Nos. 14-cv-101 & 14-cv-126

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

COMPETITIVE ENTERPRISE INSTITUTE, ET AL.,

Defendants-Appellants,

v.

MICHAEL E. MANN,

Plaintiff-Appellee.

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

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 28(a)(2)(B), *amicus* Alliance Defending Freedom states that it is a non-profit organization incorporated in the Commonwealth of Virginia, that it has no stock or debt securities issued to the public, that it has no parent companies, subsidiaries, or affiliates that have issued stock or debt securities to the public, and that it has no parent companies, subsidiaries, or affiliates in which any publicly-held corporations hold stock.

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INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, Alliance Defending Freedom (formerly known as Alliance Defense Fund) has played a role, either directly or indirectly in many cases before the United States Supreme Court, including: *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (represented Petitioners Conestoga Wood Specialties Corp., et al.); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (represented Petitioner Town of Greece); and *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011) (represented Petitioner Arizona Christian School Tuition Organization); as well as hundreds more in lower courts.

Many of these cases involve the Free Speech Clause of the First Amendment. For example, Alliance Defending Freedom and its counsel are currently representing the Petitioners in a free speech case that the Supreme Court will hear next term. *See Reed v. Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013), *cert. granted* 134 S. Ct. 2900 (2014) (posing the question of whether a lack of discriminatory motive renders a facially content-based sign code content-neutral and justifies that code's differential treatment of religious signs). Because affirmance in this case would undermine its efforts to ensure that the protections provided by the Free Speech Clause are broadly construed and not restricted by defamation laws, Alliance Defending Freedom seeks to highlight the First Amendment's safeguard of offensive or inflammatory speech and the important role that hyperbole plays in American politics.

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[1] *Amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Alliance Defending Freedom files this brief pursuant to Rule 29(a). All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Appellants' colorful criticism of Michael Mann's work on climate change lies at the core of speech protected by the First Amendment. Mann's work, including his famous "hockey stick" graph purporting to show evidence of man-made global warming, addresses matters of public concern. Criticism of the methodology and data underlying his work, including rhetorical hyperbole and tongue-in-cheek statements that are part and parcel of polemical usage, would be chilled by the application of defamation law. The First Amendment has historically survived this and other tort-based claims to suppress speech. If this Court were to do an about-face from traditional First Amendment values, then debates on political topics, including the Israeli-Palestinian conflict, the refusal to ratify the Kyoto Protocol, and the merits of universal healthcare, as well as other matters of public concern where hyperbole and accusatory language are coin of the realm would likewise be chilled. These rhetorical devices play a vital role in public discourse. Debate thus stunted by defamation law would be colorless and ineffective.

ARGUMENT

I. Courts Have Consistently Protected the Right of Free Speech—Even When That Speech Could Be Considered Offensive or Inflammatory.

The Supreme Court has long held that the First Amendment protects offensive or controversial speech, including the kind of imaginative expression and rhetorical hyperbole indulged in by Appellants, from a heckler's veto. *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (stating that "the *Bresler-Letter Carriers-Fallwell* line of cases" ensures 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" (quotation omitted)); *Hustler*

Magazine, Inc. v. Falwell, 485 U.S. 46, 54 (1988) ("Despite their sometimes caustic nature, from the early cartoons portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate."); *Papish v. Bd. of Curators of Univ. of Missouri*, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—. . . may not be shut off in the name alone of 'conventions of decency.'").

In *Terminiello v. City of Chicago*, the Supreme Court overturned the conviction of a man based on a city ordinance that banned speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." *Terminiello v. City of Chi.*, 337 U.S. 1, 3 (1949). The speech in question was inflammatory comments directed at certain racial and political groups. In overturning the conviction, the Court held that the *highest purpose* of the freedom of speech protected by the First Amendment is to invite dispute:

> The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Terminiello, 337 U.S. 1, 4-5 (1949) (citations omitted).

Similarly, in 2011, the Supreme Court upheld the right of the Westboro Baptist Church to picket outside a military funeral with offensive signs. In so doing, the Court explained that speech regarding a matter of public concern and made in a public place cannot be restricted "simply because it is upsetting or arouses contempt." *See Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) ("'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'" (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989))). The Court found that a state tort claim of intentional infliction of emotional distress could not trump the First Amendment's guarantee of freedom of expression. Otherwise, juries would have to opine on whether the speech was "outrageous" enough to sustain that particular tort claim, and the risk of a jury thereby "becoming an instrument for the suppression of ... 'vehement, caustic, and sometimes unpleasan[t]'" expression was simply too great for the First Amendment to bear. *See id*. (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

The Court's decision in *Cohen v. California*, 403 U.S. 15 (1971), is particularly instructive on the value held by even immoderate, imprecise, and pejorative speech:

> [We] cannot overlook the fact … that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, . . . one of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.

Id. at 25-26 (quotation and alteration omitted).

Mann challenges blog posts dealing with a major political issue: the allegation that

mankind is causing large-scale changes to the climate and that governments should place stringent limits on human activity to prevent these changes. Prior to the posts at issue, other critics questioned the validity of Mann's work, alleging that his "hockey stick" graph paints a flawed picture of global temperature trends. Mann seems to believe that what distinguishes this criticism from those prior is that his sensibilities were offended by the blog posts that refer to him as "the Jerry Sandusky of climate science" and "the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of this tree-ring circus." Yet these critiques employ familiar techniques of rhetorical hyperbole and personal accusations to convey valuable information on a matter of public concern.

II. Rhetorical Hyperbole Has a Significant Role in Political Debate Which Is Protected by the First Amendment, Regardless of Whose Sensibilities It May Offend.

The Western political tradition has enjoyed a robust history of high-spirited debates, complete with imprecise and immoderate expression. Participants in these debates have routinely resorted to rhetorical hyperbole and personal accusations, including accusations of fraud, regarding their opponents. For example, wags in ancient Pompeii left graffiti on the side of a wall, discussing a candidate for aedile in A.D. 79: "The petty thieves support Vatia for aedile" and "the late night drinkers all ask you to elect Marcus Cerrinius Vatia as aedile." Philip Freeman, *Attack Ad, Pompeii-Style*, N.Y. TIMES, Aug. 30, 2012, *available at* http://query.nytimes.com/gst/fullpage.html?res=9806E1D6173CF932A0575BC0A9649D8B63&partner=rssnyt&emc=rss (last visited Aug. 7, 2014).

America is no exception to this tradition. In the Lincoln-Douglas debates, often considered the high watermark of American political debate, Douglas attempted to disparage Lincoln by labeling him as an abolitionist who wanted to overturn state laws that excluded blacks from states such as Illinois. See Lincoln-Douglas Debates, *First Debate: Ottawa, Illinois,*

August 21, 1858, NAT'L PARK SERV., *available at* http://www.nps.gov/liho/historyculture/debate1.htm (last visited Aug. 7, 2014). And of course Grover Cleveland's candidacy—and supposed fathering of a child out of wedlock—gave rise to the campaign ditty, "Ma, ma, where's my pa?"

This tradition continues unabated today, and the Internet gives these rhetorical devices greater play. Take, for example, one post on the conservative Power Line Blog, which concludes that a fundraising email sent by the Democratic National Committee is "filled with misinformation and outright lies." *See* John Hinderaker, *The Democratic Party Lies for Money*, THE POWER LINE BLOG (Aug. 28, 2013), *available at* http://www.powerlineblog.com/archives/2013/08/the-democratic-party-lies-for-money.php (last visited Aug. 7, 2014). Headlines on the liberal Daily Kos website further bear out the role that hyperbole and accusations play in debate:

- "Dick Cheney Is Back to Tell You Decades-old Lies."[2]
- "WI-Gov: Mary Burke (D) Fights Back Against Scott Walker's (R) Lies About Trek Bicycle in New Ad."[3]
- "Jon Stewart Exposes GOP Lies About Reagan's Response to Downed Airliner."[4]
- "Bruce Rauner is a Fraud."[5]

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[2] *See* Hunter, *Dick Cheney is Back to Tell You Decade-Old Lies*, DAILY KOS.COM, *available at* http://www.dailykos.com/story/2014/07/17/1314654/-Dick-Cheney-is-back-to-tell-you-decade-old-lies (last visited Aug. 7, 2014).

[3] *See* poopdogcomedy, *WI-Gov: Mary Burke (D) Fights Back Against Scott Walker's (R) Lies About Trek Bicycle in New Ad*, DAILY KOS.COM, *available at* http://www.dailykos.com/story/2014/07/18/1314872/-WI-Gov-Mary-Burke-D-Fights-Back-Against-Scott-Walker-s-R-Lies-About-Trek-Bicycle-In-New-Ad (last visited Aug. 7, 2014).

[4] *See* BruinKid, *Jon Stewart Exposes GOP Lies About Reagan's Response to Downed Airliner*, DAILY KOS.COM, *available at* http://www.dailykos.com/story/2014/07/22/1315721/-Jon-Stewart-exposes-GOP-lies-about-Reagan-s-response-to-downed-airliner (last visited Aug. 7, 2014).

- "Religious Freedom Frauds."[6]

The authors of these posts accuse their opponents of lies in the service of a political agenda. And the accused are free to respond and refute these accusations. That simple remedy improves the quality of the debate because each side is forced to re-evaluate and defend their positions.[7] Litigating these issues hinders the ability of public debate to tease these opponents' best arguments. *See United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uniformed, the enlightened; to the straightout lie, the simple truth."); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

In this case, Appellants posted comments that Mann was the leader of a "tree-ring circus," that his work was "intellectually bogus," and that Mann was the "Jerry Sandusky of climate science," a reference to the investigation into Sandusky by Mann's employer, Penn State. As in the other examples cited above, Appellants stated their opinion that Mann's hockey-stick graph is a fraud. The hockey-stick graph has been a key political point for many years, and

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[5] *See* MoonlightGraham, *Bruce Rauner is a Fraud*, DAILY KOS.COM, *available at* http://www.dailykos.com/story/2014/06/30/1280398/-Bruce-Rauner-is-a-Fraud (last visited Aug. 7, 2014).

[6] *See* Jon Perr, *Religious Freedom Frauds*, DAILY KOS.COM, *available at* http://www.dailykos.com/story/2014/06/29/1309930/-Religious-freedom-frauds (claiming that conservatives seeking to protect religious freedom are perpetrating fraud) (last visited Aug. 7, 2014).

[7] For a fuller discussion of the important role "truthiness" plays in American politics, see the *amicus* brief of The Cato Institute and P.J. O'Rourke in support of the Petitioners in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014), which is available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-193_pet_amcu_cato-pjo.authcheckdam.pdf.

Mann has enjoyed a long career as a public intellectual based on that graph. Now he seeks to use the law as a cudgel against critics of it. The allegation that Mann's graph is fraudulent is common-place for political debates. But if Mann is successful in his suit, all of the examples cited above could give rise to defamation litigation, thereby clogging the courts and discouraging the free exchange of ideas that the First Amendment exists to protect. *See Terminiello*, 337 U.S. at 4 ("The vitality of civil and political institutions in our society depends on free discussion.").

III. Extending Defamation Law to Rhetorical Hyperbole Would Chill the Exercise of Speech in Passionate Political Debates Involving Competing Values.

If Mann is successful, he will effectively silence his political opponents. Yet political debate is awash in heated rhetoric, hyperbole, personal accusations, and loaded comparisons. Allowing Mann to proceed in this matter will open the floodgates to litigating political questions, thereby stifling public advocacy. *See Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014) ("Speech by citizens on matters of public concern lies at the heart of the First Amendment, which 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)); *Cox v. Louisiana*, 379 U.S. 536, 552 (1965) ("Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy.").

Hyperbole and personal accusation are par for the course in debates involving competing values, sometimes religious, sometimes secular, that are passionately held. That those disputes have only rarely given rise to defamation or other tort claims shows that most participants accept over-the-top statements as "fair play" in the debate itself. Extending defamation laws to these controversies would chill the free exercise of speech and deprive the public of the full panoply of arguments and imaginative expressions that attend them. Whatever discussion remains would be bland and lifeless. *See McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1451 (2014)

("[T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it." (quotation omitted)).

A survey of current popular debates underscores just how many statements would run afoul of defamation law based on Mann's theory. For example, the Supreme Court's recent *Hobby Lobby* decision provoked a spate of articles claiming one side or another is lying. Sally Kohn claimed that conservatives are lying about the facts of the case and the effect of the decision. *See* Sally Kohn, *Hobby Lobby: Sex, Lies, and Craft Supplies*, THE DAILY BEAST (July 2, 2014), *available at* www.thedailybeast.com/articles/2014/07/02/hobby-lobby-sex-lies-and-craft-supplies.html (last visited Aug. 7, 2014). Another author took a similar tack with her post, "3 Lies About Birth Control that Were Just Reinforced by the Hobby Lobby Ruling." *See* Tara Culp-Ressler, *3 Lies About Birth Control that Were Just Reinforced by the Hobby Lobby Ruling*, THINK PROGRESS (June 30, 2014), *available at* http://thinkprogress.org/health/2014/06/30/3454815/birth-control-lies-hobby-lobby-ruling (last visited Aug. 7, 2014). In contrast, a conservative columnist penned an article in which the very headline accuses Hillary Clinton of lying about the case. Deroy Murdock, *Hillary Leads the Lies on Hobby Lobby*, NAT. REV. ONLINE (July 3, 2014), *available at* http://www.nationalreview.com/article/381952/hillary-leads-lies-hobby-lobby-deroy-murdock (last visited Aug. 7, 2014).

Similarly, the Affordable Care Act has created a cottage industry in personal accusations and claims of fraud. "House GOP Leaders Take Up the Banner of Obamacare Trutherism," reads one headline of an article claiming that Republican leaders are lying about healthcare enrollment. *See* Dylan Scott, *House GOP Leaders Take Up the Banner of Obamacare Trutherism*, TALKING POINTS MEMO (Apr. 17, 2014), *available at* http://talkingpointsmemo.com/dc/house-gop-obamacare-trutherism (last visited Aug. 7, 2014). Economist and blogger Paul

Krugman wrote in a post entitled "Health Reform and Affinity Fraud" that conservatives are "easily duped by con men who seem to be like them, to be their kind of people"—the "con men" referenced appear to be Rush Limbaugh and every contributor to Fox News. *See* Paul Krugman, *Health Reform and Affinity Fraud*, N.Y. TIMES BLOG (Apr. 11, 2014), *available at* http://krugman.blogs.nytimes.com/2014/04/11/health-reform-and-affinity-fraud (last visited Aug. 7, 2014).

Another fertile source of heated rhetoric is the abortion debate. For example, the case of *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014), is typical. Representative Steve Driehaus, a Congressman from Ohio, voted for Obamacare. Susan B. Anthony List, a pro-life organization, issued a press release stating that Driehaus had voted for "taxpayer-funded abortion," and sought to erect a billboard in his district before the 2010 election. *Id*. at 2339. Driehaus then filed a complaint with the Ohio Elections Commission stating that the press release was false and that he had not voted for taxpayer-funded abortion. *Id*. He sought written discovery and noticed three depositions. *Id*.

The *Susan B. Anthony List* case demonstrates the fractious nature of American politics. Driehaus undoubtedly voted for the Affordable Care Act. Based on the Byzantine nature of that law, some analysts and pundits have determined that it requires taxpayers to pay for abortions. *See* Sarah Torre, *Obamacare's Many Loopholes: Forcing Individuals and Taxpayers to Fund Elective Abortion Coverage*, HERITAGE FOUNDATION BACKGROUNDER 2872 (Jan. 13, 2014), *available at* http://www.heritage.org/research/reports/2014/01/obamacares-many-loopholes-forcing-individuals-and-taxpayers-to-fund-elective-abortion-coverage (last visited Aug. 7, 2014). Others have opined that it does not. *See* Sally Kohn, *In Susan B. Anthony List Case, Supreme Court Votes for the Right to Lie*, THE DAILY BEAST (June 16, 2014), *available at*

http://www.thedailybeast.com/articles/2014/06/16/in-susan-b-anthony-list-cast-supreme-court-votes-for-the-right-to-lie.html (last visited Aug. 7, 2014). By running to an administrative court rather than the court of public opinion, Driehaus sought to have state government determine whether an opinion regarding the effect of a complex law was true or not.

IV. This Court Should Not Add Another Deterrent to the Exercise of Free Speech.

Supporters of unpopular views already face significant deterrents to expressing their opinions and voting their conscience. These extra-legal sanctions range from boycotts and intimidation to loss of funding or livelihood. The costs of defending against a defamation claim would only exacerbate these deterrents and shrink meaningful debate still further.

Brendan Eich, creator of JavaScript and co-founder of Mozilla, stepped down as Mozilla's CEO in April amidst public controversy over his 2008 donation to the campaign for Proposition 8, which established that only a marriage between a man and a woman would be recognized as valid in California. *See* Mitchell, *Brendan Eich Steps Down as Mozilla CEO*, THE MOZILLA BLOG (Apr. 3, 2014), *available at* https://blog.mozilla.org/blog/2014/ 04/03/brendan-eich-steps-down-as-mozilla-ceo (last visited Aug. 7, 2014). He had only been named CEO in late March, but his appointment prompted a boycott of Mozilla by popular online dating site OKCupid because of his private political donation. *See* Ian Johnston, *OkCupid Calls for Firefox Boycott to Protest Anti-gay Marriage CEO Brendan Eich*, THE INDEPENDENT (Apr. 1, 2014), *available at* http://www.independent.co.uk/life-style/gadgets-and-tech/news/ online-dating-site-okcupid-calls-for-firefox-boycott-to-protest-at-antigay-marriage-boss-9226904 .html (last visited Aug. 7, 2014).

In 2013, retired neurosurgeon and 2008 recipient of the Presidential Medal of Freedom Ben Carson withdrew from speaking at the Johns Hopkins University commencement amidst

public controversy over his statements in defense of traditional marriage during a television interview. These remarks prompted a student petition that he withdraw and also drew condemnation from the Dean of Medical Faculty at Johns Hopkins. *See* Aaron Blake, *Ben Carson Withdraws As Johns Hopkins Graduation Speaker*, WASH. POST (Apr. 10, 2013), *available at* http://www.washingtonpost.com/blogs/post-politics/wp/2013/04/10/ben-carson-withdraws-as-johns-hopkins-graduation-speaker (last visited Aug. 7, 2014).

Supporters of unpopular opinions face enough obstacles to speaking their minds—social ostracism, boycotts, loss of their livelihoods, and professional disrepute. Adding legal sanctions to these public controversies would only prolong the stagnation in which many political debates are currently stalled. *See* Burgess Everett, *Congress Punts*, POLITICO (July 21, 2014), *available at* http://www.politico.com/story/2014/07/congress-summer-2014-agenda-109199.html (last visited Aug. 7, 2014).

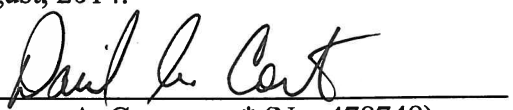
CONCLUSION

America's system of popular government requires that citizens be free to engage in debate over political issues. Defamation lawsuits over political statements fundamentally impair this process. And the rising costs of litigation means that defamation suits create even greater burdens now than in the past. Those like Mann seek to use defamation suits to punish political opponents and intimidate potential foes from entering the public square.

It is precisely this kind of suit intended to silence critics and burden them with the costs of legal defense that caused the Council of the District of Columbia to pass the anti-SLAPP law. Appellants criticized Mann's hockey stick graph as a means of opposing sweeping new laws to combat posited climate change. Instead of arguing the merits in the public square, Mann filed this lawsuit to punish those in the media who oppose his political agenda. This Court, in keeping

with the First Amendment, should reverse the Superior Court and dismiss Mann's claims.

Respectfully submitted this 11th day of August, 2014.



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I hereby certify that on August 11, 2014, a copy of the foregoing *amicus curiae* brief was served on the attorneys listed below by First Class mail. Courtesy copies were also served via electronic mail on each of the attorneys listed below.

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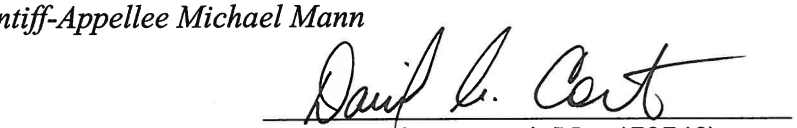

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