliction of emotional distress claims where defamation claim failed).

So too here. As shown above, the CEI Defendants' statements are not actionable because they are statements of pure opinion and hyperbole and are not false assertions of fact. As a result, Mann cannot establish that his emotional distress claim "is likely to succeed on the merits," and it must therefore be dismissed.

CONCLUSION

Professor Mann's lawsuit against the CEI Defendants is premised on a misunderstanding of the nature of scientific progress and a misapplication of decades of constitutional and common law. He argues that, because his research has been allegedly "exonerated," any vigorous challenge to it is false and defamatory. But that is not how science or the First Amendment works. Karl Popper argued that the essence of scientific progress is falsifiability, the repeated attempt to refute theories so that those which fall short may be replaced by those that better explain natural phenomena. *See generally Karl Popper, Conjectures and Refutations: The Growth of Scientific Knowledge* (1963). Taking a different view, Thomas Kuhn observed that, in the main, science progresses through gradual refinement, avoiding critical scrutiny of its fundamental paradigms, until all at once those paradigms

are upset in a scientific revolution, such as the shift from Ptolemy's astronomy to Copernicus's methods or from global cooling to the greenhouse effect and global warming. *See generally Thomas Kuhn, The Structure of Scientific Revolutions* (1962). In either view, scientific progress depends on skepticism, the willingness to challenge received wisdom in search of higher truths. Thus, 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 achieved, any disagreement with it is an illegitimate attack unworthy of First Amendment protection contradicts the history of scientific progress from the Greeks to the present and the development of a unique and prized American legal system supporting free expression.

Professor Mann is no doubt 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.

For the foregoing reasons, Mann is unable to carry his burden of showing that he is "likely to succeed on the merits" of his claims against Defendants Competitive Enterprise Institute and Rand Simberg. The Anti-SLAPP Act therefore requires that those claims be dismissed, promptly and with prejudice. If Mann wishes to "fight back" against the CEI Defendants' commentary on global warming and his research, he should do so with words, not legal harassment.[119]

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[119] Pursuant to the D.C. Anti-SLAPP Act, D.C. Code § 16-5504, and Rule 54(d)(2)(B), prevailing defendants also are entitled to move for an award of "the costs of litigation, including reasonable

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Dated: December 14, 2012 Respectfully submitted,

By: /s/ David B. Rivkin, Jr.

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attorney fees," within fourteen days after the entry of judgment. The CEI Defendants hereby reserve their right to seek such an award.

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2012, I caused a copy of the foregoing Motion to be served by CaseFileXpress on the following:

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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., et al., Defendants.	Case No. 2012 CA 008263 B Judge Natalia Combs Greene Next event: Initial Scheduling Conference January 25, 2013

(PROPOSED) ORDER GRANTING DEFENDANTS COMPETITIVE ENTERPRISE INSTITUTE AND RAND SIMBERG'S SPECIAL MOTION TO DISMISS PURSUANT TO THE D.C. ANTI-SLAPP ACT

Before the Court is Defendants Competitive Enterprise Institute and Rand Simberg's Special Motion to Dismiss the Complaint Pursuant to the D.C. Anti-SLAPP Act. Upon consideration of the Motion, and good cause having been shown, it is hereby

ORDERED that the Motion is granted and all claims for relief against Defendants Competitive Enterprise Institute and Rand Simberg are hereby DISMISSED with prejudice and without leave to amend.

SO ORDERED.

DATE: _____

_____
Judge Natalia Combs Greene