

Nos. 14-CV-101 and 14-CV-126 (consolidated)

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

COMPETITIVE ENTERPRISE INSTITUTE, *ET AL.*

AND

NATIONAL REVIEW, INC.,

DEFENDANTS-APPELLANTS,

v.

MICHAEL E. MANN,

PLAINTIFF-APPELLEE

On Appeal from the Superior Court for the District of Columbia

**BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND 26 OTHER ORGANIZATIONS
IN SUPPORT OF APPELLANTS AND URGING REVERSAL**

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STATEMENT OF INTEREST

Pursuant to D.C. App. R. 29, the Reporters Committee for Freedom of the Press and 26 other organizations, through undersigned counsel, respectfully submit this brief as *amici curiae* in support of appellants Competitive Enterprise Institute, *et al.* and National Review. Pursuant to D.C. App. R. 29 (a), this brief is filed with the consent of all parties.

Media *amici* have an interest in ensuring anti-SLAPP statutes remain effective tools in protecting free speech. While all citizens who choose to speak out on public affairs benefit from anti-SLAPP statutes, which aim to deter the use of litigation to silence speech, as regular speakers news organizations have an especially strong interest in ensuring that these statutes provide meaningful relief. It is news organizations that choose every day to venture into the thick of public controversy to make sure citizens are fully informed about their world. This engagement with important issues makes the news media more liable to be drawn into court, particularly when a controversial figure decides to use litigation as a weapon to counter thorough reporting or challenging commentary.

The American Civil Liberties Union of the Nation's Capital is the Washington, D.C., affiliate of the American Civil Liberties Union (ACLU), a nonprofit membership organization dedicated to protecting and expanding the civil liberties of all Americans, particularly their right to freedom of speech. The ACLU of the Nation's Capital played a leading role in supporting passage of the D.C. Anti-SLAPP Act and, having represented defendants in several SLAPP suits, is familiar with the intimidating effect such lawsuits can have on free speech.

The *amici* are: The Reporters Committee for Freedom of the Press, The American Civil Liberties Union of the Nation's Capital, American Society of News Editors, Association of Alternative Newsmedia, The Association of American Publishers, Inc., Bloomberg L.P., The

Center for Investigative Reporting, First Amendment Coalition, First Look Media, Fox News Network LLC, Gannett Co., Inc., Investigative Reporting Workshop at American University, The National Press Club, National Press Photographers Association, NBCUniversal Media, LLC, Newspaper Association of America, North Jersey Media Group Inc., Online News Association, Radio Television Digital News Association, The Seattle Times Company, Society of Professional Journalists, Stephens Media LLC, Time Inc., Tribune Publishing Company, Tully Center for Free Speech, Washington City Paper, The Washington Post. Each is described more fully in Appendix A.

SUMMARY OF THE ARGUMENT

The District of Columbia enacted the anti-SLAPP statute, D.C. Code §§ 16-5501 *et seq.* (2011), to prevent claims based on speech about matters of public interest from advancing past the initial stages of litigation unless the plaintiff can demonstrate a likelihood of success on the merits. Michael Mann, a climate scientist, sued defendants for defamation regarding statements they made on blog posts about the controversy surrounding Mann's research methods and data. Defendants moved to dismiss Mann's complaint under the D.C. anti-SLAPP statute. The D.C. Superior Court denied the motions, prompting this appeal.

First, this court in *Doe No. 1 v. Burke* recently found that the denial of a special motion to quash under the D.C. anti-SLAPP statute is immediately appealable under the collateral order doctrine. *Doe No. 1 v. Burke*, 91 A.3d 1031 (D.C. 2014). *Amici* urge this court to hold that a special motion to dismiss under the anti-SLAPP statute is likewise immediately appealable.

Second, the court below erred on the merits by failing to treat the commentaries at issue as constitutionally protected opinion and fair comment. The challenged statements were made in settings and using language that conveyed they were opinions. Against that backdrop, the challenged statements – that Mann manipulated data to serve a political agenda and that governmental bodies improperly endorsed his views – are, as numerous other courts have recognized, protected opinions about both scientific research and public policy based on it. While Mann essentially claims that he can silence critics because he is “right,” the judicial system should not be the arbiter of either scientific truth or correct public policy. While *amici* may not necessarily agree with the content of defendants' speech, they believe that, if left to stand, the decision below will chill the expression of opinion on a wide range of important scientific and public policy issues, and therefore urge that it be reversed.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO HEAR IMMEDIATE APPEALS OF SPECIAL MOTIONS TO DISMISS UNDER THE D.C. ANTI-SLAPP STATUTE.

Under the collateral order doctrine and in tandem with this court's recent decision in *Doe No. 1 v. Burke*, 91 A.3d 1031 (D.C. 2014) (finding that denials of special motions to quash are immediately appealable), an order denying a special motion to dismiss under the D.C. anti-SLAPP statute is immediately appealable. Such a holding would be in keeping with numerous circuit and state courts that have found that the rights conveyed by anti-SLAPP statutes would be irreparably lost if not immediately appealable.

A. Under the Collateral Order Doctrine, Special Motions to Dismiss, Like Special Motions to Quash, Are Immediately Appealable.

This court recognizes and applies the collateral order doctrine in determining whether it has jurisdiction over non-final orders. *See Stein v. United States*, 532 A.2d 641, 643-44 (D.C. 1987). Under the collateral order doctrine, three criteria must be met for the court to assert its jurisdiction: (1) the order "must conclusively determine a disputed question of law, (2) it must resolve an important issue that is separate from the merits of the case, and (3) it must be effectively unreviewable on appeal from a final judgment." *McNair Builders, Inc. v. Taylor*, 3 A.3d 1132, 1135 (D.C. 2010).

The D.C. anti-SLAPP statute is unique in that, in addition to providing an avenue for quickly dismissing a case, it allows anonymous speakers to quash subpoenas associated with meritless lawsuits when the speech is on an issue of public interest. D.C. Code § 16-5502 to -5503; *see also Burke, supra*, 91 A.3d at 1039. The statute's language for each motion is substantially similar:

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 (emphasis added).

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

D.C. Code § 16-5503 (emphasis added).

In *Burke*, this court found that an order denying a special motion to quash under the D.C. anti-SLAPP statute met each criterion of the collateral order doctrine and was therefore immediately appealable. *Burke, supra*, 91 A.3d at 1036 n.6, 1040. Although the court declined at that time to decide whether special motions to dismiss were also immediately appealable, *id.*, the reasoning and analysis of the court in *Burke* applies in equal measure to special motions to dismiss, which should also be immediately appealable in this court.

1. Denial of a Special Motion to Dismiss Conclusively Determines a Disputed Question of Law.

To satisfy the first criterion of the collateral order doctrine – that the order conclusively determine a disputed question of law – the court in *Burke* found that an order denying an anti-SLAPP motion to quash effectively determines that the individual does not qualify for protection under the statute. *Id.* at 1038. By finding that the movant’s “speech was not of the sort that the Anti-SLAPP statute intends to protect,” the trial court made a final determination on that question of law. *Id.*

The special motion to dismiss requires no different analysis than the special motion to quash in satisfying the first criterion. Denying a special motion to dismiss conclusively determines that the speaker will not be protected by the immunity from suit provided by the

statute, just as the special motion to quash does. Both provisions offer special protections for speakers beyond the standard protections in the rules. *See* D.C. Council Report on Bill 18-893, “Anti-SLAPP Act of 2010,” Council of the District of Columbia, Committee on Public Safety and the Judiciary (Nov. 18, 2010), at 4 (“Committee Report”) (noting that the statute extends “immunity” and “substantive rights” to those who qualify for its protection). Denying an anti-SLAPP motion – whether it be a motion to quash or motion to dismiss – determines with finality that the individual is not eligible to benefit from the heightened protections of the statute.

2. Denial of a Special Motion to Dismiss Resolves an Important Issue That Is Separate from the Merits.

To satisfy the second criterion of the collateral order doctrine – that the order must resolve an important issue separate from the merits – the court in *Burke* held that a determination of who qualifies for protection under the anti-SLAPP statute and a determination of whether a party is liable for defamation are entirely separate. *Burke, supra*, 91 A.3d at 1038-39 (“Put another way, the ‘[d]enial of an anti-SLAPP motion resolves a question separate from the merits in that it merely finds that such merits may exist, without evaluating whether the plaintiff’s claim will succeed.’”) (quoting *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003)). While a plaintiff must show a likelihood of success on the merits to defeat both a special motion to quash and a special motion to dismiss, the purpose of that inquiry is different from the purpose of proving the merits at trial. *Id.* at 1038 (citing *Henry v. Lake Charles Am. Press LLC*, 566 F.3d 164, 175 (5th Cir. 2009)). Proving the merits at trial results in liability for committing a tort, while proving likelihood of succeeding on the merits determines whether the defendant will be immune from suit or will be forced to litigate.

This court cited with approval the Fifth Circuit’s opinion in *Henry* for the proposition that “issues of immunity [like those considered in evaluating a motion under an Anti-SLAPP statute]

are decided prior to trial and then not normally revisited.” *Id.* at 1038 n.10 (quoting *Henry, supra*, 566 F.3d at 176) (bracketed text in original). Denying a special motion to dismiss denies the defendant immunity from suit; once the case is tried, the defendant obviously cannot re-raise the issue of immunity. Therefore, the inquiry as to whether the defendant will be forced to litigate – the question raised by a special motion to dismiss – is separate from the inquiry into whether the defendant committed a tort, which satisfies the second criterion of the collateral order doctrine.

3. Denial of a Special Motion to Dismiss Confers an Immunity from Suit That Is Unreviewable on Appeal.

To satisfy the third criterion of the collateral order doctrine – that the order must be effectively unreviewable on appeal – this court in *Burke* held that the First Amendment right at issue (there, the right to anonymous speech), once lost, cannot be vindicated or reviewed on appeal. *Burke, supra*, 91 A.3d 1031 at 1039-40. While the court ruled solely on a special motion to quash, it strongly endorsed the notion that a special motion to dismiss also satisfies the third criterion. *See id.* at 1039. First, the court noted that a motion asserting immunity is commonly the kind found to satisfy the collateral order doctrine. *Id.* (citing *McNair Builders, supra*, 3 A.3d at 1136). Then the court said a special motion to dismiss “explicitly protects the right not to stand trial.” *Id.* at 1039. Finally, the court concluded that a special motion to quash “also confers an immunity of a sort from suit,” in addition to a special motion to dismiss conferring immunity. *Id.* (emphasis added).

When drafting the anti-SLAPP legislation, D.C. lawmakers emphasized that the statute was designed to extend immunity to those engaged in protected activities. Committee Report at 4. The statute conveys a substantive right “to expeditiously and economically dispense of litigation.” *Id.* The purpose of the statute, then, is to protect certain defendants from having to

expend the time and money in defending meritless claims, because such claims chill speech on matters of public interest. Once defendants are forced to litigate, they have lost their immunity from trial, which is unreviewable on appeal.

Therefore, a special motion to dismiss meets the three criteria of the collateral order doctrine and is therefore immediately appealable.

B. Numerous Other Jurisdictions Have Found That the Rights Conferred by an Anti-SLAPP Statute Will Be Irreparably Lost if Orders Denying Anti-SLAPP Motions Are Not Immediately Appealable.

Because the D.C. Council based the language of its anti-SLAPP statute on similar laws in other states, *see* Committee Report at 4, this court may properly look to other jurisdictions for guidance. In that regard, the U.S. District Court for the District of Columbia has consulted decisions in other jurisdictions in interpreting the D.C. anti-SLAPP statute. *See, e.g., Boley v. Atlantic Monthly Grp.*, 950 F. Supp. 2d 249, 255 (D.D.C. 2013) (“Where appropriate, then, the Court will look to decisions from other jurisdictions . . . for guidance in predicting how the D.C. Court of Appeals would interpret its own anti-SLAPP law.”); *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 13 (D.D.C. 2013).

1. Five Federal Circuit Courts Have Found, Under the Collateral Order Doctrine, That Anti-SLAPP Statutes Are Immediately Appealable.

Federal courts routinely find that interlocutory orders denying anti-SLAPP motions must be immediately appealable to preserve the very rights conferred to defendants under statutes similar to the D.C. anti-SLAPP statute. The First, Second, Fifth, Ninth, and Eleventh Circuits have all relied on the collateral order doctrine, *see Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), in finding that the anti-SLAPP statutes in Maine,¹ Louisiana,² California,³ and

¹ Me. Rev. Stat. tit. 14, § 556 (1999) (amended 2012).

² La. Code Civ. Proc. Ann. art. 971 (1999) (amended 2012).

Georgia⁴ required the right of immediate appeals to preserve the purpose of the statutes. *See Royalty Network, Inc. v. Harris*, 42 Media L. Rptr. (BNA) 2011 (11th Cir. 2014); *Liberty Synergistics Inc. v. Microflo, Ltd.*, 718 F.3d 138 (2d Cir. 2013); *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009 (9th Cir. 2013) (reaffirming *Batzel, supra*, 333 F.3d at 1024-26); *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009).

The Ninth Circuit held that the first two criteria of the collateral order doctrine (that the ruling was conclusive and resolved important questions separate from the merits) were clearly satisfied. *D.C. Comics, supra*, 706 F.3d at 1013. Analyzing the third criterion, the court held that California's anti-SLAPP statute, based on the language of the statute and the legislative history behind it, was meant to confer immunity and not merely a defense against ultimate liability. *Id.* Because immunity from suit is unreviewable on appeal from final judgment, the third criterion of the collateral order doctrine was met. *Id.* The Ninth Circuit noted that the protection of the right to free speech embedded in the anti-SLAPP statute requires "particular solicitude within the framework of the collateral order doctrine." *Id.* at 1016. The court further explained that "[t]he California legislature's determination, through its enactment of the anti-SLAPP statute, that such constitutional rights would be imperiled absent a right of interlocutory appeal deserves respect." *Id.*

The First Circuit similarly found that the first two criteria of the collateral order doctrine were met before concluding that the rights created by the Maine anti-SLAPP statute were akin to immunity and therefore unreviewable on appeal from final judgment. *Godin, supra*, 629 F.3d at

³ Cal. Civ. Proc. Code § 425.16 (West 1992) (amended 2011). The California statute was addressed by both the Second and Ninth Circuits.

⁴ Ga. Code Ann. § 9-11-11.1 (1998).

84-85. Looking at a Maine court's decision granting interlocutory review, the court found that "lawmakers wanted to protect speakers from the trial itself rather than merely from liability." *Id.* at 85.

The Fifth Circuit analyzed each criterion of the collateral order doctrine, likewise finding that interlocutory orders denying an anti-SLAPP motion fall under the "small class" of orders that are immediately appealable. *Henry, supra*, 566 F.3d at 173-81. Regarding the third criterion, the court found that anti-SLAPP statutes "provide defendants the right not to bear the costs of fighting a meritless defamation claim" and are therefore unreviewable on appeal from final judgment. *Id.* at 177-78. "[I]mmunity is not simply a right to prevail, but a right not to be tried," and that right is lost if the case proceeds to trial. *Id.* at 177. Echoing the Ninth Circuit, which held that free speech protections should be given greater import under the collateral order doctrine, *DC Comics, supra*, 706 F.3d at 1016, the Fifth Circuit noted that the importance of protecting First Amendment rights "weighs profoundly in favor of appealability," *Henry, supra*, 566 F.3d at 180. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Following the lead of these other cases, the Second and Eleventh Circuits similarly concluded that the denial of an anti-SLAPP motion is immediately appealable under the collateral order doctrine. *Liberty Synergistics, supra*, 718 F.3d at 145-51; *Royalty Network, supra*, 42 Media L. Rep. at 2014-16.

2. At Least Two States Have Found That Anti-SLAPP Statutes Create Immunity from Suit, a Right That Is Irreparably Lost if Denials of Anti-SLAPP Motions Are Not Immediately Appealable.

Maine and Massachusetts have likewise held that denial of anti-SLAPP motions are immediately appealable, even though neither of their statutes explicitly provides for that right.

Morse Bros. v. Webster, 772 A.2d 842 (Me. 2001); *Fabre v. Walton*, 781 N.E.2d 780 (Mass. 2002).⁵ Both courts focused their analyses on whether the right in question will be irreparably lost if denials of motions to dismiss under anti-SLAPP laws are not immediately appealable, which is essentially the third element of the collateral order doctrine. *Morse Bros.*, *supra*, 772 A.2d at 847; *Fabre*, *supra*, 781 N.E.2d at 784.

The Massachusetts high court held that the right to avoid “the harassment and burdens of litigation” is similar to government immunity in that the right is lost if the defendant is forced to litigate a case beyond its initial stages. *Id.* Not only did the high court find that defendants *may* immediately appeal the denial of an anti-SLAPP motion, *id.*, but an appellate court later held that defendants *must* immediately appeal the interlocutory order or they lose their right to appeal after final judgment, *Wendt v. Barnum*, 2007 Mass. App. Div. 93, 96 (App. Div. 2007). In *Wendt*, a defendant fully litigated his case after his anti-SLAPP motion was denied, and then he appealed the anti-SLAPP order along with other claims of error. 2007 Mass. App. Div. at 93-97. The court dismissed the anti-SLAPP appeal as moot because the defendant failed to appeal the interlocutory order immediately after it was issued. *Id.* at 96.

Much like the Massachusetts high court and the five federal circuits, the Maine high court found that anti-SLAPP statutes create a right to avoid the “cost and delay of litigating [a] claim,” and forcing a defendant to continue litigation is the “precise harm that the statute seeks to prevent.” *Morse Bros.*, *supra*, 772 A.2d at 848; *see also Schelling v. Lindell*, 942 A.2d 1226 (Me. 2008). The court explained that the statute was “designed to protect certain defendants from meritless litigation,” as indicated by its provisions offering an expedited hearing on the motion and temporarily switching the burden of proof to the plaintiff. *Morse*, *supra*, 772 A.2d at

⁵ The Massachusetts anti-SLAPP statute can be found at Mass. Gen. Laws ch. 231, § 59H (1994) (amended 1996).

848. Ultimately, the court held that not immediately hearing an appeal of the denial of an anti-SLAPP motion would result in the “loss of substantial rights.” *Id.*

Like the anti-SLAPP statutes in California, Georgia, Louisiana, Maine, and Massachusetts, the D.C. anti-SLAPP statute confers a right to avoid the costs and harassment of meritless litigation – a right that will be lost if an order denying that right is not immediately appealable. *See* D.C. Code §§ 16-5501 *et seq.* The D.C. anti-SLAPP statute is crafted to forestall litigation. *See id.* Much like the statute in Maine, *see Morse Bros., supra*, 772 A.2d at 848, the D.C. statute requires the court to hold an expedited hearing on the special motion to dismiss and shifts the burden to the plaintiff to prove likelihood of success on the merits. D.C. Code §§ 16-5502 (b), (d); 16-5503 (b). Furthermore, it permits the court to award the costs of litigation to a party who prevails on an anti-SLAPP motion, another deterrent to litigation. *Id.* § 16-5504 (a). D.C. lawmakers recognized that the unique problem with SLAPP lawsuits “is that the goal of the litigation is not to win the lawsuit but punish the opponent and intimidate them into silence.” Committee Report at 4. The anti-SLAPP statute, then, is a remedy to the litigation itself. Just as the court in *Godin* stated, “lawmakers wanted to protect speakers from the trial itself rather than merely from liability.” 629 F.3d at 85. As five federal circuits have recognized, along with the high courts of Maine and Massachusetts, requiring a party to continue litigation before appealing the denial of an anti-SLAPP motion results in irreparable injury – the exact injury the statute was meant to guard against.

3. Contrary Decisions of Other Courts Indicating There Is No Right to Immediately Appeal the Denial of Anti-SLAPP Motions Are Distinguishable Because the D.C. Anti-SLAPP Statute Provides Immunity.

The Ninth Circuit distinguished between California’s anti-SLAPP statute, *Batzel, supra*, 333 F.3d 1018, and those of Oregon, *Englert v. MacDonell*, 551 F.3d 1099 (9th Cir. 2009), and

Nevada, *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795 (9th Cir. 2012), finding that appeals of anti-SLAPP motions are immediately appealable under California law because California lawmakers intended to confer immunity, whereas Nevada's and Oregon's lawmakers did not. *See Metabolic Research, supra*, 693 F.3d at 801-02 (“We must presume the legislature selected its words with purpose, and immunity from “civil liability” is unquestionably different than immunity from “suit” or “trial.”). In response to *Metabolic Research*, the Nevada legislature amended its statute so that denials of anti-SLAPP motions are immediately appealable. S.B. 286 (Nev. 2013) (amending Nev. Rev. Stat. § 41.637).

Like California lawmakers, D.C. lawmakers intended to confer immunity from suit in the D.C. anti-SLAPP statute. They expressly noted that they were following the lead of other jurisdictions in extending “immunity to individuals engaging in protected actions” and providing “substantive rights to defendants in a SLAPP.” Committee Report at 4. This court in *Doe No. 1 v. Burke* likewise found that a special motion to dismiss under the D.C. statute “explicitly protects the right not to stand trial.” *Burke, supra*, 91 A.3d 1031 at 1039.

That the statute is silent as to the right of immediate appeal is irrelevant in light of the statute's unique legislative history. Lawmakers originally included a provision granting a defendant the right of immediate appeal but later removed it solely because they thought the provision might exceed their authority, based on this court's decision in *Stuart v. Walker*, 6 A.3d 1215 (D.C. 2010); *see* Committee Report at 7. Even after lawmakers removed the provision, the report noted that the “Committee agrees with and supports the purpose of this provision.” *Id.* This court in *Burke* chose to “read little into the absence of a provision that the Council may not have been empowered to include in the first place.” *Burke, supra*, 91 A.3d at 1039 n.12.

The clear intention of the D.C. lawmakers to permit immediate appeals demonstrates that the statute confers immunity from litigation, which would be irreparably lost if the denial of an anti-SLAPP motion is not immediately appealable.

II. THE CHALLENGED STATEMENTS ARE PROTECTED EXPRESSIONS OF OPINION ON AN IMPORTANT SCIENTIFIC AND PUBLIC POLICY DEBATE.

If affirmed, the decision below will work a profound chill on expressions of opinion about important scientific and public policy issues, and the publication of such opinions by *amici* and other speakers. As is readily apparent from the face of the online commentaries at issue, and the context in which they were published, defendants were expressing constitutionally protected opinions about both (a) the validity of Mann’s scientific conclusions on climate change *and* (b) the findings of governmental bodies that had endorsed his views, including, as he alleges in his complaint, the EPA, the National Science Foundation, and Penn State University. *See, e.g., Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 582 (D.C. 2000) (op-ed “column discussing a subject of public interest must surely be accorded a high level of protection, lest the expression of critical opinions be chilled”).

The opinions expressed were no doubt harsh, and many – including a number of the *amici* submitting this brief – may not agree with them. But, honoring our “profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open,” the First Amendment protects expression that challenges the prevailing orthodoxy of the day even in language that is “vehement, caustic and . . . unpleasantly sharp.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also, e.g., Snyder v. Phelps*, 131 S. Ct. 1207 (2010) (protecting anti-homosexual protest at funeral of soldier). Such protection is particularly warranted where the public policy under discussion involves a complex scientific issue that is properly left to scientists and concerned citizens to test, debate, and resolve – rather than

attempting to adjudicate scientific “truth” in a court, a task for which the judicial system is uniquely unqualified in the context of a defamation action. Because the commentaries, even if one strongly disagrees with the views they expressed, were both clearly within the ambit of D.C.’s anti-SLAPP statute and were non-actionable under the First Amendment protection for opinion, the order below should be reversed.

A. A Statement Is Actionable Only if It Reasonably Can Be Interpreted As Stating Actual Facts That Can Be Readily Proven As True or False.

“The critical determination of whether” a challenged publication contains actionable statements of fact or protected opinion is a threshold matter of law for the court. *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 49-50 (D.C. 1983) (per curiam) (endorsing the “early sifting of groundless allegations from meritorious claims made possible by a” motion to dismiss, including to protect expressions of opinion); *see also Ollman v. Evans*, 242 U.S. App. D.C. 301, 309, 750 F.2d 970, 978 (1984) (holding as a matter of law that columnists’ criticisms of university professor were protected opinion). That legal determination requires the court to assess, *inter alia*, whether the statement can “reasonably be interpreted as stating actual facts,” *e.g.*, *Lane v. Random House, Inc.*, 985 F. Supp. 141, 150 (D.D.C. 1995), that are “provable as false,” *e.g.*, *Rosen v. Am. Israel Pub. Affairs Comm., Inc.*, 41 A.3d 1250, 1256 & n.17 (D.C. 2012); *see also Armstrong v. Thompson*, 80 A.3d 177, 184 (D.C. 2013) (a “statement of opinion is actionable if – but only if – [it is] ‘objectively verifiable.’”) (citation omitted).⁶ These two complementary

⁶ Both *Lane* and *Rosen* rely on the U.S. Supreme Court decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), which made clear that not everything labeled “opinion” is constitutionally exempt from defamation liability, *see id.* at 21 (observing that even a statement that starts “In my opinion . . .” may sometimes be “sufficiently factual to be susceptible of being proved true or false . . . [based upon] a core of objective evidence”). Nevertheless, it left intact the basic requirement that, to be actionable, a statement must include a false assertion of fact. *Id.* at 19-20 (finding the First Amendment requires that “a statement on matters of public concern must be provable as false before there can be liability under state defamation law” and further forbids liability for “statements that cannot ‘reasonably [be] interpreted as stating actual facts’”).

requirements for actionable defamation – a statement of actual fact that is capable of being proven true or false – operate together to immunize speakers against liability for expressions of opinion. In distinguishing assertions of fact from opinions, courts consider the language used, the context of the statement, and the extent to which it is verifiable. *See Ollman, supra*, 242 U.S. App. D.C. at 310, 750 F.2d at 979.

B. The Challenged Publications Bear All the Traditional Hallmarks of Opinion.

Like the article in *Ollman*, which appeared on the Op-Ed page of *The Washington Post*, the publications in this case appeared on websites known for heated commentary. As such, the defendants' placement of the commentaries signals to the "average reader" that he or she should "read the [challenged statements] to be opinion." *Ollman, supra*, 242 U.S. App. D.C. at 321, 750 F.2d at 990; *see also, e.g., Guilford Transp. Indus., supra*, 760 A.2d at 597 (finding it "critical to our inquiry that the allegedly defamatory utterances in this case appeared in an Op-Ed column in which [defendant] was commenting on matters of substantial public concern"); *Moldea v. New York Times Co.*, 306 U.S. App. D.C. 1, 11, 22 F.3d 310, 315, 320 (1994) (finding statements in a book review, even if "written with an aim to damage a writer's reputation," to be protected opinion where they were published in a context "quintessentially of a type readers expect to find in that genre").

The language of the commentaries similarly confirms that they are opinions. They describe Mann variously as "unscientific" and "the ringmaster of a tree-ring circus" and compare him metaphorically to both Jerry Sandusky and Bernie Madoff. And they criticize the official reviews of his methods, using terms like "scandal," "whitewash," "cover up," and "Climategate." No one reading these pieces would reasonably understand them to be fact-based news reporting. Indeed, as this court has held, accusations that a plaintiff or his work are untrustworthy are decidedly nonactionable statements of opinion where, as here, the publication's context signals

to the reader that the author is expressing a personal view. *See, e.g., Armstrong, supra*, 80 A.3d at 187-88 (although challenged statements accused plaintiff of “‘serious misconduct and other violations,’ ‘gross misconduct and integrity violations,’ and ‘serious issues of . . . unethical behavior,’” these “various characterizations of [plaintiff’s] alleged misconduct” reflected “one person’s subjective view of the underlying conduct and were not verifiable as true or false”). That the court below found unprotected opinions expressed in such a context and using such obviously opinion-based language is particularly concerning to *amici*, which regularly include opinions within their publications, broadcasts, and websites.

C. Harsh Criticisms of Scientific Methodology and Conclusions Are Regularly Held to Be Nonactionable Statements of Opinion.

Although the court below acknowledged that “[o]pinions and rhetorical hyperbole are protected speech under the First Amendment” and that “several of defendants’ statements fall into these protected categories,” including the obviously hyperbolic statement calling Mann the “Jerry Sandusky of climate science,” Jan. 22, 2014 Order at 3 & n.6, it nevertheless denied defendants’ motions in their entirety. The focus of that holding was that accusing Mann of manipulating data to support a particular outcome was a statement of fact.⁷ In the context of

⁷ *See, e.g.,* Jan. 22, 2014 Order at 3 (“Accusing a scientist of conducting his research fraudulently, manipulating his data to achieve a predetermined or political outcome, or purposefully distorting the scientific truth are factual allegations.”); *id.* at 3-4 (accusation that Mann “‘molested and tortured data’ could easily be interpreted to mean that [he] distorted, manipulated, or misrepresented his data. . . . A reasonable reader, both within and outside the scientific community, would understand that a scientist who molests or tortures his data is acting far outside the bounds of any acceptable scientific method” and fairly “interpret the comment . . . as an allegation that Dr. Mann had committed scientific fraud.”); *id.* at 5 (“describing Dr. Mann as ‘the man behind the fraudulent climate-change ‘hockey-stick’ graph’” added “insult to injury” and was “itself defamatory” in that it “parallels [the] claim that Dr. Mann ‘molested and tortured data.’”); *see also id.* at 4 (concurring with “many of the reasons in Judge Combs Greene’s July 19 [2013] orders”). In the July 19, 2013 orders, the court below found that calling Mann “intellectually bogus” is defamatory for someone “[i]n Plaintiff’s line of work,” because “[t]o call [his] work a sham or to question his intellect and reasoning is tantamount to an accusation of fraud.” *See, e.g.,* July 19, 2013 NRO Order at 15-16.

these commentaries, however, that was error. As Mann himself concedes, the commentaries did *not* accuse him of fabricating data from thin air but instead were harshly critical of his scientific models, methods, and conclusions. *See, e.g.*, Am. Compl. ¶ 23 (“[m]uch 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,” all of which are “appropriate for scientific debate.”) (quoting Aug. 2011 National Science Foundation report). *Amici* respectfully submit that permitting such a defamation claim to proceed will substantially chill speech that challenges scientific conclusions, as well as public policies based on them. In holding otherwise, the court below failed to appreciate that hyperbolic criticisms are a legitimate part of the “rough and tumble” nature of heated debate on important issues of public concern. *See Ollman, supra*, 242 U.S. App. D.C. at 324, 750 F.2d at 993 (Bork, J., concurring) (column that “openly questioned the measure or method of [professor’s] scholarship” was protected opinion given “the public and constitutional interest in free, and frequently rough, discussion”); *Lane*, 985 F. Supp. at 148 (accusing plaintiff of “BEING GUILTY OF MISLEADING THE AMERICAN PUBLIC” with his research fits “comfortably within the boundaries of rough and tumble debate”).

Other courts have repeatedly confronted almost identical circumstances to those presented here and have uniformly recognized that statements calling a scientist a “fraud,” a “crank,” or a “liar” – including that he “will lie to suit [his] agenda” – are properly understood as expressions of opinion about the scientist’s views, conclusions, or methodologies, and are not, as the court below incorrectly found, statements of fact for purposes of defamation liability. For example, in a highly analogous case, a federal court in Virginia dismissed a defamation action concerning a scientific issue that engenders perhaps nearly as much passion as climate change:

mandatory vaccinations for children. An infectious disease specialist and vaccine proponent was quoted in an article in *Wired* magazine as challenging the theories of the plaintiff, a prominent vaccine skeptic, saying they make him “just want to scream” because “she lies.” *Arthur v. Offit*, 2010 WL 883745, at *3 (E.D. Va. Mar. 10, 2010). The plaintiff sued the scientist and the magazine for defamation, but the court found that the challenged statement – plaintiff “lies” – could not be reasonably understood in that context to suggest that the plaintiff is “a person lacking honesty and integrity.” *Id.* Instead, the court found that the statement was part of “an emotional and highly charged debate about an important public issue over which” the parties had “diametrically opposed views” and that the word choice was “precisely the kind of ‘loose, figurative’ language that tends to ‘negate any impression that the speaker is asserting actual facts.’” *Id.* at *5 (citations omitted). Like the defendants’ criticisms here, the scientist’s comments were self-evidently grounded in his personal viewpoint and were “the very sort that, in the context of a heated and very public scientific debate, would ‘fall on [listeners’] ears like repetitive drumbeats.” *Id.* at *6. In sum, the court concluded that the statement that the plaintiff “lies” about vaccine science was “illustrative of the rough-and-tumble nature” of the scientific controversy at issue and “simply not actionable” in the context of “the intense nature of the debate” over that question. *Id.* at *5.

Similarly, in *Spelson v. CBS, Inc.*, 581 F. Supp. 1195 (N.D. Ill. 1984), *aff’d*, 757 F.2d 1291 (7th Cir. 1985), the plaintiff brought defamation claims arising out of broadcasts calling him a “practitioner of fraud” and a “con-artist” in the prevention and treatment of cancer, and accusing him of “[c]ancer quackery,” the “cruellest form of medical fraud.” *Id.* at 1198. Holding that the reports were constitutionally protected opinion, the court observed that “the underlying subject matter, medical science, is at best an inexact science in which numerous and widely

varied approaches and philosophies exist” and about which “there can be much debate and disagreement.” *Id.* at 1202-03. As such, “[r]egardless of the merit of this opinion, it is a view which [defendant] is entitled to hold and to expound.” *Id.* at 1203.

Finally, a Fourth Circuit ruling likewise illustrates both why courts are reticent to subject scientific inquiry to the litigation process and how statements criticizing scientific conclusions as “fraud” or “lies” are properly treated as opinion. See *Faltas v. State Newspaper*, 155 F.3d 557 (4th Cir. 1998) (unpublished), *aff’g* 928 F. Supp. 637 (D.S.C. 1996). In *Faltas*, the plaintiff, a doctor, published her opinions questioning the validity of a prior study that had suggested a “biological predisposition to homosexuality” in a certain percentage of the population, and advanced an alternative explanation for the hormonal variations the study had identified in the brain activity of gay men. 928 F. Supp. at 641, 646 (citation omitted). The defendants subsequently published a letter criticizing the plaintiff as someone who “will lie to suit her agenda” and who “views her status as [a] physician as an opportunity to present lies as truth.” *Id.* at 646. When the plaintiff sued for defamation, the court held that the term “lie” had been “used in the context of challenging plaintiff’s position on a given controversial subject as to which ‘experts’ obviously disagree, often in less than collegial tones.” *Id.* at 648. Thus, in light of the context surrounding this scientific debate – “a highly controversial topic as to which emotions and verbal exchanges often ran hot,” *id.* at 649 – the court concluded as a matter of law that “the letter is an impassioned response to the positions taken by [the plaintiff], and nothing more.” *Id.* at 648. Adopting the reasoning of the district court, the Fourth Circuit affirmed. 155 F.3d at 557.

Importantly, the *Faltas* court rejected plaintiff’s argument that a different result was required by the U.S. Supreme Court’s decision in *Milkovich*, in which the challenged newspaper

column had “nine or more [times] . . . indicated the plaintiff had lied, under oath,” at a specific hearing. 928 F. Supp. at 647-48 (citing *Milkovich, supra*, 479 U.S. at 6-7). The *Faltas* court explained that the alleged “lie” in *Milkovich* concerned a specific statement about a discrete incident that had “occurred on a given date at a given time,” been personally observed by the defendant, and was therefore “an objectively verifiable event.” *Id.* at 648. By contrast, the allegation of lying in *Faltas* was simply a “challenge” as to “the validity of plaintiff’s statistical analysis or [as to] whether she had adequate, if any, support for one of her conclusions.” *Id.* The court explained:

[The] statements that plaintiff would “lie to suit her agenda” and would “present lies as truth,” in context, translate to either an accusation that plaintiff baldly states conclusions without any data or that she has intentionally misinterpreted the available statistics to support her view of the issue, or both. In other words, at worst, [the] letter can be interpreted as stating that plaintiff manipulated or ignored statistics.

Id. at 649. That, the court said, was a quintessential example of a statement that would be understood as an expression of opinion, rather than fact. *See id.* (“When it comes to ‘imaginative expression’ and ‘rhetorical hyperbole,’ few terms have enjoyed so frequent an association in the common culture as the terms ‘lie’ and ‘statistic.’”).⁸

⁸ *See also Dilworth v. Dudley*, 75 F.3d 307, 310 (7th Cir. 1996) (calling widely published professor of mathematics “a crank [was] basically just a colorful and insulting way of expressing disagreement with his master idea,” and resolving such “academic controversies” was not the role of defamation law); *Underwager v. Channel 9 Australia*, 69 F.3d 361, 367 (9th Cir. 1995) (statement that expert on unreliability of children’s testimony about sexual abuse was “[l]ying” was non-verifiable opinion “[b]ecause how one proves child abuse is a highly controversial subject” and “the audience . . . would be likely to recognize that the statements did not represent provable assertions”); *Klein v. Victor*, 903 F. Supp. 1327, 1335 (E.D. Mo. 1995) (statements about child abuse therapist, claiming she supplied “pseudo-scientific propaganda materials” and suggesting she was motivated by desire to seek economic profit, were rhetorical expressions of author’s viewpoint and unverifiable); *Yiamouyiannis v. Thompson*, 764 S.W.2d 338, 340 (Tex. App. 1988) (statements in context of debate over fluoridation of drinking water that biochemist was a “quack,” “hoke artist,” and “imported fearmonger” were protected as “vintage hyperbole” and a “shorthand way of opining that [the opponent] was not worthy of belief, his views are confused nonsense, and he is not qualified to instruct the public about fluoridation”).

In this case, as a scientist active in the public debate over a leading issue of the day, Mann’s work elicits strong emotions and, yes, opinions. Mann essentially complains that the defendants accused him of manipulating data, including by molesting and torturing it, to serve a political agenda. But, even the lower court here properly acknowledged that “[a]ccusing plaintiff of working ‘in the service of politicized science’” is at least “arguably a protected statement of opinion.” Jan. 22, 2014 Order at 3 n.6; *see also, e.g., Price v. Viking Penguin, Inc.*, 881 F.3d 1426, 1432, 1438 (8th Cir. 1989) (“qualitative judgment about [a party’s] motivation” and other “statements regarding motive are ‘intrinsically unsuited’ to serve as a basis for libel”). Because the statements are quintessential opinions about the validity of Mann’s scientific methods and conclusions, they are entitled to full constitutional protection.

D. Punishing Defendants’ Speech Because Mann’s Work Had Been Backed by Other Scientists or Governmental Agencies Is Contrary to Core First Amendment Principles.

Both Mann and the court below appeared to believe that Mann’s scientific conclusions are provably true, including because they have been endorsed by other scientists and because government agencies have accepted them. But, with respect, that question is properly resolved by ongoing public and scientific debate, not in a court of law adjudicating a defamation action. Indeed, the prospect of litigation over evolving scientific study has been a chief reason that similar accusations in other cases have been deemed nonactionable:

[I]t is the very premise of the scientific enterprise that it engages with empirically verifiable facts about the universe. At the same time, however, it is the essence of the scientific method that the conclusions of empirical research are tentative and subject to revision, because they represent inferences about the nature of reality based on the results of experimentation and observation. . . . In a sufficiently novel area of research, propositions of empirical “fact” advanced in the literature may be highly controversial and subject to rigorous debate by qualified experts. Needless to say, courts are ill-equipped to undertake to referee such controversies. Instead, the trial of ideas plays out in the pages of peer-reviewed journals, and the scientific public sits as the jury.

ONY, Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490, 496-97 (2d Cir. 2013). Echoing this sentiment, the court in *Arthur* recognized that lawsuits involving the resolution of scientific claims “threaten[] to ensnare the Court in the thorny and extremely contentious debate” into the disputed science, “hardly the sort of issue that would be subject to verification based upon a ‘core of objective evidence.’” 2010 WL 883745, at *6 (citing *Milkovich*, 497 U.S. at 21):

Courts have a justifiable reticence about venturing into the thicket of scientific debate, especially in the defamation context. Plaintiff may wish to defend in Court the credibility of her conclusions [and] the policy choices that flow from those views – as well as her own credibility for having advanced those positions. These, however, are academic questions that are not the sort of thing that courts or juries resolve in the context of a defamation action.

*Id.*⁹

So too here. Mann’s claim “threatens to ensnare the court” in the contentious debate over climate change – its existence, causes, and solutions. Having a court or a jury sit as the arbiter of scientific truth is not only contrary to settled First Amendment law, but also stunts the ongoing evolution of scientific exploration. *See, e.g., Ezrailson v. Rohrich*, 65 S.W.3d 373, 382 (Tex. App. 2001) (“Scientists continuously call into question and test hypotheses and theories; this questioning advances knowledge” and scientific conclusions are “‘subject to perpetual

⁹ Copernicus, Newton, Einstein, and Darwin all challenged the then-prevailing scientific truths of the day, as have modern scientists. *See, e.g.,* Alison Rose Levy, *What Statins, Trans Fats, and GMOs Tell Us About Scientific Controversies*, Huffington Post (Dec. 4, 2013), http://www.huffingtonpost.com/alison-rose-levy/what-statins-transfats-and-gmos-tell-us-about-scientific-controversies_b_4385741.html (noting that, “despite claims of scientific consensus, scientific findings are rarely absolute because it is the nature of science to evolve” and detailing various examples, including that, notwithstanding “the medical consensus of the 1960s, 1970s, 1980s and beyond, which advised people to eat trans fats to prevent heart disease,” in 1978 lipid researcher Mary Enig first “published data connecting consumption of trans fats to health concerns including cardiovascular illness and cancer.”). Indeed, even the giants of science are not immune from ongoing criticism of their methods. *See, e.g.,* Michael Brooks, *Scientists Behaving Badly*, Huffington Post (Apr. 24, 2012), http://www.huffingtonpost.com/michael-brooks/scientists-behaving-badly_b_1448729.html (accusing scientists such as Newton, Galileo, and Einstein, and many currently working scientists, of cherry-picking data to fit their scientific results to their intuitions).

revision. . . . The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance.”) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)); *Time, Inc. v. Hill*, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part and dissenting in part) (“[I]n many areas which are at the center of public debate ‘truth’ is not a readily identifiable concept, and putting to the pre-existing prejudices of a jury the determination of what is ‘true’ may effectively institute a system of censorship. Any nation which counts the Scopes trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity. ‘The marketplace of ideas’ where it functions still remains the best testing ground for truth.”) (citation omitted).¹⁰

Furthermore, to the extent the Superior Court credited Mann’s assertion that investigations by the EPA, the National Science Foundation, and Penn State, among other scientific and governmental bodies, “laid to rest” defendants’ questions regarding Mann’s research, Am. Compl. ¶ 24, this too was in error. *See also* July 19, 2013 Orders at 16 (suggesting that statements were actionable because “Plaintiff’s work has been investigated and substantiated on numerous occasions”). The fact that certain official panels backed Mann’s methodology – facts that were not only disclosed in the challenged publications but in fact formed the basis for them – cannot allow him to silence his critics in a defamation claim. Under

¹⁰ *See also Auvil v. CBS 60 Minutes*, 836 F. Supp. 740, 742 (E.D. Wash. 1993) (granting summary judgment because assertions that a chemical was a carcinogen could not be properly resolved as true or false in court), *aff’d*, 67 F.3d 816 (9th Cir. 1995); *Freyd v. Whitfield*, 972 F. Supp. 940, 945-46 (D. Md. 1997) (psychologist’s statements endorsing repressed memory theory was protected opinion because the “existence of repressed memories remains hotly contested” and “cannot . . . be objectively proven false or verified as true”); *Immuno AG v. Moor-Jankowski*, 567 N.E.2d 1270, 1276, 1280 (N.Y. 1991) (statements concerning hepatitis research on chimpanzees was nonactionable because “there was an ongoing process of discovery and debate centering on” the issue).

the First Amendment, the government is not the final arbiter of truth with the power to foreclose further challenge to its policies.¹¹

Indeed, this fundamental principle was the basis for repudiating the Sedition Act of 1798, which had criminalized speech criticizing the government. In *New York Times Co. v. Sullivan*, *supra*, the Supreme Court emphasized that protecting debate about the government, its policies and elected officials was “the central meaning of the First Amendment,” and that the Act, “because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.” 376 U.S. at 273, 276; *see also Snyder, supra*, 131 S. Ct. at 1219 (“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)); *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966) (“Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected.”).¹²

¹¹ Indeed, if the First Amendment and case law interpreting it stand for anything, it must be that disagreement with findings of government and quasi-government bodies are fully protected. Here, defendants criticized the investigative bodies as, variously, lacking independence, failing to interview a relevant witness and therefore being too limited in scope, and being overly reliant on evidence provided by Mann’s employers, who had “so much at stake.” *See Am. Compl., Ex. A.*

¹² In this regard, Mann’s description of the commentaries omits that they disclose that governmental agencies had in fact sided with him while also criticizing those official findings. That background is described in their text – and, in some instances, through hyperlinked sources – thereby allowing readers to formulate their own judgments about the opinions expressed. *See, e.g., Boley, supra*, 950 F. Supp. 2d at 262 (hyperlinking to an earlier article provided “the necessary context for the allegedly defamatory remark”); *Abbas, supra*, 975 F. Supp. 2d at 18 & n.7 (finding hyperlinks were sufficient to disclose background for fair comment privilege); *Agora, Inc. v. Axxess, Inc.*, 90 F. Supp. 2d 697, 704-05 (D. Md. 2000) (dismissing defamation claim based on facts disclosed through hyperlinks), *aff’d*, 11 F. App’x 99 (4th Cir. 2001); *Adelson v. Harris*, 973 F. Supp. 2d 467, 483 (S.D.N.Y. 2013) (relying on a hyperlink to a report about an official proceeding in dismissing a defamation claim).

At bottom, a participant in the “rough-and-tumble” of public debate should not be able to use a lawsuit like this to silence his critics, regardless of whether one agrees with Mann or defendants. See *Guilford Transp. Indus.*, *supra*, 760 A.2d at 595-96 (endorsing Voltaire’s philosophy, “I disapprove of what you say, but I will defend to the death your right to say it,” which “anticipatorily articulated the spirit of our First Amendment”). The “law certainly does not insist” that a speaker “look kindly on [his] subjects,” nor that a plaintiff “simply by filing suit and crying ‘character assassination!’” may “silence those who hold divergent views, no matter how adverse those views may be to plaintiffs’ interests.” *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994). Rather, as the Seventh Circuit eloquently put it, expressing a sentiment echoed by other courts: “Scientific controversies must be settled by the methods of science rather than by the methods of litigation. More papers, more discussion, better data, and more satisfactory models – not larger awards of damages – mark the path toward superior understanding of the world around us.” *Id.* (citation omitted).¹³

¹³ In its earlier orders, endorsed by the order now on appeal, the court below also erroneously applied the District of Columbia’s “fair comment” privilege. The court acknowledged that defendants were relying on “the ‘fair comment’ privilege which protects opinions based on facts that are well known to readers.” July 19, 2013 Orders at 18. But then it held that, “[t]o be in a position to take advantage of this privilege, a defendant must ‘clear[] two major hurdles to qualify for the fair report privilege,’” namely, “that the publication was ‘fair and accurate’ and that the ‘publication properly attributed the statement to the official source.’” *Id.* at 19 (quoting *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 87 (D.C. 1980)). In so doing, the Superior Court conflated two privileges that protect two different things, both important protections of District of Columbia law relied on by *amici*, and consequently failed to properly apply the fair comment privilege. The decision below should be reversed for this reason as well.

CONCLUSION

For the foregoing reasons, the court should accept jurisdiction to hear an appeal of the denial of appellants' anti-SLAPP motion to dismiss and reverse the denial of the motion.

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APPENDIX A: DESCRIPTION OF *AMICI*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The American Civil Liberties Union of the Nation's Capital is the Washington, D.C., affiliate of the American Civil Liberties Union (ACLU), a nonprofit membership organization dedicated to protecting and expanding the civil liberties of all Americans, particularly their right to freedom of speech. The ACLU of the Nation's Capital played a leading role in supporting passage of the D.C. Anti-SLAPP Act, and, having represented defendants in several SLAPP suits, is familiar with the intimidating effect such lawsuits can have on free speech.

With some 500 members, American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative

to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The Association of American Publishers, Inc. (“AAP”) is the national trade association of the U.S. book publishing industry. AAP’s members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Bloomberg L.P. operates Bloomberg News, a 24-hour global news service based in New York with more than 2,400 journalists in more than 150 bureaus around the world. Bloomberg supplies real-time business, financial, and legal news to the more than 319,000 subscribers to the Bloomberg Professional service world-wide and is syndicated to more than 1000 media outlets across more than 60 countries. Bloomberg television is available in more than 340 million homes worldwide and Bloomberg radio is syndicated to 200 radio affiliates nationally. In addition, Bloomberg publishes Bloomberg Businessweek, Bloomberg Markets and Bloomberg Pursuits magazines with a combined circulation of 1.4 million readers and Bloomberg.com and Businessweek.com receive more than 24 million visitors each month. In total, Bloomberg distributes news, information, and commentary to millions of readers and listeners each day, and has published more than one hundred million stories.

The Center for Investigative Reporting (CIR) believes journalism that moves citizens to action is an essential pillar of democracy. Since 1977, CIR has relentlessly pursued and revealed

injustices that otherwise would remain hidden from the public eye. Today, we're upholding this legacy and looking forward, working at the forefront of journalistic innovation to produce important stories that make a difference and engage you, our audience, across the aisle, coast to coast and worldwide.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

First Look Media, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Fox News Network LLC ("Fox News") owns and operates the Fox News Channel, the top rated 24/7 all news national cable channel, and the Fox Business Network, as well as Foxnews.com, Foxbusiness.com, and the Fox News Radio Network.

Gannett Co., Inc. is an international news and information company that publishes more than 80 daily newspapers in the United States – including USA TODAY – which reach 11.6 million readers daily. The company's broadcasting portfolio includes more than 40 TV stations, reaching approximately one-third of all television households in America. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-

depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

NBCUniversal Media, LLC is one of the world's leading media and entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline NBC" and "Meet the Press."

Newspaper Association of America (“NAA”) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today’s newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

North Jersey Media Group Inc. (“NJMG”) is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: The Record (Bergen County), the state’s second-largest newspaper, and the Herald News (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties and a family of glossy magazines, including (201) Magazine, Bergen County’s premiere magazine. All of the newspapers contribute breaking news, features, columns and local information to NorthJersey.com. The company also owns and publishes Bergen.com showcasing the people, places and events of Bergen County.

Online News Association (“ONA”) is the world’s largest association of online journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. ONA’s more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

Radio Television Digital News Association (“RTDNA”) is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper The Seattle Times, together with The Issaquah Press, Yakima Herald-Republic, Walla Walla Union-Bulletin, Sammamish Review and Newcastle-News, all in Washington state.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Stephens Media LLC is a nationwide newspaper publisher with operations from North Carolina to Hawaii. Its largest newspaper is the Las Vegas Review-Journal.

Time Inc. is the largest magazine publisher in the United States. It publishes over 90 titles, including Time, Fortune, Sports Illustrated, People, Entertainment Weekly, InStyle and Real Simple. Time Inc. publications reach over 100 million adults, and its websites, which attract more visitors each month than any other publisher, serve close to two billion page views each month.

Tribune Publishing Company is one of the country’s leading publishing companies. Tribune Publishing’s ten daily publications include the Chicago Tribune, Los Angeles Times,

The Baltimore Sun, Sun Sentinel (South Florida), Orlando Sentinel, Hartford Courant, The Morning Call, Daily Press, Capital Gazette, and Carroll County Times. Popular news and information websites, including www.chicagotribune.com and www.latimes.com, complement Tribune Publishing's publishing properties and extend the company's nationwide audience.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

Washington City Paper, founded in 1981, is an alternative media company located in Washington D.C. City Paper both serves as the definitive local guide to cultural and civic life in the District, and publishes groundbreaking coverage of local affairs – including a variety of diverse opinions and commentary, sometimes inspiring controversy. City Paper was sued in 2011 by billionaire and Washington Redskins owner Daniel Snyder over a commentary critical of him, and it filed a special motion to dismiss under the D.C. Anti-SLAPP statute, following which Snyder voluntarily dismissed his case. As such, City Paper has a particular interest in ensuring that the vital protections of the Anti-SLAPP statute remain robust for all speakers and publishers.

WP Company LLC (d/b/a The Washington Post) publishes one of the nation's most prominent daily newspapers, as well as a website, www.washingtonpost.com, that is read by an average of more than 20 million unique visitors per month.

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