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

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Competitive Enterprise Institute, *et al.*,

Appellants,

v.

Michael E. Mann,

Appellee.

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

Reply Brief of Appellants
Competitive Enterprise Institute and Rand Simberg

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INTRODUCTION

Michael Mann gets the First Amendment's protection of free speech precisely backwards. Mann claims the right to slur individuals and groups who disagree with him as engaging in "fraudulent" work, as publishing "bogus" research, as "hired assassin[s]," as "deniers," as "shills for the fossil fuel industry," as "deeply unethical," and as perpetuators of a "crime against humanity." *See* CEI Br. at 29–30. But faced with criticism of his own views, Mann claims that government agencies decided the matter once and for all in his favor and that any dissent is therefore false and defamatory. Our traditions and law reject that premise in favor of the "bedrock First Amendment principle…that citizens have a right to voice dissent from government policies." *Tobey v. Jones*, 706 F.3d 379, 391 (4th Cir. 2013). That principle is not only central to our democracy, but also to scientific progress, which depends on those willing to challenge prevailing wisdom in the never-ending search for truth. A government report, or even a stack of them, does not and cannot mean that a matter of scientific dispute and public debate has been conclusively "put to rest." Mann Br. at 18. That Mann considers this debate illegitimate and an obstacle to implementing his favored policies does not undermine that conclusion—quite the opposite.

Mann's suit should be dismissed because the statements he challenges are protected expressions of opinion as a matter of law. The principal defect in Mann's reasoning is that he ignores language and context in favor of repetitious assertions that the Think Tank Defendants accused him of some unspecified "fraud"—a word that appears 116 times in Mann's brief and zero times in Simberg's blog post. But in the context of Simberg's commentary, it is apparent that the statements Mann challenges are expressions of opinion critical of his research and behavior and of Penn State, not accusations of some unspecified act of fraud. And in the context of the heated global-warming debate, the statements of which Mann complains are actually quite temperate.

Mann's own statements show that Simberg's commentary is typical of that debate. In 2005,

Mann deemed a paper by two scientists with whom he disagrees to be "pure scientific fraud" and stated that this view would be "reinforced by just about any legitimate scientist in our field you discuss this with." In response to claims that this was part of a campaign by Mann and his allies to suppress dissenting scientific views, the U.S. Environmental Protection Agency explained that Mann's use of the word "fraud" was not defamatory but simply "reflect[ed] his scientific judgment that the…paper was flawed" and that it is "entirely acceptable and appropriate for scientists to express their opinions and challenge papers that they believe are scientifically flawed." As the EPA recognized, Mann was just airing his opinion in the context of a contentious debate.[1]

By ignoring context, Mann arrives at a strained interpretation of Simberg's commentary that could be shared by no reasonable reader. If, as Mann contends, Simberg meant to accuse Mann of some particular act of fraud, why wouldn't the blog post just say so, rather than use language that readers would view as expressing general disapproval and disagreement? Why would it link to criticisms of Mann's *scientific methodology*? Why would it link to reports that it describes as "declar[ing] him [Mann] innocent of any wrongdoing" and that Mann claims "exonerate" him? And why would it conclude by calling for "a fresh, truly independent investigation" of Mann's research, rather than simply demand that he be fired? Taken in context, the only reasonable reading is that Simberg offered a critical commentary on the revelations of Climategate and Penn State's "whitewash[ed]" investigation of Mann's research, using language typical of the genre and the subject matter.

Any finding to the contrary would strip First Amendment protection from broad swaths of the public debate over controversial issues, where passions run high and strong language predominates. That is no small matter. "[S]peech concerning public affairs is more than self-expression; it is

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[1] U.S. Environmental Protection Agency, 3 EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act 73–74 (2010), http://www.epa.gov/climatechange/Downloads/endangerment/response-volume3.pdf (quoting and discussing Mann's statement).

the essence of self-government." *Garrison v. Lousiana*, 379 U.S. 64, 74–75 (1964). For that reason, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Meyers*, 461 U.S. 138, 145 (1983) (quotation marks omitted). This Court should carry out the purposes of the First Amendment and the D.C. Anti-SLAPP Act by reversing the decisions of the court below and ordering it to dismiss Mann's claims.

ARGUMENT

I. Rather Than "Exonerate" Him, the Reports Mann Cites Actually Raise Questions Regarding His Scientific Methodology, Supporting Simberg's Commentary

Simberg's commentary is a supportable interpretation of the underlying facts. Mann does not contest the Climategate revelations that he and other climate scientists blackballed scientists skeptical of catastrophic climate change, suppressed their own doubts about their research showing anomalous recent warming, and sought to hinder critical analyses of their research. *See* CEI Br. at 8–10. But he does argue that he has been "investigated for and exonerated of any fraud or misconduct." Mann Br. at 43. Not only is this false, but the very evidence that Mann says "exonerated" him actually raises serious questions regarding his research, defeating his ability to prove actual malice.

A. Mann's Work Has Been Met with Controversy and Criticism

Mann's recitation of the factual background confirms that his research is controversial and has been subject to vigorous debate in scientific, policy, and political circles for years. Mann Br. at 7–18. Mann may believe that these debates and concerns over his and others' research methodologies are unfounded or counterproductive, but the facts show that many others disagree.

And they have reason to do so. For example, in response to the Think Tank Defendants' discussion of McIntyre and McKitrick's criticisms of Mann's work, Mann states that "*every* peer-reviewed study that has examined McIntyre and McKitrick's claims has found them to be inaccurate." Mann Br. at 9 (emphasis added). That is false. In a 2011 paper published in the *Annals of Applied Statistics* (a peer-reviewed journal), Blakely McShane (Northwestern University) and Abraham

Wyner (University of Pennsylvania) confirmed McIntyre and McKitrick's claims that Mann's statistical methods assume the hockey-stick result and that his temperature proxy data perform worse at temperature estimation than "fake" data run through similar methodologies. Their conclusion: "the long flat handle of the hockey stick is best understood to be a feature of regression and less a reflection of our knowledge of the truth."[2]

And that is far from the only scholarly criticism of Mann's statistical methodology. Mann cites a 2006 report by the National Research Council as confirming his work, but omits its criticisms that "[l]ess confidence can be placed in large-scale surface temperature reconstructions for the period from A.D. 900 to 1600" and that "[v]ery little confidence can be assigned to statements concerning the hemispheric mean or global mean surface temperature prior to about A.D. 900."[3] And while Mann attempts (at 9–10) to cast doubt on Edward Wegman's critical report to Congress on Mann's statistical methodology, he does not challenge its conclusions (some of which he conceded in congressional testimony).[4] Mann's *ad hominem* attack that Wegman was reprimanded for his report is false: the committee assembled to investigate charges of plagiarism raised by a Mann ally unanimously found that "no misconduct was involved."[5]

Moreover, the very investigations that Mann says "exonerated" him actually raise questions concerning his research and conduct. As the National Science Foundation Inspector General's re-

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[2] Blakeley B. McShane and Abraham J. Wyner, A Statistical Analysis of Multiple Temperature Proxies, 5 Annals of Applied Statistics, no. 1, 2011, at 39.

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

[4] Hearing before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives regarding Questions Surrounding the 'Hockey Stick' Temperature Studies, July 19 and 27, 2006 (Testimony of Michael Mann) (repudiating statistical methods such as "principal component analysis" used in Mann's late-1990s research).

[5] Dan Vergano, University reprimands climate science critic for plagiarism, USA Today, Feb. 22, 2012, http://content.usatoday.com/communities/sciencefair/post/2012/02/george-mason-university-reprimands-edward-wegmand-/1.

port explained, the "publicly released emails…contained language that reasonably caused individuals, not party to the communications, to suspect some impropriety on the part of the authors," including Mann. JA 880–81. That same report also raised "concerns" regarding "the quality of the statistical analysis techniques" used in Mann's research and about how Mann "had influenced the debate in the overall research field." JA 881. The Independent Climate Change Email Review report recognized that there are "multiple sources of uncertainty in respect of proxy temperature reconstructions," such as those by Mann, and that these "are the subject of an ongoing and open scientific debate" as to their correctness. JA 432. Similarly, the UEA Scientific Assessment Panel report actually identified the potential for bias in the statistical models used for long-term temperature reconstructions and specifically found that some researchers engaged in paleoclimate reconstruction had employed "inappropriate statistical tools with the potential for producing misleading results." JA 367.

B. Not One of the Post-Climategate Reports "Exonerated" Mann

Of the eight reports that Mann says "exonerated" him, three do not even mention his name once, and six involved no investigation at all of his research or conduct. Of the two reports that do concern Mann, one did not investigate the charge for which he claims to be "exonerated"—falsifying data—and the other dropped its investigation of that charge at an early stage, without examining Mann's research or practices.

Mann's discussion of these materials is so misleading as to seriously call into question his and his counsel's candor to the Court. In these circumstances, it would be well within the Court's discretion to order Mann and his counsel to show cause why they should not be sanctioned for misrepresentation of the record and for unreasonably imposing litigation costs on Defendants. *See Bredehoft v. Alexander*, 686 A.2d 586, 589 (D.C. 1996) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991)) (sanctions within Court's inherent authority); Rule 30(b)(2).

1. UEA Scientific Assessment Panel (Oxburgh Panel). JA 366–74. This report does not

even mention Mann, much less "exonerate" him. Instead, the Panel was established to assess the research of the University of East Anglia's Climatic Research Unit, and its investigation consisted only of reviewing "representative publications" by the Unit's researchers and talking with them. JA 366. The Panel found that "inappropriate statistical tools with the potential for producing misleading results have been used by some other groups"—this, a Panel member later confirmed, was an oblique reference to Mann[6]—and noted that "[t]he potential for misleading results arising from selection bias is very great in this area." JA 367–68. It was "very surprising," the Panel concluded, "that research in an area that depends so heavily on statistical methods has not been carried out in close collaboration with professional statisticians." JA 370. Far from exonerating Mann, the Oxburgh Panel actually criticizes his research, without saying anything about his data practices or other conduct—which it never investigated. In fact, Mann himself conceded as much in his book, stating that "our own work did not fall within the remit of the committee" whose report he now claims "exonerated" him.[7]

2. Independent Climate Change Email Review (Russell Panel). JA 376–535. As with the Oxburgh Panel, the ICCER's remit was to investigate allegations regarding the conduct of scientists in the University of East Anglia's Climatic Research Unit. JA 385. Accordingly, it made no findings regarding Mann's conduct, which it did not investigate. *See* JA 429–37 (addressing allegations regarding temperature reconstructions without mentioning Mann even once). It did, however, conclude that two renditions of the "hockey stick" diagram were "misleading in not describing that one of the series was truncated post 1960 for the figure, and in not being clear on the fact that proxy and instrumental data were spliced together." JA 435. These manipulations, it explained, related to the

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[6] Catherine Brahic, Climategate scientists chastised over statistics, New Scientist, Apr. 14, 2010, http://www.newscientist.com/article/dn18776-climategate-scientists-chastised-over-statistics.html.

[7] Michael Mann, The Hockey Stick and the Climate Wars 235 (2012).

attempts mentioned in the Climategate emails to "hide the decline" through "Mike's [i.e., Mann's] Nature trick." *Id.*

It is surprising, to say the least, that Mann now claims the "misleading" figure published on the cover of a WMO report "had absolutely nothing to do with [him]," Mann Br. 13, in light of the facts that he is listed as a co-author of the figure and actually claims co-authorship of it in his *curriculum vitae*.[8] And Mann simply ignores that ICCER also criticizes as misleading a "similar figure" by Mann published in IPCC's 2001 report. JA 435. Equally surprising is Mann's claim that the ICCER report "exonerated" him, in light of his characterization of the report (at the time of its release) as addressing only "the rigour and honesty of the CRU scientists" at University of East Anglia.[9]

3. United Kingdom Secretary of State for Energy and Climate Change. JA 599–614. Again, this report does not even mention Mann, much less "exonerate" him. Moreover, this report is not the result of any investigation at all, but a policy response by the UK Government to a separate investigatory report by the House of Commons Science and Technology Committee concerning the University of East Anglia's Climatic Research Unit. JA 603.

4. House of Commons Science and Technology Committee. JA 537–97. This report mentions Mann a few times in passing but does not address his conduct, his research, or any allegations directed at him. *See* JA 585–89 (reporting conclusions without mentioning Mann). Instead, its focus is the University of East Anglia's Climatic Research Unit. *See* JA 546–47.

5. Pennsylvania State University. JA 615–24 (inquiry report); JA 626–44 (investigation report). As commentator Clive Crook—a strong supporter of Mann's views on climate change—put

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[8] *See* World Meteorological Organization, WMO Statement on the Status of the Global Climate in 1999, WMO No. 913, at 2; Michael Mann, Curriculum Vitae, at 22, http://www.meteo.psu.edu/holocene/public_html/Mann/about/cv/cv_pdf.pdf.

[9] Michael Mann and Gavin Schmidt, The Muir Russell report, RealClimate, July 7, 2010, http://www.realclimate.org/index.php/archives/2010/07/the-muir-russell-report/.

it, Penn State's investigation "would be difficult to parody":

> Three of four allegations are dismissed out of hand at the outset: the inquiry announces that, for "lack of credible evidence", it will not even investigate them…. Moving on, the report then says, in effect, that Mann is a distinguished scholar, a successful raiser of research funding, a man admired by his peers—so any allegation of academic impropriety must be false…. In short, the case for the prosecution is never heard. Mann is asked if the allegations (well, one of them) are true, and says no. His record is swooned over. Verdict: case dismissed, with apologies that Mann has been put to such trouble.[10]

Among the allegations dismissed out of hand is that Mann falsified data, JA 619—the very charge for which Mann claims to have been "exonerated." Mann Br. at 14. Rather than investigate this charge, the inquiry committee simply reviewed some of the Climategate emails, spoke with Mann, and then dismissed it. JA 619. In response, the National Science Foundation Inspector General "concluded that the University did not adequately review the allegation in either its inquiry or investigation processes." JA 880. MIT's Richard Lindzen was more blunt: "Penn State has clearly demonstrated that it is incapable of monitoring violations of scientific standards of behavior internally." JA 198. As Simberg noted, Lindzen concluded that Penn State's inquiry was a "whitewash."[11]

6. Environmental Protection Agency. JA 646–85 (denial of petitions for reconsideration); 687–852 (additional responses to comments). The EPA report that Mann claims "exonerated" him is not the result of any investigation at all, but the agency's response to petitions asking it to reconsider its "Endangerment Finding" identifying greenhouse gases as a regulated "pollutant" under a Clean Air Act program. *See* JA 647 (summary of EPA action). Rather than investigate Mann's research, EPA instead denied that it had relied on it in deciding to issue its Endangerment Finding. JA 662. According to EPA, "[t]he core defect in petitioners' arguments [regarding Climategate] is that these arguments are not based on consideration of the body of scientific evidence" that the agency

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[10] Clive Crook, Climategate and the Big Green Lie, The Atlantic (July 14, 2010), http://www.theatlantic.com/politics/archive/2010/07/climategate-and-the-big-green-lie/59709/

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

says underlies the Endangerment Finding. JA 648. For that reason, the agency decided that arguments based on the Climategate emails did not require it to reconsider the Endangerment Finding. *Id.* The agency does not claim to have conducted any independent investigation, only that it "reviewed all of the CRU e-mails." JA 672. EPA's notice denying the petitions mentions Mann once, in a footnote citation to a 2009 paper. JA 662 n.25.[12]

7. U.S. Department of Commerce Inspector General. JA 854–77. Once again, this report does not even mention Mann, much less "exonerate" him. Its focus, instead, is the National Oceanic and Atmospheric Administration, whose actions regarding Climategate had been questioned by a senator. JA 854–55. In response, the Inspector General conducted an investigation that consisted of reviewing the Climategate emails and speaking with "relevant NOAA and [Department of Commerce] officials." JA 855. As the report itself states, it "did not assess the validity and reliability of NOAA's or any other entity's climate science work." *Id.*

8. National Science Foundation Inspector General. JA 879–83. Although NSF did speak with several critics in its inquiry into possible "data fabrication or falsification," it did not conduct an investigation of Mann's data practices or research because it determined that "no direct evidence has been presented that indicates the Subject fabricated the raw data he used for his research or falsified his results." JA 881. It also declined to address Mann's original "hockey stick" research because it had been conducted before Mann "receive[d] NSF research funding as a Principal Investigator." *Id.* Thus, Mann was not "exonerated" following an investigation into the facts; instead, the inquiry into his conduct was dropped at a preliminary stage.

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[12] EPA also published a "Myths vs. Facts" press release, which Mann quotes at length (at 15–16), concerning the denial of the petitions for reconsideration. The agency again stated that its investigation consisted of "carefully review[ing] the CRU emails" and that its findings on global warming were based on "multiple lines of evidence" besides those implicated by the Climategate scandal. EPA, Myths vs. Fact, http://www.epa.gov/climatechange/endangerment/myths-facts.html.

II. Mann Is Not "Likely To Succeed on the Merits" of His Claims

Mann concedes (at 22–24) that his claims are subject to the D.C. Anti-SLAPP Act, concedes (at 21–22) that this Court has jurisdiction over this appeal, and concedes (at 25) that he is a "public figure" at least for purposes of this litigation. But he resists application of basic First Amendment principles to his claims, preferring instead to assert again and again and again, without analysis or supporting argumentation, that Simberg accused him of some unspecified act of "fraud" for which he has supposedly been "exonerated" by various governmental bodies. The law, however, does not credit assertions but instead requires courts to "analyze the totality of the circumstances in which [challenged] statements are made to decide whether they merit the absolute First Amendment protection enjoyed by opinion." *Ollman v. Evans*, 242 U.S. App. D.C. 301, 310, 750 F.2d 970, 979 (1984) (en banc). Mann avoids this kind of analysis because it is fatal to his case. The context, disclosed factual basis, language, and non-verifiability of the statements Mann challenges all confirm that they are not actionable assertions of fact that Mann engaged in some act of fraud, but First Amendment-protected expressions of opinion and interpretation regarding Climategate and its aftermath.

A. Mann Identifies No Provably False Statement of Fact That Could Support a Libel or Emotional-Distress Claim

Mann reluctantly acknowledges (at 28) that, unlike a statement of fact, "a subjective view, an interpretation, a theory, conjecture, or surmise…is not actionable." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 597 (D.C. 2000). But rather than attempt to show that the Think Tank Defendants uttered any false statement of fact about him, Mann simply assumes that as a premise of his argument. *See* Mann Br. at 26–27. Given that premise, he can easily conclude that the statements he challenges are verifiable, that their context is irrelevant, and even that their precise language doesn't require much scrutiny. Of course, this is not how (successful) legal argumentation works. *See, e.g., United States v. Apel*, 134 S. Ct. 1144, 1152 (2014) (rejecting argument that "assumes the conclusion").

1. Mann Ignores Crucial Context—Including His Own Statements Characterizing Other Scientists' Work as "Fraud"

Mann blows off the Think Tank Defendants' showing that Simberg's language is typical of spirited debate in the field of global warming. The question is not, as he frames it (at 32), whether context would "immunize" a false statement of fact from liability, but whether, taken in context, a statement would be understood as stating actual facts (potentially actionable) or subjective views and interpretations (not). *Guilford*, 760 A.2d at 597. As the Think Tank Defendants demonstrated (at 29–30), participants in the debate over global warming (including Mann) tend to have strong opinions that they often express in hard, vituperative language of the sort that might, in other contexts, imply actionable facts. In the context of this debate, even characterizations of research as being "pure scientific fraud" and "bogus"—these quotations are Mann's, not Simberg's, *id.*—are not viewed as stating actual facts. Instead, as the EPA recognized, these are expressions of "opinions" and are "entirely acceptable and appropriate" in the global warming debate. *See supra* n.1. As in *Guilford*, such statements "which on their face resemble statements of fact, may…be treated as statements of opinion not subject to an action for libel" when uttered in the context of a heated debate. 760 A.2d at 597 (quotation marks omitted).

Contrary to Mann's characterization, *Weyrich v. New Republic, Inc.*, 344 U.S. App. D.C. 245, 235 F.3d 617 (2001), supports this point. It held that a magazine article's attribution of "bouts of paranoia" to a political figure was not actionable because, taken in context, "paranoia" was used in its popular, pejorative sense and not as an assertion that the plaintiff suffered from a psychological condition. *Id.* at 252, 235 F.3d at 624. Although the court recognized that "bouts of paranoia" "might suggest [the plaintiff] actually suffered repeated delusional or psychotic episodes," it explained that the First Amendment required it to "place these references in their proper context" as criticism of the plaintiff's behavior. *Id.* at 253, 235 F.3d at 625. By contrast, the court did hold actionable several "historical vignettes," containing quotations attributed to the plaintiff, that the plain-

tiff alleged to be fabricated. The difference was that "nothing in the common parlance of political criticism would alert a reasonable reader that the article's anecdotes about [the plaintiff] are other than verifiable facts." *Id.* at 254, 235 F.3d at 626. The statements Mann challenges are like the use of "paranoia" in *Weyrich*: given the context, no one could mistake them for anything other than pejorative digs at Mann and his "hockey stick" research. And unlike the use of anecdotes and quotations in *Weyrich*, Simberg's commentary does not recount or describe any particular act of fraud by Mann, like falsifying data. Instead, a reasonable reader would recognize it as just another volley in what Mann himself calls the "Climate Wars."[13]

2. Mann Does Not Dispute Any of the Disclosed Facts Underlying Simberg's Blog Post

Mann also gives short shrift to the disclosed factual basis of Simberg's blog post. Again, he puts the cart before the horse, simply assuming his conclusion that Simberg's commentary utters a false statement of fact about him, such that any disclosed factual basis is irrelevant. Mann Br. at 34. But the proper inquiry is whether Simberg's comments can be viewed as "supportable interpretations of the underlying facts." *See* CEI Br. at 33–34 (quoting *Washington v. Smith*, 317 U.S. App. D.C. 79, 81, 80 F.3d 555, 557 (1996)). That's because, "when an author outlines the facts available to him,"

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[13] Mann's citation (at 38–39) of *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), is unavailing for the same reason as his citation to *Weyrich*. *Buckley* held non-actionable statements that a public figure was a "fellow traveler" of "fascism" and spread materials from "openly fascist journals" due to the "ambiguity and looseness" of those terms in the context of a popular book. *Id.* at 891–94. It rejected the plaintiff's unsupported assertion, much like Mann's here, that those statements must be interpreted as charging the plaintiff "with being a fellow traveler of the fascists"; in the court's view, that was just one possible interpretation of statements that could also be read as reflecting the author's impression and criticism that the plaintiff was in the orbit of the "radical right." *Id.* at 890. By contrast, there was no such ambiguity in the statement that the plaintiff was just like an infamous ex-journalist "who lied day after day in his column" and "could be taken to court by any one of several people who had enough money to hire competent legal counsel." *Id.* at 896. This was actionable because it was "an assertion of fact." *Id.* But Simberg's commentary makes no such assertion; instead, is precisely the kind of "loosely definable, variously interpretable statements of opinion…made inextricably in the contest of political, social or philosophical debate" that the *Buckley* court identified as not actionable. *Id.* at 895. *See also* CEI Br. at 28–45.

it is "clear that the challenged statements represent his own interpretation of those facts." *Partington v. Bugliosi*, 56 F.3d 1147, 1156–57 (9th Cir. 1995). *See also Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 16 (D.D.C. 2013) ("Where the factual basis for a conclusion is outlined in the article…, those statements are protected by the First Amendment"). Simberg's commentary links to materials regarding Climategate and its aftermath, including detailed criticisms of Mann's statistical methods, criticisms of Mann's and other climate scientists' biases, and criticisms of Penn State's conduct regarding both Mann and Sandusky. *See* JA 197–99 *et seq*. It also links to two of the reports that Mann says "exonerated" him, as well as to Mann's research. *Id.* These linked materials disclose the factual basis of Simberg's comments, and Mann does not dispute any of those facts or identify a single statement in Simberg's blog post that is not a supportable interpretation of them. *See* Mann Br. at 34–35. This should be taken as a concession that Simberg's commentary is a First Amendment-protected, supportable interpretation of disclosed facts and also that it is protected by the District's fair comment privilege—which Mann similarly does not contest. *See* CEI Br. at 33–36.

3. Mann Makes No Attempt To Interpret or Address the Actual Text of Simberg's Blog Post

Conspicuously absent from Mann's briefing is any kind of analysis of the language used in Simberg's commentary—that is, some argument connecting the actual words to what Mann asserts is their meaning beyond just asserting that they amount to some unspecified act of "fraud." *Compare* CEI Br. at 36–43 (analyzing the language of Simberg's commentary). The Think Tank Defendants showed, among other things, that to accuse one of "molesting" or "torturing" data is well understood as a criticism of statistical methodology, *id.* at 38–39; that "data manipulation" is often used in a pejorative sense without suggesting falsification or other fraud, *id.* at 40; and that "corrupt" is routinely used in its hyperbolic sense to imply "moral criticism of objectives and methods" of the very sort contained in Simberg's commentary, *id.* at 40–41. Mann has no response to any of this.

Instead, Mann focuses on online comments and other statements by Mann's supporters pro-

fessing shock that anyone would dare compare him to Jerry Sandusky. *See* Mann Br. at 35–37. But "the inquiry into whether a statement should be viewed as one of fact or one of opinion must be made from the perspective of *an 'ordinary reader'* of the statement," not partisans on one side or the other. *Mr. Chow of N.Y. v. Ste. Jour Azur S.A.*, 759 F.2d 219, 224 (2d Cir. 1985) (citation omitted and emphasis added). And "the determination of whether a statement is opinion or rhetorical hyperbole as opposed to a factual representation *is a question of law for the court*." *Id.* (emphasis added). Mann's carefully curated selection of unrepresentative comments and articles is therefore no substitute for sustained analysis of the text at issue and the governing law.

4. Mann Fails To Show the Actual Statements He Challenges Are Verifiable

Finally, Mann never actually shows that the statements he challenges are verifiable. Instead, as described above, he assumes the result: that Simberg accused him of some verifiable act of "fraud" and "corruption." *See* Mann Br. at 29–32. But "general characterizations" of the sort contained in Simberg's commentary are not "concrete enough to reveal 'objectively verifiable' falsehoods" that could possibly be the subject of a defamation claim. *Rosen v. Am. Israel Public Affairs Comm., Inc.*, 41 A.3d 1250, 1259 (D.C. 2012) (footnote omitted). *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 5 (1990), is inapt because the statements held actionable in that case were premised on the contested fact that the plaintiff committed perjury; that this fact could be verified rendered it actionable. *Id.* at 21. By contrast, how would one possibly verify whether "Mann could be said to be the Jerry Sandusky of climate science," that he "has become the posterboy of the corrupt and disgraced climate science echo chamber," or that Penn State might act to "hide academic and scientific misconduct" when there is "much as stake"? These and Simberg's criticisms of Mann's research methodologies are "too subjective, too amorphous, too susceptible of multiple interpretations…to make any of them susceptible to proof of particular, articulable content." *Rosen*, 41 A.3d at 1260. Were the law otherwise, any negative criticism could be grounds for a libel action.

B. Mann Abandons His Indefensible Claim Against CEI for "Republication" of Lowry's Column

Mann makes no defense of his Count V, which seek to hold CEI liable merely for hyperlinking to a column by *National Review* editor Rich Lowry that Mann alleges to be defamatory. *See* JA 79–81. As CEI explained in its opening brief (at 46–47), this claim fails as a matter of law because CEI never published the allegedly defamatory statement. Mann offers no response to this argument and has therefore abandoned Count V. *See Grimes v. District of Columbia, Bus. Decisions Info. Inc.*, 89 A.3d 107, 112 n.2 (D.C. 2014); *Maupin v. Haylock*, 931 A.2d 1039, 1040 n.1 (D.C. 2007) (holding that claims unsupported on appeal were abandoned).

C. Mann Fails To Demonstrate That He Is "Likely To Succeed on the Merits" of Proving by Clear and Convincing Evidence That the Think Tank Defendants Acted with Actual Malice

The Court need not reach the issue of actual malice because Mann does not challenge any provably false statements of fact. But even if the Court accepts Mann's view that Simberg's commentary accused him of some verifiable act of fraud like falsifying data, Mann's claims must still be dismissed due to his failure to demonstrate that the Think Tank Defendants acted with actual malice. Because this issue may require the Court to evaluate Mann's evidentiary showing—unlike the other issues presented in this appeal, which involve questions of law—the Court may also have to address a plaintiff's burden under the D.C. Anti-SLAPP Act to avoid dismissal.

1. Mann Misstates His Burden Under the Anti-SLAPP Act

The Court should not accept Mann's invitation to defang the D.C. Anti-SLAPP Act's clear textual requirement that, to escape dismissal, a plaintiff like Mann must demonstrate that each of his claims "is likely to succeed on the merits." D.C. Code § 16-5502(b). "Likely to succeed on the merits" refers to and incorporates the well-known first element of the preliminary-injunction standard. *See* Newsmax Br. at 10–11. Justice Jackson memorably explained: "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presuma-

bly knows and adopts the cluster of ideas that were attached to each borrowed word…. In such a case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them." *Morissette v. United States*, 342 U.S. 246, 263 (1952). That principle controls here: the "likely-to-succeed-on-the-merits" standard is ubiquitous in law and has a clear and well-established meaning. *See Winter v. N.R.D.C.*, 555 U.S. 7, 20–22 (2008). Nothing in the Act suggests an intent to depart from it. To the contrary, the Council stated that its overriding purpose was to "ensure[] that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates" and it knew that achieving that purpose would require allowing dismissal of even some potentially meritorious cases that lacked compelling evidentiary support at the outset. JA 170, 185. This explains why the Council acted to hold potential SLAPP plaintiffs to the high standard applicable to requests for extraordinary relief.

Mann's arguments to depart from the plain meaning of the Act are unconvincing. First, adopting the lesser burden that prevails under California's anti-SLAPP act would disregard the Council's deliberate policy choice to the contrary. *See* Mann Br. at 22–23. Under California's act, a plaintiff's burden is only to "establish[] that there is a probability that the plaintiff will prevail on the claim." Cal. Code Civ. Proc., § 425.16(b). The D.C. Council chose a different standard, imposing a higher burden on plaintiffs. Mann never explains how the California standard is consistent with that policy choice and the language of the D.C. Anti-SLAPP Act. It isn't. Under the California standard, a claim that is <u>not</u> "likely to succeed on the merits" can nonetheless avoid dismissal so long as it satisfies the elements of the cause of action and is supported by a "prima facie showing of facts" (e.g., a party declaration) that the court must credit. *Price v. Stossel*, 620 F.3d 992, 1000 (9th Cir. 2010).[14]

Second, the standard proposed by Mann—an additional summary-judgment stage, without

[14] Mann asserts (at 22) that California's statute "served as the model" for the District's. But nothing in the legislative history supports that assertion, and the two statutes differ substantially in operative language and structure. *Compare* Cal. Code Civ. Proc., § 425.16.

the weighing of evidence—would substantially nullify the Act. *See* Mann Br. at 24. After all, nothing has ever prevented a SLAPP defendant from filing a motion for summary judgment the same day the complaint is served. *See* D.C. Sup. Ct. R. Civ. P. 56. But as the D.C. Council recognized, the ability to move for summary judgment is unequal to the evil posed by SLAPP lawsuits, and that is why it acted to extend additional "substantive rights to defendants in a SLAPP," not merely to confirm their preexisting procedural rights. JA 170.

Finally, even Mann's proposed standard, incorrect as it is, is higher than that applied by the superior court. *See* JA 144; JA 163 (considering "the allegations of the amended complaint in the light most favorable to the plaintiff," rather than require a factual showing). The superior court's evident confusion indicates that this Court's guidance is necessary. And the consequences of its undue deference to the Plaintiff here—in a case where the superior court recognized over a year ago that the Plaintiff had failed to carry his burden and yet allowed this case to continue, JA 144—demonstrates that the higher standard set by the D.C. Council is essential to achieve the Act's purpose of shielding SLAPP targets from the burden of never-ending litigation.

2. Mann Is Unable To Meet His Burden

Mann comes nowhere near meeting his burden to demonstrate that he is likely to succeed on the merits of proving by clear and convincing evidence that the Think Tank Defendants acted with actual malice. First, Mann simply ignores that the very reports that Mann says "exonerate" him actually paint a more complicated picture of his conduct that defeats any possible showing of actual malice. As shown above, both the Oxburgh Panel and Russell Panel criticize Mann's "hockey stick" research, and Mann recognizes that their criticism is sufficiently damning that he seeks to disassociate himself from published research for which he had previously claimed credit. *Supra* § I.B.1–2. These reports—with their references to Mann's "inappropriate statistical tools," "misleading results," and "misleading" figures and their lack of any defense of Mann's own conduct, by contrast to their

treatment of University of East Anglia researchers—could certainly be read to suggest that Mann committed some impropriety. That is "one of a number of possible rational interpretations' of an event [i.e., Climategate] 'that bristled with ambiguities," which defeats any claim that they acted with actual malice. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984) (quoting *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971)). The First Amendment protects "the interpretive license that is necessary when relying upon ambiguous sources." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 518 (1991).

Second, Mann's principal attempt to show actual malice fails because the reports he says "exonerated" him, and thereby purportedly prove that Defendants knowingly or recklessly defamed him, actually do nothing of the sort. Mann's position is that Simberg's commentary amounts to an "accusation that Dr. Mann has falsified his research," Mann Br. at 27, but seven of the eight reports cited by Mann conducted no investigation at all on that question. *See supra* § I.B.1–7. The only one that did is the NSF Inspector General's report, and it actually declined to investigate Mann's data practices itself and declined to investigate Mann's original "hockey stick" papers because they predated Mann's NSF funding. *See supra* § I.B.8. Nothing in these reports dispels the reasonable suspicion prompted by the Climategate emails that Mann was up to no good: blackballing scientists skeptical of catastrophic warming, devising "tricks" to "hide the decline" in temperatures, and suppressing his own doubts about the quality and strength of his research.

Third, Mann's argument (at 44–45) regarding Defendants' supposed "motive" to defame him confuses "actual malice" with malice. Actual malice is "a term of art denoting deliberate or reckless falsification," and it "should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson*, 501 U.S. at 499. "Actual malice may not be inferred alone from evidence of personal spite, ill will or intention to injure on the part of the writer." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 n.7 (1989). Because Mann's other evidence fails to

demonstrate actual malice, his claims about the Think Tank Defendants' motives are also unavailing.

They are also unsupported by anything other than Mann's say-so. Mann apparently regards CEI as some kind of comic-book super-villain bent on opposing "science" and dooming the world. *See* Mann Br. at 45. But Mann's burden was to come forward with evidence, and his brief cites absolutely nothing regarding CEI's or Simberg's supposed ill motives.

3. The Think Tank Defendants Contested Mann's Ability To Show Actual Malice in the Court Below

Contrary to Mann's claim (at 42), the Think Tank Defendants did challenge Mann's ability to demonstrate that he was likely to succeed in proving actual malice. Because showing likelihood of success was Mann's burden under the Anti-SLAPP Act, the Defendants were obligated to do no more than point out that Mann could not meet his burden. *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); 10A Charles A. Wright, et al., Federal Practice & Procedure Civil § 2727 (3d ed.).

The Think Tank Defendants did so in their special motions to dismiss the original and amended complaints. Their special motion to dismiss (at 36) states that it was Mann's burden "to prove by clear and convincing evidence that the CEI Defendants acted with 'actual malice,' that is, 'with knowledge' that the challenged statements were false or that they 'entertained serious doubts as to the truth' of the statements." Their special motion to dismiss Mann's amended complaint (at 1) states that Mann "fails to plausibly allege that the CEI Defendants acted with actual malice, a required element of both the defamation and intentional infliction of emotional distress claims."[15]

The superior court addressed this argument in both of its orders. In its first order, it acknowledged that the Think Tank Defendants argued that Mann "will be unable to prove 'actual

[15] Mann's response to the first motion (at 40) conceded his burden to "establish that Defendants made the defamatory statements with actual malice." His response to the second motion (at 15) argued that he had presented adequate "proof of actual malice," citing the reports that he says "exonerated" him and also arguing that circumstantial evidence demonstrated that the Think Tank Defendants acted so as "to further their political agendas."

malice'…by clear and convincing evidence," recited Mann's arguments to the contrary, and then ruled against the Think Tank Defendants based on "the numerous findings that Plaintiff's work is sound." JA 134, 142–44. The second order also decided the issue. JA 164–65. While those rulings were in error, they do reflect that the issue was raised, briefed, and decided by the superior court.

D. Mann Abandons His Emotional-Distress Claim

Emotional-distress claims are subject to the same First Amendment limitations as defamation actions, and liability is only available for false statements of "actual facts" about the plaintiff. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56–57 (1988). Mann does not dispute that he must identify a false statement of fact, but nonetheless fails to do so. *See* Mann Br. at 45–46. None are discernable in the statement he challenges, that "Mann could be said to be the Jerry Sandusky of climate science." Accordingly, this claim fails as a matter of law. *See* CEI Br. at 50.

Mann's claim also fails because the Sandusky comparison is not "extreme and outrageous." *Minch v. District of Columbia*, 952 A.2d 929, 940 (D.C. 2008). That inquiry must take account of "the specific context in which the conduct took place" and that, "[i]n any context, no liability can be imposed for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Ortberg v. Goldman Sachs Grp.*, 64 A.3d 158, 163 (D.C. 2013) (quotation marks omitted). As insulting as the Sandusky comparison may have been, it was nothing more than that—an insult—and Mann does not contend otherwise. *See* Mann Br. 45–46. It is not actionable.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2014, I caused a copy of the foregoing Reply Brief of Appellants Competitive Enterprise Institute and Rand Simberg to be served by first-class mail, postage prepaid, upon:

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