Nos. 14-cv-101, 14-cv-126 (consolidated)

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

National Review, Inc.;
Competitive Enterprise Institute; and Rand Simberg,

Defendants- Appellants,

v.

Michael E. Mann, Ph.D.,

Plaintiff-Appellee.

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

Brief of Appellee Michael E. Mann, Ph.D.

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Rule 28(a)(2) Disclosure

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

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

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

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

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Amici Curiae The Cato Institute, Reason Foundation, Individual Rights Foundation, and Goldwater Institute, represented by Bradley Benbrook and Stephen M. Duvernay of Benbrook Law Group, PC and Ilya Shapiro of the Cato Institute;

Amici Curiae Newsmax Media, Inc., Free Beacon, LLC, The Foundation for Cultural Review, The Daily Caller, LLC, PJ Media, LLC and The Electronic Frontier Foundation, represented by Phillip C. Chang, Jonathan E. Buchan, E. Duncan Getchell, and Amy Miller of McGuire Woods LLP.

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INTRODUCTION

Defendants[1] and amici assert that this case is a threat to freedom of expression and involves a "scientific controversy" which courts are "ill-equipped" to referee. *See, e.g.* National Review Br. at 21; CEI Br. at 2. They are mistaken.[2] The issues in this case are simple, straightforward, and certainly capable of an effective judicial resolution. This is not a referendum on global warming, or climate change, or even the accuracy of Dr. Mann's conclusions. This is a defamation case, no more and no less: did Defendants defame Dr. Mann when they accused him of fraud? As in any defamation case, the issues are limited: were the defendant's statements true or false; did the defendant make a defamatory allegation of fact concerning the plaintiff; and did the defendant act with the requisite degree of fault? Those are the essential questions in this case as well—and they do not involve a search for "scientific truth," as Defendants claim. Nor is there, as Defendants suggest, any broad-based "science exclusion" in defamation law.

Here, there is no question that Defendants' assertions were false, and Defendants do not even attempt to argue that their statements about Dr. Mann were true. They have accused him of "academic and scientific misconduct," "data manipulation," "molesting and torturing data," and "corruption and disgrace"—all the while gloating in a disgraceful comparison to Jerry Sandusky, a convicted child molester who worked at the same institution that employs Dr. Mann. And they made these statements knowing that Dr. Mann's research has been reviewed repeatedly and replicated by other scientists, and that Dr. Mann has been repeatedly exonerated: no fraud; no misconduct; no molestation; no corruption. Importantly, Dr. Mann brought this lawsuit not to

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[1] "Defendants" refers to National Review, Inc. ("National Review"), Competitive Enterprise Institute ("CEI") and Rand Simberg ("Mr. Simberg"). CEI and Mr. Simberg are collectively referred to as "the CEI Defendants."

[2] Four amicus briefs were submitted in support of Defendants on the merits of the motions to dismiss. (The District of Columbia submitted an amicus brief on the jurisdictional question only.) Amici largely rehash arguments made in Defendants' principle briefs, calling into question their usefulness. *See Ryan v. Commodity Futures Trading Com'n*, 125 F.3d 1062, 1063-4 ("The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' brief . . . They are an abuse.").

squelch public debate, but rather to protect himself against those who have recklessly accused him of fraud and misconduct.

Rather than defending the falsity of their words, because they cannot, Defendants attempt to hide behind the inapposite "opinion defense" and the unsupported position that accusations of fraud are an accepted part of political discourse and thus protected under the First Amendment. Defendants say that their words are "protected speech" because they are "pure opinion and hyperbole" and cannot be construed, by any reasonable reader, to be assertions of fact. Not so, and the U.S. Supreme Court has been clear on this opinion defense. Whether the defamatory statement appears in a news story, a newspaper column, an editorial, or Defendants' "blogs," the opinion defense does not apply if the statement is capable of objective verification, i.e., if the statement can be proven true or false. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990). Here, this is an easy question. Numerous academic institutions and government agencies have already successfully undertaken the task of attempting to verify precisely the same fraud allegations (and have rejected them). As Defendants well know, their fraud allegations, like all fraud allegations, are clearly capable of judicial resolution. Fraud is an issue that this Court, like all courts, are routinely asked to resolve.

Defendants also argue that they really did not intend to accuse Dr. Mann of fraud. They now claim that they were just engaging in hyperbole; and that, in any event, their readers (or at least their reasonable readers) did not construe their statements to be factual assertions of fraud, but rather to be legitimate criticism of Dr. Mann's scientific conclusions. These arguments are not only factually unsupported, they are flatly contradicted by the evidence. Defendants' own subsequent statements make it clear that they intended to—and did—accuse Dr. Mann of fraud. In response to Dr. Mann's request for a retraction, National Review published another article in which they said that they did not mean to accuse Dr. Mann of fraud in the "criminal" sense. Whether National Review meant to accuse Dr. Mann of fraud in the "criminal sense," or fraud in the "civil sense," is meaningless in this case. Both allegations are defamatory per se. National Review then went on to state that its real purpose in publishing this article was to call Dr.

Mann's research "bogus," which is another distinction without a difference: "bogus" being a synonym for fraud.[3] Certainly Defendants' "reasonable" readers did not have any difficulty understanding that the statements at issue in this case constituted specific allegations of fraud against Dr. Mann.

Defendants' secondary challenge to this lawsuit is that it should be dismissed because Dr. Mann is not likely to prove actual malice by clear and convincing evidence. Defendants assert that in order to prevail on his defamation claim, Dr. Mann must establish that Defendants made their defamatory statements with knowledge that those statements were false or that they were made with a reckless disregard of their falsity. *See Thomas v. News World Communications*, 681 F.Supp. 55, 65 (D.D.C. 1988) (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 280 (1964)). There is simply no way that any reasonable reader could have read the multiple reports exonerating Dr. Mann of misconduct without developing an understanding that Dr. Mann's work was not a fraud. The allegations already of record without access to discovery demonstrate overwhelmingly that Defendants knew that there was no fraud, and, at the very least, proves that Defendants acted with a reckless disregard for the truth or a "deliberate effort to avoid the truth." *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 684-685 (1989); *see also, Schatz v. Republican State Leadership Committee*, 669 F.3d 50, 58 (1st Cir. 2012) (citations and internal quotations omitted)("[r]ecklessness amounting to actual malice may be found ... where the defendant deliberately ignores evidence that calls into question his published statements"). In and of itself, Defendants' purposeful avoidance of the very studies that have exonerated Dr. Mann demonstrates that they have no defense to the actual malice claim. *See Schatz*, 669 F.3d at 58.

Finally, National Review, in a naked attempt to distance itself from Mark Steyn, one of its marquee contributors, argues that it is protected from liability under the Communications Decency Act of 1996 (the "CDA"). As a preliminary matter, having not raised this defense below, National Review has waived it for purposes of this interlocutory appeal. Even assuming

[3] *See* Dictionary.com, (listing "fraudulent" as a synonym for "bogus"), available at: http://dictionary.reference.com/browse/bogus?s=t.

that this issue were properly before the Court, the CDA does not protect National Review from liability for defamatory speech posted on National Review's website by its agent and endorsed author Mark Steyn.

ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court correctly found that Dr. Mann is likely to succeed on the merits of his defamation claims against National Review, CEI and Mr. Simberg.

2. Whether the Superior Court correctly found that Dr. Mann is likely to succeed on the merits of his intentional infliction of emotional distress claims against National Review, CEI, and Mr. Simberg.

STATEMENT OF THE CASE

Dr. Mann filed this lawsuit for defamation and intentional infliction of emotional distress in October 2012 against two sets of defendants, National Review and its contributor, Mark Steyn, and CEI and its adjunct scholar, Rand Simberg. Shortly thereafter, Defendants filed motions to dismiss pursuant to the Act and Rule 12(b)(6) arguing that the statements at issue were constitutionally protected opinion and/or rhetorical hyperbole and that Dr. Mann had failed to plead actual malice.[4] Prior to the Superior Court's ruling on Defendants' motions to dismiss, Dr. Mann moved to amend his complaint to include a defamation claim for the statement comparing Dr. Mann to Jerry Sandusky and stating that Dr. Mann had "molested and tortured data in the service of politicized science." The trial court granted Dr. Mann's motion to amend on July 10, 2013. On July 19, 2013, the trial court denied Defendants' motions to dismiss, finding that Dr. Mann was likely to succeed on the merits of all of his claims; that Defendants' statements were accusations of fraud, not opinion or mere hyperbole; and that there was sufficient evidence of actual malice.

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[4] Importantly for the purposes of this appeal, the CEI Defendants only raised the actual malice issue with the Superior Court in its Rule 12(b)(6) motion, not its anti-SLAPP motion. The denial of the CEI Defendants' Rule 12(b)(6) motion is not on appeal (nor could it be). Accordingly, the CEI Defendants cannot argue that there is insufficient evidence of actual malice at this stage. *See infra* at p. 42.

Defendants then asked the trial court to reconsider its orders denying the motions to dismiss and to certify for interlocutory appeal its orders denying the motions to dismiss. The trial court denied Defendants' motions for reconsideration and motion for interlocutory certification. On September 17, 2013, Defendants filed notices of appeal of the July 19 denials of the motions to dismiss, pursuant to the collateral order doctrine. This Court subsequently issued an Order to Show Cause, directing Defendants to show cause why their appeal should not be dismissed in light of the absence of a right to interlocutory review under the Act. On December 19, 2013, this Court dismissed as moot Defendants' interlocutory appeal.

On January 22, 2014 the Superior Court denied Defendants' motion to dismiss for the *third* time, affirming the original denials of the motion to dismiss and finding that Dr. Mann was likely to succeed on the merits of all of his defamation and intentional infliction of emotional distress claims. Defendants filed notices of appeal in January 2014.[5] This Court consolidated the appeals and again issued an order to show cause on jurisdiction. On June 26, the Court ordered briefing on the merits and reserved a decision on the jurisdictional question.

STATEMENT OF FACTS

Dr. Mann is a research scientist known for his work regarding the paleoclimate—the study of the earth's past climate before instrument temperature records. A graduate of the University of California, Berkeley and Yale University, Dr. Mann is Distinguished Professor of Meteorology and Director of the Earth Systems Science Center at Pennsylvania State University ("Penn State") and was a faculty member at the University of Virginia.

I. The Hockey Stick Graph

In 1998, Dr. Mann co-authored a peer-reviewed paper in *Nature* on the "paleoclimate" (i.e., the study of ancient climate). The study applied new statistical techniques in an attempt to reconstruct temperatures over past centuries from "proxy" indicators—natural archives that record past climatic conditions—which had been gathered and analyzed by other researchers in

[5] Mark Steyn, the remaining defendant in this lawsuit, has opted not to seek interlocutory review.

prior peer-reviewed studies.[6] These proxy indicators include the growth rings of ancient trees and corals, sediment cores from ocean and lake bottoms, ice cores from glaciers, and cave sedimentation cores. The 1998 *Nature* paper ("MBH98") concluded that "Northern Hemisphere mean annual temperatures for three of the past eight years [1990-1998] are warmer than any other year since (at least) AD 1400," and that rising carbon dioxide concentrations is the primary "forcing" cause.

In 1999, Dr. Mann co-authored a second peer-reviewed paper in *Geophysical Research Letters* ("MBH99").[7] MBH99 built upon MBH98 and concluded that the recent 20th century rise in global temperature is *likely* unprecedented in at least the past millennium, and correlates with a concomitant rise in atmospheric concentrations of carbon dioxide—primarily emitted by the combustion of fossil fuels. Included in MBH99 was a graph depicting this 20th century rise in global temperature. The graph came to be known as the "Hockey Stick," due to its iconic shape—the "shaft" reflecting a long-term cooling trend from the so-called "Medieval Warm Period" (broadly speaking from 1050 AD to 1450 AD) through the "Little Ice Age" (broadly speaking from 1550 AD to 1900 AD), and the "blade" reflecting a dramatic upward temperature swing during the 20th century that culminates in anomalous late 20th century warmth.

The key findings of MBH98 and MBH99—that Northern Hemispheric average temperatures for the most recent decades are probably the highest in at least 1000 years—prompted a number of follow-up peer-reviewed studies. These studies not only replicated Dr. Mann's work using the same data and methods, but independently validated and extended his conclusions using other techniques, and using newer and more extensive datasets. Upwards of a dozen studies have been published in peer-reviewed journals replicating the findings of Dr.

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[6] M.E. Mann, R.S. Bradley, and M.K. Hughes, "Global-scale Temperature Patterns and Climate Forcing Over the Past Six Centuries," 392 *Nature* 779 (1998), available at: http://www.geo.umass.edu/faculty/bradley/mann1998.pdf.

[7] M.E. Mann, R.S. Bradley, and M.K. Hughes, "Northern hemisphere temperatures during the past millennium: Inferences, uncertainties and limitations," 26 *Geophysical Research Letters* 759 (1999), available at: http://www.geo.umass.edu/faculty/bradley/mann1999.pdf.

Mann and his research colleagues that recent hemispheric warmth is likely unprecedented as far back as the past millennium, using a variety of independent statistical techniques and/or types of proxy data and scientific information.[8] The most recent study by a team of 78 researchers from 24 nations, sponsored by the National Science Foundations of the United States and Switzerland and by the U.S. National Oceanic and Atmospheric Administration, found that the area-weighted average reconstructed temperature was higher during the period AD 1971–2000 than any other time in nearly 1,400 years.[9]

Significantly, in 2005 the U.S. House of Representatives commissioned the National Research Council of the National Academies of Science—originally chartered by President Abraham Lincoln to "investigate, examine, experiment, and report upon any subject of science"—to assess the state of scientific efforts to reconstruct surface temperatures for the Earth over approximately the last 2,000 years. The authors of the report, which included members of

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[8] *See, e.g.*, Committee on the Importance of Deep-Time Geologic Records for Understanding Climate Change Impacts; National Research Council of the National Academies, "Understanding Earth's Deep Past: Lessons for Our Climate Future," (2011); P.D. Jones, et al., "High-resolution palaeoclimatic records for the last millennium: Interpretation, integration and comparison with General Circulation Model control-run temperatures," 8 *Holocene* 455–71 (1998); T.J. Crowley & T.S. Lowery, "How warm was the Medieval Warm Period? A comment on 'Man-made versus natural climate change'," 29 *Ambio* 51 (2000); K.R. Briffa, et al.,"Low-frequency temperature variations from a northern tree ring density network," 106 *Journal of Geophysical Research* 2929 (2001); J. Esper, et al., "Low-frequency signals in long tree-ring chronologies for reconstructing past temperature variability," 295 *Science* 2250 (2002); A. Moberg, et al. "Highly variable Northern Hemisphere temperatures reconstructed from low- and high-resolution proxy data," 433 *Nature* 613 (2005); J. Oerlemans, "Extracting a Climate Signal from 169 Glacier Records," 308 *Science* 675 (2005); G.C. Hegerl, et al. "Climate sensitivity constrained by temperature reconstructions over the past seven centuries." 440 *Nature* 1029 (2006); R.D. D'Arrigo, et al., "On the long-term context for late twentieth century warming," 111 *J Geophys Res* (2006); M.N. Juckes, et al., "Millennial Temperature Reconstruction Intercomparison and Evaluation," 3 *Climate of the Past* 591 (2007); M.E. Mann, et al. (2008) "Proxy-based reconstructions of hemispheric and global surface temperature variations over the past two millennia," 105 *Proceedings of the National Academy of Sciences* 13252; D.S. Kaufman et al., "Recent Warming Reverses Long-Term Arctic Cooling," 325 *Science* 1236 (2009); F.C. Ljungqvist, "A New Reconstruction of Temperature Variability in the Extra-tropical Northern Hemisphere During the Last Two Millennia." 92 *Geografi ska Annaler* 339 (2010).

[9] Pages 2K Consortium, "Continental-scale temperature variability falling on the past two millennia," 6 *Nature Geoscience* 339 (2013).

the National Academy and distinguished faculty of leading research universities and institutions with expertise in atmospheric science, climate, statistics and other relevant disciplines, concluded:

> The basic conclusion of Mann et al. (1998, 1999) . . . that the late 20th century warmth in the Northern Hemisphere was unprecedented during at least the last 1,000 years . . . has subsequently been supported by an array of evidence ...Based on the analyses presented in the original papers by Mann et al. and this newer supporting evidence, the committee finds it plausible that the Northern Hemisphere was warmer during the last few decades of the 20th century than during any comparable period over the preceding millennium.[10]

A. IPCC's Third Assessment Report—2001

In 2001, the IPCC[11] published its Third Assessment Report, which prominently featured Dr. Mann and his colleagues' work from MBH98 and MBH99. The Third Assessment Report included the Hockey Stick graph. The report summarized Dr. Mann's work and the paleoclimate reconstruction work of other scientists, and the report included a graph demonstrating that several different reconstructions, not just those of Dr. Mann, showed modern warming to be unprecedented over the past millennium.[12]

B. Criticism Of The Hockey Stick Graph

After the publication of the IPCC report, two individuals, mining consultant Stephen McIntyre and University of Guelph Economics Professor Ross McKitrick published a paper in *Energy and Environment* purporting to demonstrate that the Hockey Stick Graph was an artifact

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[10] The National Academies, "Surface Temperature Reconstructions for the Last 2,000 Years: Report in Brief," (2006) available at: http://dels.nas.edu/resources/static-assets/materials-based-on-reports/reports-in-brief/Surface_Temps_final.pdf.

[11] The IPCC is the leading international body for the assessment of climate change. It was established by the United Nations Environment Programme and the World Meteorological Organization in 1988 to provide the world with a clear scientific view on the current state of knowledge in climate change and its potential environmental and socio-economic impacts.

[12] *See* IPCC, "Climate Change 2001: Working Group I: The Scientific Basis," Fig. 2.2.1, available at: www.grida.no/publications/other/ipcc_tar/?src=/climate/ipcc_tar/wg1/069.htm.

of bad data.[13] A later article by the same authors in the journal *Geophysical Research Letters* suggested that the "hockey stick" shape was an artifact of a faulty statistical approach.[14] However, every peer-reviewed study that has examined McIntyre and McKitrick's claims has found them to be inaccurate.[15] Significantly, the IPCC weighed in definitively against McIntyre and McKitrick claims in its Fourth Assessment Report (2007) noting that the impact of any supposed flaws identified by McIntyre and McKitrick are inconsequential.[16] While Defendants continue to point to McIntyre and McKitrick's work as evidence of Dr. Mann's use of faulty statistics. *See* CEI Br. at 7,[17] at no point have McIntyre or McKitrick accused Dr. Mann of misconduct or fraud.

Similarly, in 2006, U.S. Congressmen Joe Barton and Ed Whitfield (both avowed climate change skeptics) requested Edward Wegman, a statistician from George Mason University, to

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[13] S. McIntyre & R. McKitrick, "Corrections to the Mann et al. [1998] Proxy Database and Northern Hemisphere Average Temperature Series," 14 *Energy and Environment* 751 (2003).

[14] S. McIntyre & R. McKitrick, "Hockey Sticks, Principal Components, and Spurious Significance," 32 *Geophysical Research Letters* (2005).

[15] *See, e.g.*, E.R. Wahl & C.M. Amman, "Robustness of the Mann, Bradley, Hughes Reconstruction of Surface Temperatures: Examinations of Criticisms Based on the Nature and Processing of Proxy Climate Evidence," 85 *Climatic Change* 33 (2007); E.R. Wahl & C.M. Ammann, "The Importance of the Geophysical Context in Statistical Evaluations of Climate Reconstruction Procedure," 85 *Climatic Change* 71 (2007); H. Von Storch & E. Zorita, "Comment on 'Hockey Sticks, Principal Components, and Spurious Significance' by S. McIntyre and R. McKitrick," 32 *Geophysical Research Letters* (2005); P. Huybers, "Comment on 'Hockey Sticks, Principal Components, and Spurious Significance by S. McIntyre and R. McKitrick," 32 *Geophysical Research Letters* (2005).

[16] *See* S. Solomon, et al., "Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (2007), available at: http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch6s6-6.html#6-6-1).

[17] The CEI Defendants also reference a 2011 paper published in *Annals of Applied Statistics* by Blakely McShane and Abraham Wyner which supposedly confirmed McIntyre and McKitrick's claims. *See* CEI Br. at 8. Defendants fail to mention that *Annals of Applied Statistics* also published several critiques of the McShane/Wyner paper. *See, e.g.*, M.P. Tingley, "Spurious predictions with random time series: The LASSO in the context of paleoclimatic reconstructions. A Discussion of 'A Statistical Analysis of Multiple Temperature Proxies: Are Reconstructions of Surface Temperatures over the Last 1000 Years Reliable?," 5 *Annals of Applied Statistics* 83 (2011).

investigate Dr. Mann's research. Dr. Wegman, like McIntyre and McKitrick, concluded that the statistical methodology underlying the Hockey Stick Graph was faulty. Subsequently, George Mason conducted a formal investigation into charges of plagiarism and misconduct related to the Wegman Report.[18] While Dr. Wegman was not sanctioned for misconduct per se, he did receive a letter of reprimand due to plagiarism and his paper was retracted by its publisher, the journal *Computational Statistics and Data Analysis*.[19]

II. Theft Of E-Mails From CRU

Unable to debunk Dr. Mann's research based upon a legitimate review of his work or upon contrary peer-reviewed science, Defendants and other climate change skeptics pounced upon the theft and publication of thousands of e-mails from the Climate Research Unit ("CRU") at the University of East Anglia in the United Kingdom. The CRU e-mails, some of which were exchanged between Dr. Mann and researchers at CRU, were then posted anonymously on the internet just a few weeks before the United Nation's Global Climate Change Conference in Copenhagen in December 2009. A few of the more than one thousand CRU e-mails stolen from the University of East Anglia had been "cherry-picked" by climate change skeptics (as described by the EPA[20]), taken out of context, and misrepresented to falsely imply impropriety and academic fraud on the part of the scientists involved, including Dr. Mann. The skeptics claimed that the CRU e-mails proved that anthropogenic climate change was a hoax perpetrated by scientists from across the globe colluding with government officials to reap financial benefits. The CRU e-mails led to the controversy now derisively referred to as "Climategate."

The most quoted e-mail, and one highlighted by Defendants in their briefs, is a November

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[18] *See* D. Vergano, "University investigating prominent climate science critic," *USA Today* (Oct. 8, 2010).

[19] *See* D. Vergano, "Climate study gets pulled after charges of plagiarism," *USA Today* (May 15, 2011).

[20] U.S. Environmental Protection Agency, Myths vs. Facts: Denial of Petitions for Reconsideration of the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, available at: epa.gov/climatechange/endangerment/myths-facts.html.

16, 1999 message from Phil Jones, the director of CRU, to Dr. Mann, Raymond Bradley, and Malcolm Hughes (all climate researchers) in which Jones writes: "I've just completed Mike's [referring to Dr. Mann] *Nature* trick of adding in the real temps to each series for the last 20 years (i.e., from 1981 onwards) and from 1961 for Keith's to hide the decline." Defendants, with no factual support, assert: (1) that the decline referenced by Professor Jones represents the "gulf between reconstructed temperature estimates (such as those made by Mann) and more recent instrumental temperature data;" (2) that the decline "undermines the case for recent global warming;" and (3) that "any attempt to hide [the decline] by use of a 'trick "appear[s] (to say the least) suspicious." CEI Br. at 8-9; *see also*, National Review Br. at 5-6 (arguing that Professor Jones's e-mail and the omission of certain tree-ring data renders Dr. Mann's research "misleading"). Defendants omit the alternative (and correct) interpretation of this e-mail, which is that scientists often use the term "trick" to refer to a common statistical method to deal with data sets. This was a standard "trick" described openly in *Nature* and was hardly something that was secret or nefarious. Further, the term "decline" does not refer to a decline in global temperatures, but rather a well-documented, and certainly unhidden, divergence in tree ring density proxies after 1960.[21] Most importantly, any suggestion that Dr. Mann's research is misleading is demonstrably false. Dr. Mann's hockey stick graph is clear regarding what it contains—both the instrumental and reconstructed temperatures are clearly labeled as such on the Hockey Stick Graph.[22]

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[21] This "divergence" problem refers to an enigmatic decline in tree ring response to warming temperatures after 1960. This decline was discussed and addressed in various publications and was therefore not hidden, but rather simply not used to infer temperatures after 1960. *See* K.R. Briffa, et al., "Reduced Sensitivity of Recent Tree-Growth to Temperature at High Northern Latitudes," 391 *Nature* 678 (1998); R. D'Arrigo et al., "On the 'Divergence Problem' in Northern Forests: A Review of the Tree-Ring Evidence and Possible Causes," 60 *Global and Planetary Change* 289 (2008).

[22] *See* MBH99, *supra* note 8, at 761, Figure 3(a) (temperature reconstruction graph clearly labeling instrumental data and reconstruction data).

III. Dr. Mann Is Exonerated

Following the publication of the CRU e-mails, and the subsequent baseless charge that these e-mails showed that global warming was a hoax, a number of climate change skeptics, including CEI, called for official inquiries into whether any of the researchers had committed fraud, or had improperly manipulated any data. Their calls were heeded—two universities and six governmental agencies independently investigated the allegations of fraud and misconduct against Dr. Mann and others in the climate science community. And every one of these investigations concluded that there was no basis to the allegations of fraudulent conduct, data manipulation, or the like.

A. University Of East Anglia

In April 2010, the University of East Anglia convened an international Scientific Assessment Panel, in consultation with the Royal Society of London for Improving Natural Knowledge, and chaired by Professor Ron Oxburgh. The Oxburgh Panel assessed the integrity of the research published by the CRU and found "no evidence of any deliberate scientific malpractice in any of the work of the Climatic Research Unit."[23] In an effort to distort the findings of the Oxburgh Panel, National Review highlights off-the-cuff statements made in a press conference by Professor David Hand, a member of the Oxburgh Panel, regarding a supposed exaggeration of the size of the Hockey Stick's blade. *See* National Review Br. at 4. Defendants fail to mention that in the immediate wake of Dr. Hand's statements, the Panel amended its report to make clear that "neither the panel report nor the press briefing intended to imply that any research group in the field of climate change had been deliberately misleading in any of their analyses or intentionally exaggerated their findings."[24]

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[23] Professor Ron Oxburgh FRS (Lord Oxburgh of Liverpool), et al., "Report of the International Panel set up by the University of East Anglia to examine the research of the Climatic Research Unit." (April 12, 2010), at p. 5 (JA 370).

[24] *Id.* at p. 6 (JA 371).

Three months later, the University of East Anglia published the Independent Climate Change Email Review report, prepared under the oversight of Sir Muir Russell. The report examined whether manipulation or suppression of data occurred and concluded that the CRU scientists' "rigour and honesty as scientists are not in doubt."[25] In their briefs, Defendants suggest that the University of East Anglia's investigation actually found that the hockey stick graph was "misleading" because it did not identify that certain data was "truncated" and that other proxy and instrumental temperature data had been spliced together. *See* CEI Br. at 13-14; National Review Br. at 12. This allegation is yet another example of Defendants' attempts to obfuscate the evidence in this case. The "misleading" comment made in this report had absolutely nothing to do with Dr. Mann, or with any graph prepared by him. Rather, the report's comment was directed at an overly simplified depiction of the hockey stick that was reproduced on the frontispiece of the World Meteorological Organization's Statement on the Status of the Global Climate in 1999.[26] Dr. Mann did not create this depiction, and to state that this report suggested an effort by Dr. Mann to mislead is disingenuous.

B. The United Kingdom Parliament And The United Kingdom Department Of State

In March 2010, the United Kingdom's House of Commons Science and Technology Committee published a report finding that the skeptics' criticisms of the CRU were misplaced, and that CRU's actions "were in line with common practice in the climate science community." It also found that "there is no case to answer" with respect to accusations of dishonesty. Further, in September 2010, in response to the House of Commons Science and Technology Committee report, the Secretary of State for Energy and Climate Change "agree[d] with and welcome[d], the overall assessment of the Science and Technology Committee" and, echoing the conclusions of the University of East Anglia, noted:

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[25] Sir Muir Russell, et al., "The Independent Climate Change E-mails Review," (July 2010), at p. 11 (JA 386).

[26] *Id.* at pp. 59-60 (JA 434-435).

> the rigour and honesty of the scientists are not in doubt; that there is no evidence of bias in data selection; that there is no evidence of subversion of peer review and that allegations of misusing the Intergovernmental Panel in Climate Change (IPCC) process cannot be upheld.[27]

Accordingly, as far as expressly determined by the government of the United Kingdom, there is no truth to any allegation of data manipulation, misconduct, or fraud.

C. Pennsylvania State University

In February, 2010, as a result of communications it received from alumni, politicians, and others, that accused Dr. Mann of "manipulating data, destroying records and colluding to hamper the progress of scientific discourse," Penn State launched an inquiry into whether Dr. Mann had committed research misconduct. Penn State subsequently released an Inquiry Report finding that "there exists no credible evidence that Dr. Mann had or has ever engaged in, or participated in, directly or indirectly, any actions with an intent to suppress or to falsify data."[28] Moreover, given the severity of the charges, the inquiry committee decided to empanel an investigatory committee to further consider these allegations against Dr. Mann. In June 2010, after a review of all material, the committee concluded that there was "no substance" to the allegations that Dr. Mann engaged in any action with an intent to suppress or falsify data."[29]

D. United States Environmental Protection Agency

In February 2010, CEI, along with nine other coordinated petitions for reconsideration by various states, corporations, industry groups, and "free market" think tanks, petitioned the EPA to reconsider its Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act. A central argument by the petitioners was their contention that Dr. Mann and other scientists had distorted, concealed, and manipulated certain temperature

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[27] Government Response to House of Commons Report at p. 3 (JA 603).

[28] *See* RA-10 Inquiry Report: Concerning the Allegations of Research Misconduct Against Dr. Michael E. Mann, Department of Meteorology, College of Earth and Mineral Sciences, The Pennsylvania State University, (February 3, 2010), at pp. 1, 5 (JA 615, 619).

[29] *See* RA-10 Final Investigation Report Involving Dr. Michael E. Mann, (June 4, 2010), at p. 5 (JA 630).

data, which fundamentally called into question EPA's endangerment finding. In their petition, CEI stated that Dr. Mann's proxy data which was included in IPCC's assessment report "was artfully truncated" so as to give the "false impression that the tree ring data agree with reported late 20th Century surface temperature data, when in fact they did not."[30] CEI went on to explicitly accuse Dr. Mann of "artful deceit" and "deliberate" "deception," even attaching an exhibit to their petition titled "An Explanation of How Michael Mann Hid the Decline."[31] In response, the EPA thoroughly investigated each and every e-mail and found that there was no evidence of data manipulation or fraud.[32]

After considering CEI's petition, the United States Environmental Protection Agency concluded that:

> Inquiries from the UK House of Commons, Science and Technology Committee, the University of East Anglia, Oxburgh Panel, the Pennsylvania State University, and the University of East Anglia, Russell Panel, all entirely independent from EPA, have examined the issues and many of the same allegations brought forward by the petitioners as a result of the disclosure of the private CRU e-mails. These inquiries are now complete. Their conclusions are in line with EPA's review and analysis of these same CRU e-mails. The inquiries have found no evidence of scientific misconduct or intentional data manipulation on the part of the climate researchers associated with the CRU e-mails.

The EPA categorically rejected the fraud allegations against Dr. Mann as a "myth":

> **Myth**: The University of East Anglia's Climatic Research Unit (CRU) emails prove that temperature data and trends were manipulated.
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> **Fact**: Not true. Petitioners say that emails disclosed from CRU provide evidence of a conspiracy to manipulate data. The media coverage after the emails were released was based on email statements quoted out of context and on

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[30] *See* Petition for Reconsideration of the International Nongovernmental Panel in Climate Change, the Science and Environmental Policy Project, and the Competitive Enterprise Institute, Endangerment and Cause (February 12, 2010), at pp. 6-7, available at: http://cei.org/sites/default/files/1-Joint%20Petition%20for%20Reconsideration,%202-12-10.pdf.

[31] *See id.* at pp. 6-7, 12.

[32] *See* EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Finding for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Volume 1: Climate Science and Data Issues Raised by Petitioners (JA 687-852).

> unsubstantiated theories of conspiracy. The CRU emails do not show either that the science is flawed or that the scientific process has been compromised. EPA carefully reviewed the CRU emails and found no indication of improper data manipulation or misrepresentation of results.[33]

Further, on June 2012, the United States Circuit Court of Appeals for the District of Columbia Circuit affirmed the EPA's "Endangerment Finding" and the denial of ten petitions for reconsideration of that finding filed by, among others, CEI. *Coalition for Responsible Regulation Inc. v. EPA*, 684 F.3d 102, 124-125 (D.C. Cir. 2012).

E. United States Department Of Commerce

In February 2011, after a request from Senator James Inhofe, the Inspector General of the Department of Commerce conducted an independent review of the e-mails stolen from CRU.[34] In the course of its inquiry, the department examined all of the CRU e-mails, including the November 16, 1999 e-mail referenced above in which Professor Jones used the words "trick" and "hide the decline."[35] The department found "no evidence" of inappropriate manipulation of data.[36]

F. National Science Foundation

Most recently, all of these same allegations were reviewed, once again, by the Inspector General of the National Science Foundation ("NSF"). The NSF is an independent federal agency established to, among other things, "promote the progress of science," and "advance the national health, prosperity, and welfare." *See* National Science Foundation Act of 1950, Pub. L. No. 81-507, 81st Congress (1950). The NSF is the only federal agency "dedicated to the support of

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[33] U.S. Environmental Protection Agency, Myths vs. Facts: Denial of Petitions for Reconsideration of the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, available at: http://www.epa.gov/climatechange/endangerment/myths-facts.html.

[34] *See* Letter from Todd J. Zinser to The Honorable James M. Inhofe (February 18, 2011), JA 854-857.

[35] Detailed Results of Inquiry Responding to May 26, 2010, Request from Senator Inhofe, at pp. 2-3 (JA 859-60).

[36] *Id.* at pp. 11-12 (JA 868-869).

fundamental research and education in all scientific and engineering disciplines,"[37] and is essentially the final arbiter of scientific research in the United States. The NSF's Inspector General is further tasked with investigating fraud and other violations of laws and regulations. *See* 45 C.F.R. §§ 689.1-689.10 (2011).

In 2011, the NSF, after having been notified by Penn State of its own investigation, and presumably sensitive to the hue and cry of certain skeptics regarding Penn State's failure to interview experts critical of Dr. Mann's research,[38] decided to initiate another investigation into the allegations related to research misconduct. In so doing, NSF performed its own investigation, "to determine if data fabrication or falsification[39] may have occurred and interviewed [Dr. Mann], critics, and disciplinary experts."[40] The NSF concluded that:

> no direct evidence has been presented that indicates the Subject fabricated the raw data he used for his research or falsified his results. Much of the current debate focuses on the viability of the statistical procedures he employed, the statistics used to confirm the accuracy of the results, and the degree to which one specific set of data impacts the statistical results. These concerns are all appropriate for scientific debate and to assist the research community in directing future research efforts to improve understanding in this field of research. Such scientific debate is ongoing but does not, in itself, constitute evidence of research misconduct. Lacking any direct evidence of research misconduct, as defined under the NSF Research Misconduct Regulation, we are closing this investigation with no further action. [41]

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[37] *See* "National Science Foundation History," available at: http://www.nsf.gov/about/history/.

[38] Penn State's alleged failure to interview critics is untrue. Among others, Penn State interviewed Dr. Richard Lindzen of MIT, a prominent critic of Dr. Mann. *See* RA-10 Final Investigation Report, at pp. 7, 13-14 (JA 632, 638-9).

[39] Fabrication is defined as "making up data or results and recording or reporting them"; "falsification' is defined as "manipulating research materials, equipment, or processes, or changing or omitting data or results such that research is not accurately represented in the research record." 45 C.F.R. § 689.1(a)(1)-(2).

[40] *See* National Science Foundation, Office of Inspector General, Office of Investigations, "Closeout Memorandum, Case No. A09120086," at p. 3 (JA 881).

[41] *Id.*

This NSF inquiry was intended to, and did, close the book on the question of whether Dr. Mann and his colleagues had engaged in research misconduct or fraud. NSF's exoneration of Dr. Mann was widely reported in the national press, and Defendants were aware of its conclusions.[42]

IV. Defendants Falsely Accuse Dr. Mann Of Fraud And Professional Misconduct

While this entire fraud matter was (or should have been) put to rest by in the inquiries described above, Defendants saw another opportunity to dredge up their tired and outdated attacks against Dr. Mann in the wake of the wholly unrelated publication of the results of an investigation at Penn State conducted by Louis Freeh (the former director of the Federal Bureau of Investigation) regarding the university's handling of the Jerry Sandusky child abuse scandal. Sandusky had been convicted of molesting ten young boys. The Freeh Report concluded that senior officials at Penn State had shown "a total and consistent disregard" for the welfare of the children, had worked together to conceal Sandusky's assaults, and had done so out of fear of bad publicity for the university. For the climate change skeptics, the Sandusky scandal presented a new avenue to castigate Dr. Mann and impugn his reputation and integrity. Based upon the supposed link that a different investigative panel of the university had cleared Sandusky of misconduct, Defendants baldly assert that the university also must have worked to conceal improper and fraudulent conduct on the part of Dr. Mann. While this comparison strains credulity, this was Defendants' new "news peg."

On July 13, 2012, an article authored by Rand Simberg entitled "The Other Scandal In Unhappy Valley" appeared on OpenMarket.org, a publication of CEI. Purporting to comment upon Penn State's handling of the Sandusky scandal, Mr. Simberg hearkened his readers back to "another cover up and whitewash" that occurred at the university. Mr. Simberg and CEI stated as follows:

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[42] *See, e.g.*, D. Fisher, "Federal Investigators Clear Climate Scientist, Again," *Scientific American* (August 23, 2011); Associated Press, National Science Foundation Investigation Clears Climate Change Researcher *FoxNews* (August 24, 2011).

> perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions since. Mann could be said to be the Jerry Sandusky of climate science, except for instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet.[43]

Mr. Simberg and CEI went on to state that after the leaking of the CRU e-mails,

> many of the luminaries of the "climate science" community were shown to have been behaving in a most unscientific manner. Among them were Michael Mann, Professor of Meteorology at Penn State, whom the emails revealed had been engaging in data manipulation to keep the blade on his famous hockey-stick graph, which had become an icon for those determined to reduce human carbon emissions by any means necessary.
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> **********
>
> Mann has become the posterboy of the corrupt and disgraced climate science echo chamber. No university whitewash investigation will change that simple reality.
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> **********
>
> We saw what the university administration was willing to do to cover up heinous crimes, and even let them continue, rather than expose them. Should we suppose, in light of what we now know, they would do any less to hide academic and scientific misconduct, with so much at stake?[44]

After this publication was released, the editors of Openmarket.org removed the sentence stating that "Mann could be said to be the Jerry Sandusky of climate science . . .," stating that the sentence was "inappropriate."[45]

On July 15, 2012, an article entitled "Football and Hockey" appeared on National Review Online. The article, authored by Defendant Mark Steyn, commented on and extensively quoted from Mr. Simberg's piece on Openmarket.org. Mr. Steyn and National Review reproduced

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[43] R. Simberg, "The Other Scandal In Unhappy Valley," *Openmarket.org* (July 13, 2012) (JA 197).

[44] *Id.* (JA 197-199).

[45] *Id.* (JA 89).

verbatim the defamatory statements of Mr. Simberg and CEI.[46] Perhaps realizing the outrageousness of Mr. Simberg's comparison of Dr. Mann to a convicted child molester, Mr. Steyn conceded: "Not sure I'd have extended that metaphor all the way into the locker-room showers with quite the zeal Mr. Simberg does, but he has a point." Mr. Steyn and National Review went on to state that "Michael Mann was the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus." While CEI acknowledged that certain of Mr. Simberg's statements were inappropriate, National Review continues to stand by them and they remain visible on National Review Online.

After the publication of the above statements, Dr. Mann demanded retractions and apologies from both National Review and CEI. Dr. Mann advised National Review and CEI that their allegations of misconduct and data manipulation were false and were clearly made with the knowledge that they were false. Dr. Mann further stated that it was well known that there have been numerous investigations into the issue of academic fraud in the wake of the disclosure of the CRU e-mails, and that every one of these investigations has concluded that there is no basis to these allegations and no evidence of any misconduct or data manipulation.

On August 22, National Review published a response from its editor Rich Lowry on National Review Online entitled "Get Lost."[47] National Review refused to apologize for or retract "Football and Hockey," but tellingly did not deny the falsity of the defamatory statements, nor their knowledge of their falsity. Rather, Mr. Lowry's defense was that:

> [i]n common polemical usage, 'fraudulent' doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong. I consider Mann's prospective lawsuit fraudulent. Uh-oh. I guess he now has another reason to sue us.[48]

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[46] M. Steyn, "Football and Hockey," *National Review*, (July 15, 2012) (JA 91).

[47] R. Lowry, "Get Lost: My response to Michael Mann," *National Review* (August 22, 2012) (JA 95).

[48] *Id.*

Whether criminal fraud or civil fraud, the accusations against Dr. Mann are both defamatory per se.

Defendants did not stop there. Their words and actions since Dr. Mann's demand for a retraction and the filing of this lawsuit evidence an undisguised glee at the prospect of further humiliating Dr. Mann and in battling him in court. In an initial effort to use this controversy to drum up funds, Mr. Lowry told his readers that if Dr. Mann filed a lawsuit, he and National Review:

> will be doing more than fighting a nuisance lawsuit; we will be embarking on a journalistic project of great interest to us and our readers . . . we may eventually even want to hire a dedicated reporter to comb through the materials and regularly post stories on Mann. My advice to poor Michael is to go away and bother someone else. If he doesn't have the good sense to do that, we look forward to teaching him a thing or two about the law and about how free debate works in a free country. He's going to go to great trouble and expense to embark on a losing cause that will expose more of his methods and maneuverings to the world. In short, he risks making an ass of himself. But that hasn't stopped him before.[49]

Defendants' taunts have only grown more intense in the wake of the filing of this lawsuit—threatening to "kick Professor Mann's legal heinie,"[50] and to "stick Dr. Mann's hockey stick where the global warming don't shine"[51]--rather emphatically putting the lie to Defendants' assertions that Dr. Mann's lawsuit is a threat to their First Amendment rights.

JURISDICTION

For the reasons articulated in Dr. Mann's April 25, 2014 Opposition to Appellants' Response to the Court's Order to Show Cause, an appeal of the denial of a motion to dismiss under the Act does not meet the stringent requirements of the collateral order doctrine, and also substantially delays the progression of meritorious lawsuits such as Dr. Mann. However, in light

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[49] *See* R. Lowry, "Get Lost: My response to Michael Mann" (JA 94-95).

[50] *See* J. Fowler, "We Need Your Help" (December 10, 2012) (JA 298-9); J. Fowler, "'Mann Up' and Join Our Fight: The NR Legal-Defense Fund," *National Review* (Dece. 18, 2012) (JA 272).

[51] M. Steyn, "Nobel Laureate Steyn Takes on *National Review*, (Dec. 11, 2012), available at: http://www.nationalreview.com/corner/335320/nobel-laureate-steyn-takes-inational-reviewi-mark-steyn.

of the fact that Dr. Mann's lawsuit has been effectively stayed for almost two years, and the fact that this Court has sought briefing on the merits of Defendants' motions to dismiss, at this juncture Dr. Mann no longer opposes Defendants' arguments that this Court has jurisdiction. Dr. Mann respectfully requests that this Court proceed to the merits of Defendants' appeal so that his lawsuit can move forward to trial.

STANDARD OF REVIEW

This Court reviews *de novo* the Superior Court's denial of a special motion to dismiss under the Act. *Doe No. 1 v. Burke*, 91 A.3d 1031, 1040 (D.C. 2014).

ARGUMENT

I. The Superior Court Correctly Found That Dr. Mann's Lawsuit Should Not Be Dismissed Pursuant To The District Of Columbia's Anti-SLAPP Statute

A. Relevant Legal Standard

This Court has not yet considered the standard by which to judge whether a plaintiff has shown its claims are "likely to succeed on the merits" under the Act.[52] A sound interpretation of the statute, adopted in California (and which served as the model for the D.C. statute) is that the showing at this stage is not the high burden that Defendants and amici urge on this Court, but rather is akin to the summary judgment standard. After all, the Act was passed to protect against discovery necessitated by lawsuits that were ultimately found to be meritless. The purpose was to provide the court with an early, expeditious, look at the merits of the case before discovery, in order to spare the defendants the expense of discovery if the case was not well-founded. The law simply changes the timing on which a motion for summary disposition can be heard. The Act does not—as Defendants and amici suggest—make the substantive law of defamation more stringent. As such, if it appears at this early stage that the case can survive a motion for summary judgment by raising a triable issue, the case should proceed.

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[52] In *Doe No. 1 v. Burke*, the Court stated that a plaintiff need show likelihood of success on the merits, but did not opine on the meaning of that standard. 91 A.3d at 1044.

In fact, every court in the District of Columbia interpreting the Act has rejected the notion that the Act adopted the standard different from that urged by Dr. Mann.[53] For example in *Boley v. Atlantic Monthly Group*, 950 F. Supp. 2d 249 (D.D.C. 2013), the district court noted that the Committee Report of the District of Columbia City Council prepared in connection with the Act explained that the Council was following the model set forth in a number of jurisdictions, and that it would look for guidance to those other jurisdictions, and particularly to California, which has a "well-developed body of Anti-SLAPP jurisprudence." 950 F. Supp. 2d at 255. The court reviewed California case law as 'pertinent,' and observed that a plaintiff seeking to show a likelihood of prevailing on a claim must satisfy a standard comparable to that used on a motion for judgment as a matter of law. *Id.* at 262-263 (citing *Price v. Stossel*, 620 F.3d. 992, 1000 (9th Cir. 2011)); *see also, Abbas v. Foreign Policy Group, LLC*, 975 F. Supp. 2d 1, 13 (D.D.C. 2013) (citations omitted) (under the Act plaintiff "must demonstrate that the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited"); *Forras v. Rauf*, ---F. Supp. 2d ---, 2014 WL 1512814, at *5 (D.D.C. April 18, 2014) (same) (citations omitted); *The Wash. Travel Clinic v.*

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[53] Amici Newsmax Media argues that the D.C. Council, "intended to impose a higher burden on SLAPP plaintiffs." *See* Br. of Amici Curiae Newsmax, et al. at 8. In support, amici direct the Court to cases considering the standards for vacating default and for the granting of a preliminary injunction. *Id.* Neither standard is instructive as to the meaning of likely to succeed on the merits under the Act. First, in articulating the standard for preliminary injunctive relief, this Court has consistently noted that the standard is not a mere likelihood of success, but a "substantial" likelihood of success. *See, e.g., Feaster v. Vance*, 832 A.2d 1277, 1287 (D.C. 2003) preliminary injunction may be granted where moving party has clearly demonstrated a "substantial likelihood he will prevail on the merits"); *Zirkle v. District of Columbia*, 830 A.2d 1250, 1255 (D.C. 2003) (same); *District of Columbia v. Sierra Club*, 670 A.2d 354, 361 (D.C. 1996) (same). In drafting the Act, the D.C. Council pointedly did not require a "substantial" likelihood of success—indicating that the showing required to defeat a motion under the Act is not as stringent as that required to obtain the extraordinary relief of a preliminary injunction. Second, the fact that this Court has noted that a defendant need only show a prima facie defense as opposed to showing a likelihood of success in order to vacate a default, has no bearing on the standard required for the defeat of a motion under the Act. *See Tennille v. Tenille*, 791 A.2d 79, 83 (D.C. 2002) (discussing the standard applicable to vacating a default judgment); *Mewborn v. U.S. Life Credit Corp.*, 473 A.2d 389, 391 (D.C. 1984) (same); *Clark v. Moler*, 418 A.2d 1039, 1043 (D.C. 1980) (same).

Kandrac, Case No. 2013 CA 003233B, slip. op. at 5-6 (D.C. Super. Ct. Dec. 16, 2013). This view is squarely based on jurisprudence from the California courts. *See, e.g., Hall v. Time Warner, Inc.*, 63 Cal. Rptr. 3d 798, 804-805 (Cal. Ct. App. 2007) (internal citations and quotations omitted) (under California law, "[t]o demonstrate a probability of prevailing on the merits" the plaintiff must show that the "evidence is sufficient to support a judgment in the plaintiff's favor as a matter of law, as on a motion for summary judgment); *Taus v. Loftus*, 151 P.3d 1185, 1205 (Cal. 2007) ("past cases interpreting [the anti-SLAPP statute] establish that the Legislature did not intend that a court, in ruling on a motion to strike under this statute, would weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim, but rather intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities").

Thus, a plaintiff is required only to demonstrate that the complaint is legally sufficient and supported by a showing of facts to sustain a favorable judgment—assuming that the evidence submitted by the plaintiff is credited. That is the summary judgment standard urged by Dr. Mann below and accordingly the trial court's reviewing the evidence in the light most favorable to the plaintiff was appropriate. *See Cornier v. D.C. Water & Sewer Auth.*, 959 A.2d 658, 667 (D.C. 2008) (for the purposes of a summary judgment motion, evidence must be viewed in light most favorable to party opposing the motion).

B. The Superior Court Correctly Found That Dr. Mann Is Likely To Succeed On The Merits Of His Defamation Claims

To succeed on his defamation claims, Dr. Mann must demonstrate that: (1) Defendants made false and defamatory statements about Dr. Mann; (2) Defendants published those statements without privilege to at least one third party; (3) Defendants possess the requisite fault in publishing those statements; and (4) either the statements were actionable as a matter of law (i.e., were defamatory per se, which is the case here), or their publication caused Dr. Mann

special damages. *Williams v. District of Columbia*, 9 A. 3d 484, 491 (D.C. 2010); *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001). A statement that tends to injure the plaintiff in his profession by indicating that he lacks knowledge, skill, honesty, character, and integrity constitutes defamation per se, and is actionable as a matter of law. *See Ingber v. Ross*, 479 A.2d 1256, 1268 (D.C. 1984) (Defendants' statements were slander per se because they imputed to Plaintiff "a lack of knowledge and skill in dentistry and a lack of honesty, character and integrity which tended to injure [plaintiff's] reputation in the community and were calculated to cause harm to [plaintiff's] reputation") (citations omitted).

Assuming that Dr. Mann is a limited purpose public figure, then to prevail on his defamation claim, he must also establish that Defendants made the defamatory statements with actual malice—i.e. with knowledge that they were false or with reckless disregard as to their truth. *See Thomas v. New World Comm'cns*, 681 F. Supp. 55, 65 (D.D.C. 1988) (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 280 (1964)). Actual malice is established if it is shown that "the defendant in fact entertained serious doubts" as to the truth of the publication or acted "with a high degree of awareness of .... its probable falsity." *See OAO Alfa Bank v. Center for Public Integrity*, 387 F. Supp. 2d 20, 48 (D.D.C. 2005) (citing *St. Amant v. Thompson*, 390 U.S. 727, 731)).

In making an early assessment of Dr. Mann's likelihood of succeeding on the merits, there is only one possible conclusion that the Superior Court could have reached: Dr. Mann will prevail, as the statements at issue are false and defamatory per se and Defendants made those statements with knowledge of their falsity or reckless disregard for their truth. Defendants have accused Dr. Mann of "academic and scientific misconduct," "data manipulation," "molesting and torturing data," and "corruption and disgrace"—all the while gloating in a disgraceful comparison to Jerry Sandusky. Each of these allegations accuses Dr. Mann of fraud and dishonesty and each is false. Defendants make no claim Dr. Mann is actually guilty of fraud. Nor could they. Rather, they hang their hats on the arguments that they did not intend to accuse Dr.

Mann of fraud, that their statements are hyperbolic opinion commentary, and that Dr. Mann is unlikely to show by clear and convincing evidence that Defendants acted with actual malice.

1. The First Amendment Does Not Immunize Defendants' False Statements Regarding Dr. Mann

National Review argues that courts must act as "gatekeepers to ensure that protected speech on matters of public controversy is not subject to the burdens of litigation and potential liability." National Review Br. at 28. In National Review's telling, Defendants' specific accusations of fraud and misconduct are "ambiguous" and "subject to different interpretations," and therefore, in order to ensure Defendants' uninhibited expression, litigation is inappropriate in this case. *Id.* at 31. National Review's lofty rhetoric regarding the First Amendment aside, Dr. Mann does not dispute that there can be no liability for true expressions of opinions that merely disagree with his work. This case is different. Defendants did not merely express an opinion, they falsely stated facts accusing Dr. Mann of fraud. And as the Supreme Court has noted "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. *N.Y. Times Co. v. Sullivan*, 376 U.S. at 270.

Defendants' statements, as with all false statements of fact, belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 777 (1976) (Stewart, J., concurring) ("The Court has on several occasions addressed the problem posed by false statements of fact in libel cases. Those cases demonstrate that even with respect to expression at the core of the First Amendment, the Constitution does not provide absolute protection for false factual statements that cause private injury"); *see also Partington v. Bugliosi*, 56 F.3d 1147, 1155 (9th Cir.1995) ("[A] particular statement of opinion may imply a

false assertion of fact and therefore fall outside the scope of the First Amendment's protection as limited by *Milkovich*"); *Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1438 (9th Cir.1995) (attorney who impugns the integrity of a judge loses First Amendment protection for statements that are false or imply a false assertion of fact); *Snead v. Redland Aggregates, Ltd.*, 998 F.2d 1325, 1333 (5th Cir.1993) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("False statements of fact are 'not worthy of constitutional protection'").

Defendants argue that because their statements regarding Dr. Mann are related to "the contentious and often acrimonious debate over global warming," *see* CEI Br. at 29, NR Br. at 21, that they are somehow entitled to a free pass to say anything they wish regarding Dr. Mann, no matter how outrageous and provably false. Not true. As the Supreme Court noted in *Milkovich*:

> First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the important social values which underlie the law of defamation, and recognized that society has a pervasive and strong interest in preventing and redressing attacks upon reputation.

497 U.S. at 22 (internal quotation marks and citation omitted). There is no public debate exception to defamation or doctrine that allows journalists and so-called "think tanks" to defame scientists with impunity. Defendants' comments are not part of the debate on global warming. Defendants have not merely asserted that they disagree with Dr. Mann's views or that they believe his research is incorrect or misleading. Defendants accused Dr. Mann of fraud and scientific misconduct—an explicit and clear assertion of fact regarding Dr. Mann's reputation and integrity and an accusation that Dr. Mann has falsified his research in the service of a politicized agenda. Nothing could be more damaging to a scientist's reputation than to be accused of fraud.

2. Defendants' Specific Accusations Of Fraud And Misconduct Are Not Constitutionally Protected Opinion

"[T]he Supreme Court's decision in *Milkovich* made clear that the First Amendment gives no protection to an 'assertion sufficiently factual to be susceptible of being proved true or false.'" *Jankovic v. Int'l Crisis Group*, 593 F.3d 22, 27 (D.C. Cir. 2010) (citations omitted); *see also Gertz*, 418 U.S. at 340 ("[T]here is no constitutional value in false statements of fact."). As the D.C. Circuit further explained in *Jankovic*, "there is no wholesale exemption from liability in defamation for statements of 'opinion.' Instead, statements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false." *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 313 (D.C. Cir. 1994) ("*Moldea II*"). The key inquiry is whether a statement is capable of verification. *Weyrich v. The New Republic, Inc.*, 235 F.3d 617, 624 (D.C. Cir. 2001). "In other words, even with a per se opinion, the question is whether the person has made an assertion that can reasonably be understood as implying provable facts." *White v. Fraternal Order of Police*, 909 F.2d 512, 522 (D.C. Cir. 1990). Accordingly, Defendants cannot defeat Dr. Mann's claims absent a showing that "it is *clear* [they] are expressing a subjective view, an interpretation, a theory, conjecture, surmise, or hyperbole, rather than claiming to being in possession of objectively verifiable facts." *Washington v. Smith*, 893 F. Supp. 60, 62 (D.D.C. 1995), *aff'd*, 80 F.3d 555 (D.C. Cir. 1996) (citations omitted); *see also*, *Partington v. Bugliosi*, 56 F.3d at 1155 (All authors, even those of generally subjective pieces like book reviews, "must attempt to avoid creating the impression that they are asserting objective facts rather than merely stating subjective opinions"). Here, the statements at issue contain verifiably false statements of fact and are thus not constitutionally protected opinion.

Nor can Defendants escape liability by arguing that their statements are merely an assault on Dr. Mann's "ideas", not his "character." *See, e.g.*, National Review Br. 22. Defendants do not merely disagree with Dr. Mann's work, but rather they accuse it of being fraudulent, which explicitly incorporates an allegation that Dr. Mann engaged in fraud. Accordingly, calling Dr. Mann's work fraudulent is the same as calling Dr. Mann a fraud. Nor is there, as Defendants

suggest, any whole-sale protection for accusations made regarding an academic or scientist's work. The Seventh Circuit in *Dilworth v. Dudley*, a case cited by Defendants in support of their argument, makes this clear. 75 F.3d 307, 310 (7th Cir. 1995) ("We do not suggest that scholars can never maintain a suit for defamation...If a professor is falsely accused of plagiarism or sexual harassment or selling high grades or other serious misconduct, rather than of having unsound ideas, he has the same right to damages as any other victim of defamation); *see also*, *Chandok v. Klessig*, 648 F.Supp. 2d 449, 457 (N.D.N.Y. 2009) (rejecting defendant's argument that statements were not concerning plaintiff but rather were concerning "results" or "data" obtained through plaintiff's research and finding statements capable of defamatory meaning); *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 671 (D.C. Cir. 1987) (statements regarding advocacy group's publication of data regarding homelessness could be understood as allegations of intentional fabrication and fraud and therefore defamatory).

a. Defendants' Statements Are Verifiable False Statements Of Fact

Defendants' allegations that Dr. Mann engaged in academic and scientific misconduct and fraud and that his research is intellectually bogus are verifiable.[54] Fraud has five essential elements: "(1) a false representation (2) in reference to material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action is taken in reliance upon the representation." *Bennett v. Kiggins*, 377 A.2d 57, 59 (D.C. 1977). Whether Dr. Mann engaged in fraud is verifiable, and is a matter that this Court and others routinely address and regarding which factual findings are made every day. Defendants know this. They know that six separate entities have considered and made objective findings as to whether Dr. Mann and his colleagues engaged in misconduct or fraud. CEI called for an investigation into Dr. Mann's conduct in

[54] Defendants' semantic parsing aside, bogus is a synonym for fraud and therefore this allegation is verifiable in much the same way as the explicit fraud allegations. *See* Dictionary.com, (listing "fraudulent" as a synonym for "bogus"), available at: http://dictionary.reference.com/browse/bogus?s=t.

November 2010,[55] and has gone so far to request and receive an investigation by the EPA.[56] Defendants know that their fraud allegations are objectively verifiable (and false), why else would they call for a "fresh, truly independent investigation?"

Defendants' accusations of fraud in this case are strikingly similar to the accusations deemed factual (and therefore not constitutionally protected) by the Supreme Court in *Milkovich*. In that case, the defendant accused the plaintiff of lying during a hearing before the Ohio High School Athletic Association. 497 U.S. at 3. The Court noted that "[t]he dispositive question" was "whether a reasonable fact finder could conclude that the statements in [defendant's] column imply an assertion that [plaintiff] perjured himself in a judicial proceeding." *Id.* at 21.[57] The Court concluded "a determination whether [plaintiff] lied in this instance can be made on a core of objective evidence." *Id.* Likewise, a determination of whether Dr. Mann committed fraud in relation to his development of the Hockey Stick Graph can be made on a core of objective evidence. This Court, like any other fact finder litigating a case involving criminal or civil fraud, can hear and consider evidence as to whether Dr. Mann made any knowing and material misrepresentations in his research with the intent to deceive.

As to the allegations of "misconduct," Defendants cannot argue their way around this statement by claiming that they merely express an opinion about Penn State and not Dr. Mann.

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[55] *See* C. Hall, "Climategate Scandal One Year Later, May Questions Remain," (November 18, 2010), available at: http://cei.org/news-releases/climategate-scandal-one-year-later-many-questions-remain. In that release, Myron Ebell, the Director of CEI's Center on Energy and Environment Policy, called for a "thorough audit" of "the data and methodologies underlying the major scientific claims underlying global warming alarmism."

[56] CEI has also championed the Virginia Attorney General Ken Cuccinelli's efforts to obtain Dr. Mann's e-mail correspondence defending those efforts as "simply ... following the letter of a statute authorizing investigation of possible fraud." *See* C.C. Horner, "Cuccinelli is Following the Law; Mann Up, UVa" (May 23, 2010), available at: http://cei.org/op-eds-and-articles/cuccinelli-following-law-mann-uva. Certainly if Mr. Cuccinelli, can investigate Dr. Mann for fraud, the Superior Court can verify allegations of fraud.

[57] Perjury, like fraud, has readily identifiable elements: (1) an oath; (2) before a competent person or tribunal; (3) a false statement; (4) of material fact; and (5) knowledge of falsity. *See In re White*, 11 A.3d 1226, 1273 (D.C. 2011) (citations omitted).

(*See* CEI Br. at 45.) While the statement may include a criticism of Penn State, it clearly states that Dr. Mann, and not Penn State, is guilty of academic and scientific misconduct. There can be no question that objective evidence could be assessed to show whether Dr. Mann engaged in academic and scientific misconduct. In fact, this is the very same factual inquiry that the NSF and Penn State engaged in when those entities independently investigated whether Dr. Mann had engaged in "research misconduct."

Penn State, after receiving numerous communications "accusing [Dr. Mann] of having engaged in acts ... that included manipulating data, destroying records and colluding to hamper the progress of scientific discourse around the issue of anthropogenic global warming," reviewed "all available evidence"[58] and "determined that there was no substance to the allegations against [Dr. Mann]."[59] Similarly, the National Science Foundation noted that "[t]o recommend a finding of research misconduct, the preponderance of the evidence must show that with culpable intent [Dr. Mann] committed an act that meets the definition of research misconduct" and concluded that "no direct evidence has been presented that indicates [Dr. Mann] fabricated the raw data he used for his research or falsified his result."[60] These investigations clearly dictate that accusations of "fraud," "data manipulation," and "academic and scientific misconduct" are objectively capable of proof or disproof.

The statement that Dr. Mann "has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and the planet" is plainly factual and verifiable. It does not, as Defendants' contend, merely repeat a supposed "longstanding criticism" that Dr. Mann's work is "based on flawed assumptions and statistical methods." (CEI Br. at 39.) Further, the statement that Dr. Mann "had been engaging in data

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[58] Penn State's review included interviewing seven witnesses, including Dr. Mann, and reviewing scores of documents and e-mails. *See* RA-10 Final Investigation Report at pp. 6-7 (JA 631-2).

[59] *Id.* at 1, 19 (JA 626, 644).

[60] *See* National Science Foundation, Office of Inspector General, Office of Investigations, "Closeout Memorandum, Case No. A09120086,"at p. 3 (JA 881).

manipulation" can be proven false. It does not, as Defendants' contend, merely argue that Dr. Mann "adopted an agenda-driven statistical methodology that confirmed the preconceived notion of catastrophic warming." (*Id.* at 40.) Thus, objective evidence could be assessed to determine whether Dr. Mann deliberately altered his data, by among other things, ignoring data that does not lead to a preordained result and/or manufacturing data out of whole cloth.

Equally verifiable is the statement that Dr. Mann has become the posterboy of the corrupt and disgraced climate science. The statement explicitly accuses Dr. Mann of corruption."[T]o falsely state that [plaintiff] is incompetent and corrupt . . . is to hold him up to disgrace and contempt . . . [and is] defamatory." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299, 1307 (N.Y. 1977) (finding that defendants' statements that a judge was "corrupt" would lead the "ordinary and average reader" to "understand the use of these words . . . as meaning that plaintiff had committed illegal and unethical actions" and that such statements are not constitutionally protected as opinion); *see also Bentley v. Bunton*, 94 S.W.3d 561, 582-4 (Tex. 2002) (defendants' repeated accusations that plaintiff was "corrupt" actionable under *Milkovich* even when defendant's "ravings were often classic soapbox oratory"). It is not merely "a strongly worded criticism of mainstream science," CEI Br. at 40, rather, at the very least, it is a statement implying the possession of provable facts.

b. The Context Of Defendants' Statements Does Not Render Them Non-Actionable Opinion

"An article's political 'context' does not indiscriminately immunize every statement contained therein." *Weyrich*, 235 F.3d at 626; *see also Chapman v. Journal Concepts, Inc.*, No. 07-00002, 2008 WL 5381353, at *12 (D. Hi. Dec. 24, 2008) (citing *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1054--55 (9th Cir. 1990) ("even where the general tenor of a work is humorous and satirical, defamation still may lie where—as here—the specific statement could reasonably be viewed as an assertion of objective fact")). Here, the context of Defendants' statements does not render them immune from defamation liability. *See Moldea II*, 22 F.3d at 313 (noting that

[a]lthough the statements at issue in *Milkovich* appeared in an 'opinion column' in a newspaper sports section, the Court found no relevance in this fact . . . apparently because an accusation of perjury is not the sort of discourse that even arguably is the usual province of such columns"). The D.C. Circuit's decision in *Weyrich* is instructive in this regard. In *Weyrich,* the defamatory statements appeared in *The New Republic*. *The New Republic*, much like *The National Review*, is a well-known source of political commentary, and describes itself as a "Weekly Journal of Opinion." 235 F.3d at 625. Although most of the article at issue in *Weyrich* contained hyperbolic commentary, the D.C. Circuit still found actionable factual assertions in the article, including that the subject of the article had "snapped," was becoming "more and more isolated," had surrounded himself with a "coterie of sycophants," was "apoplectic," and had "psychological problems." *Id.* While these statements may have appeared in an opinion piece, because they were objectively verifiable, as are the statements at issue here, they did not constitute protected speech.

Further, reviewing Defendants' statement in their totality, it is clear that the gravamen of all three publications is not that Dr. Mann's research was wrong or merely misleading, but rather that Dr. Mann committed fraud and scientific misconduct. Why else would Mr. Simberg have called for a "fresh investigation" and why would Mr. Steyn wonder what other heinous crimes Penn State has covered up in addition to the "systemic statutory rape of minors"?

Finally, this Court should also reject Defendants' cynical assertions that false accusations of fraud are just part and parcel of legitimate debate. Specifically, National Review points this Court to a handful of publications calling individuals, groups, or ideas frauds. *See* National Review Br. at 24. At the outset, the fact that Defendants are able to cobble together publications where other individuals have used the word fraud has no bearing on whether the specific accusations of fraud are actionable in this case. Defendants' argument assumes that the cited publications themselves are constitutionally protected—a question which as far as Dr. Mann can tell has not been adjudicated. For this Court to base its analysis of whether the specific statements in this lawsuit are actionable on whether other publications have made similar

statements would turn defamation law on its head. The question before this Court is whether Defendants' statements are false statements of fact, not whether other individuals have gotten away with using the word "fraud" in unrelated contexts.

c. Defendants' Disclosure of the Supposed "Factual Basis" Of Their Statements Does Not Render Them Inactionable

Finally, the suggestion that Defendants' statements are protected because Defendants disclosed the facts upon which they relied is absurd. CEI Br. at 33. First, not a single one of the purportedly disclosed facts supports Defendants' allegations of fraud or misconduct. In fact, many of the supposedly disclosed facts are: (1) authored by Mr. Simberg himself (JA 204-210); (2) related solely to Penn State's investigation of Mr. Sandusky (JA 201-202; 226-227); (3) provide mere biographical information regarding Dr. Mann (JA 212-216; and/or (4) pre-date the NSF's exoneration of Dr. Mann. Not a one sets forth a scintilla of evidence that would support the opinion that Dr. Mann is guilty of research misconduct or fraud. Defendant's argument that their allegations of research misconduct find support in the articles hyperlinked to Mr. Simberg's original post is simply without merit. CEI Br. at 33-36. Mr. Simberg distorts the material he supposedly relies upon and his commentary on the investigations regarding Dr. Mann deliberately misleads his readers. *See Jankovic*, 593 F.3d at 28 (the law "protects only opinions based on true facts, accurately disclosed"). As the Supreme Court has made clear, "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich*, 497 U.S. at 18-19. False statements, or statements that are based on misstatements of fact are not protected. S*ee Fisher v. Wash. Post Co.*, 212 A.2d 335, 337 (D.C. 1965) (the fair comment privilege "goes only to opinions expressed by the writer and does not extend to misstatements of fact"); *see also Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88 (D.C. 1980) ("[The fair comment] privilege, however, has been restricted to extend protection only to opinion, not misstatements of fact."); *Jankovic*, 593 F.3d at 29 ("a conclusion based on a

misstatement of fact is not protected by the [fair comment] privilege"). Here, Defendants' statements do not offer an opinion regarding Dr. Mann, they assert as a factual matter that Dr. Mann is guilty of academic misconduct and fraud.

3. Defendants' Statements Do Not Qualify As "Rhetorical Hyperbole"

Nor can Defendants skirt liability by arguing that their statements are nothing more than rhetorical hyperbole. Defendants' assertion that the explicit allegations of fraud and misconduct "are obviously employing 'loose, figurative [and] hyperbolic language" does not withstand scrutiny. National Review Br. at 38. Defendants' lies are written as statements of fact, not statements of opinion, and they were meant to be, and were, taken literally.[61] Commentators on OpenMarket.org (the CEI blog on which Mr. Simberg originally published his defamatory statements) immediately responded to Defendants' allegations. A sampling of CEI's and National Review's readers' responses is set forth below, and make clear that Defendants' readers did not have any trouble understanding the fact that they had specifically accused Dr. Mann of research fraud:

> From CEI's readers:
>
> This is one of the most disgusting and amoral attempts to smear an honest and courageous scientist's reputation that I have ever seen. Dr. Mann has been cleared of any sort of wrongdoing whatsoever by 6 different investigations and his detractors have been shown to be complete liars. (JA 351).
>
> Falsely screaming "fraud" about one study done over a dozen years ago and ignoring the 11 other studies that confirm it reveals the accuser has no interests [sic] in the truth. (JA 353).

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[61] The cases cited by Defendants in support of their rhetorical hyperbole argument are inapposite. For example, in *Greenbelt Coop. Publ'g Assoc. v. Bresler*, 398 U.S. 6 (1970), the Supreme Court found a newspapers' statements calling plaintiff's proposal "blackmail" hyperbolic where the record was devoid of evidence that anyone believed plaintiff had been charged with a crime, and where plaintiff's proposal was accurately and fully described in each article, along with the accurate statement that some people had referred to the proposal as blackmail at a town meeting); *see also, Jenkins v. Snyder*, No. 00CV2150, 2001 WL 755818, at *5 (E.D. Va. Feb. 2, 2001) (finding statement that groundskeepers were "trying to kill the players with their crappy field" hyperbolic).

> Admit that Michael Mann isn't guilty of any kind of fraud . . . [i]f you can't do that much, or if you're going to tell me that virtually all scientists are in on a global conspiracy to conceal the truth, without any evidence of such conspiracy, then you don't deserve any kind of respect. (JA 362).
>
> From National Review's readers:
>
> NR flatly stated that Mann had written a fraudulent paper. That is slander and for a scientist is pretty much the worst thing someone can be accused of . . . not one scientific organization has supported the idea that Mann's paper or graph were fraudulent . . . There have been numerous investigations of Mann and the Climategate emails, and not one of them has concluded that Mann did anything that was in any way fraudulent. (JA 301).
>
> NR clearly [sic] says he published something that was fraudulent. Mann (and almost every other scientist who knows anything about this issue) do not think it was fraudulent. It is up to a court to decide whether accusing someone, a scientists, in particular, of fraud, when there is no supporting evidence of fraud, is libel or not. (JA 316).
>
> Even if NRO is an opinion magazine, it is not permitted to make false statements and present them as facts . . . NRO didn't imply that "Mann was a fraud *in their opinion*". They presented that particular statement as a fact." (JA 329).
>
> NRO published "Michael Mann was the man behind the fraudulent climate-change hockey stick graph." They did this despite knowing fully well that numerous investigations had found no fraud. The weak defense that NRO is now offering is that when they said "fraudulent", they didn't really mean it and were using "rhetorical hyperbole." (JA 334).

Mr. Simberg himself recognized that his and Mr. Steyn's words were not merely questioning the validity of Dr. Mann's research. Shortly after Dr. Mann demanded a retraction, Mr. Simberg stated on his personal blog that Dr. Mann was "much more upset about the accusations of scientific fraud than about the Sandusky comparison."[62]

Similarly, outside observers of Defendants' accusations had no trouble understanding the accusatory nature of their allegations. Immediately after Defendants' initial salvo against Dr. Mann last summer, commentators from a number of highly regarded publications and organizations wrote that they were "aghast" at Defendants' allegations regarding Dr. Mann—

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[62] *See* R. Simberg, "UnManned," transterrestrialmusings.com (July 23, 2012) (JA 291).

describing them as "deplorable, if not unlawful," "slimy," "disgusting," and "defamatory." For example, the *Columbia Journalism Review*, perhaps the most highly regarded media authority, stated that Mr. Steyn's and National Review's accusations of "academic fraud" "dredg[ed] up a discredited charge" and ignored "almost half a dozen investigations [that had] affirmed the integrity of Mann's research."[63] The *Columbia Journalism Review* further commented that Dr. Mann has endured "witch hunts and death threats in order to defend his work" and that "the low to which Simberg and Steyn stooped is certainly deplorable, if not unlawful." *Id.* Similarly, a blog hosted by the scientific publication *Discover Magazine* described the attacks as "slimy," "disgusting," and "defamatory."[64] Further, the Union of Concerned Scientists, through its program manager, Michael Halpern, stated that it was "aghast" at these attacks, describing them as "disgusting," "offensive," and a "defamation of character."[65]

While Defendants may be correct that the use of colorful language—without more—may qualify for constitutional protection, when that language is accompanied by a false assertion of fact, the publication becomes actionable. In our context, Defendants did not simply state that they disagreed with Dr. Mann's work; rather, they went on—at some length—to tell their readers why Dr. Mann's work was fraudulent and why he was guilty of misconduct. They said that Dr. Mann had "molested and tortured data;" that Dr. Mann had engaged in "data manipulation;" that Dr. Mann had committed "academic and scientific misconduct"; that Dr. Mann had behaved in an "unscientific manner;" that Dr. Mann had engaged in "hockey stick deceptions;" and that Dr. Mann had been improperly investigated, "whitewashed," and benefited from a "cover-up."

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[63] *See* C. Brainard, "'I don't bluff': Michael Mann's lawyer says National Review must retract and apologize," *Columbia Journalism Review* (July 25, 2012), available at: http://www.cjr.org/the_observatory/michael_mann_national_review_m.php?page=1.

[64] *See* P. Plait, "Deniers, disgust, and defamation," *Discover* (July 23, 2012), available at: http://blogs.discovermagazine.com/badastronomy/2012/07/23/deniers-disgust-and-defamation/.

[65] *See* M. Halpern, Union of Concerned Scientists, *Ecowatch* (July 23, 2012), available at: http://ecowatch.org/2012/think-tank-climate-scientist/.

The specific factual allegations against Dr. Mann stand in marked contrast to the bulk of the cases cited by Defendants, in which the defamation claims were based upon loose epithets and conjectural name-calling, without reference to specific facts. *See, e.g., Potts v. Dies*, 132 F.2d 734, 735 (D.C. Cir. 1942), (holding that calling the plaintiff a "Nazi Trojan Horse" not actionable because it was "not a proposition of fact," and that the defendant "neither said nor implied anything false." 132 F.2d at 735; *Koch v. Goldway*, 817 F.2d 507, 509-510 (9th Cir. 1987) (holding that comparing plaintiff to Adolph Hitler because there was no evidence that the remark was "understood to refer to facts"); *Parks v. LaFace Records*, 329 F.3d 437, 462 (6th Cir. 2003), (the defamation claim based upon song lyrics was not actionable because the song "does not make any factual statements about [plaintiff]"); *Dunn v. Gannett*, 833 F.2d 446 (3d Cir. 1987) (rejecting a defamation claim involving an accusation that a mayor had referred to Hispanics as "pigs" because defendant had not specifically accused the mayor of wrongdoing); *Rizzo v. Welcomat, Inc.*, No. 7240, 1986 WL 501528, at *561 (Pa.Com.Pl. Sept. 17, 1986), (rejected a defamation claim brought by the former Mayor of Philadelphia because of a statement comparing him to Hitler did not involve a fact capable of being proven false); *Yeager v. Local Union 20*, 453 N.E.2d 666 (Ohio 1983) (no defamation claim based upon calling plaintiff Hitler where epithet not accompanied by specific facts); *Williams v. Town of Greenburgh*, 535 F.3d 71 (2d Cir. 2008) (no defamation claim based upon calling plaintiff "Junior Mussolini' where epithet not accompanied by specific facts").

However, when a defendant chooses to accompany his loose figurative language with specific factual allegations that are capable of being proven true or false, then the line has been crossed, and the defendant can no longer hide behind the protection of "rhetorical hyperbole." *See, e.g. Smith v. McMullen*, 589 F. Supp. 642, 645 (S.D. Tex. 1984) (description of plaintiff as "despicable human being" when viewed in context of the statement as a whole was capable of defamatory meaning).

For example, in *Buckley v. Littell*, 539 F.3d 882 (2d Cir. 1976), a defamation case brought by William F. Buckley, the founder and former publisher of the National Review,

asserted that he had been defamed in three separate statements: (1) that he had been called a "fascist;" (2) that he had been called a "deceiver;" and (3) that he had been compared to an individual named Westbrook Pegler "'who lied day after day.'" The Second Circuit rejected Mr. Buckley's first two claims on the grounds that they could not be viewed as direct statements of fact, given the imprecision as to their meaning and usage. Yet Mr. Buckley's third asserted libelous statement, involving the comparison to Westbrook Pegler, was held to be actionable because the assertion that he had lied and libeled people was "an assertion of fact." 539 F.3d at 895-96. Further, the Second Circuit went on to say that the fact that the statements regarding Mr. Buckley were made in the context of a political attack did not entitle the statements to constitutional protection. *Id.* at 897 ("to call a journalist a libeler and to say that he is so in reference to a number of people is defamatory in the constitutional sense, even if said in the overall context of an attack otherwise directed at his political views"). Similarly, in *Jordan v. Lewis*, 20 A.D. 2d 773 (N.Y. App. Div. 1964), a New York appellate court held that the comparison to "Hitler and Eichman" could not be held to be slanderous per se. But it held that two other statements were slanderous, including the allegation that the plaintiff had committed adultery and the statement that the plaintiff had cheated on his income taxes. 20 A.D.2d at 774.

Additionally, in *Medifast v. Minkow*, No. 10–CV–382 JLS (BGS), 2011 WL 1157625 (S.D. Cal. Mar. 29, 2011), the defendant had published an article comparing certain aspects of Medifast's business operations to those that had been used by the convicted financier Bernie Madoff. The comparisons included the defendant's compensation system and its use of small accounting firms. 2011 WL 1157625 at *12. Further, the context of the article was that of "a contemporary cautionary tale." *Id.* The plaintiff interpreted these comparisons as tantamount to the assertion that "it was running a Ponzi scheme—an illegal criminal enterprise," and based its defamation claim on this alleged statement. The district court rejected this purported interpretation of the defendant's actual statements, noting that all the article actually stated or implied was that people should be cautious of Medifast, and that "things at Medifast are not what they seem." *Id.* These implications were held too inexact or subjective to "imply a provably false

assertion of fact." But the court also observed that if the defendant had stated or implied that "Medifast, like Bernie Madoff, is running a Ponzi scheme, one could hardly dispute that Defendants would be liable for defamation." *Id.* Similarly, if the defendants had simply said that Medifast ran its business like Bernie Madoff, the statement would also have been actionable. *Id.*

And as the Superior Court correctly found, that is exactly what happened in this case:

> [W]hen one takes into account all of the statements and accusations made over the years, the constant requests for investigations of Plaintiff's work, the alleged defamatory statements appear less akin to "rhetorical hyperbole" and more as factual assertions. NR Defendant's publication of Defendant Steyn's article quotes from Defendant Simberg's article The Other Scandal in Unhappy Valley. Defendant Steyn then writes: Not sure I'd have extended that metaphor all the way into the locker-room showers with quite the zeal Mr. Simberg does, but he has a point. Michael Mann was the man behind the fraudulent climate change "hockey-stick" graph" National Review Online, Football and Hockey, by Mark Steyn (July 15, 2012). The content and context of the statement is not indicative of play and "imaginative expression" but rather aspersions of verifiable facts that Plaintiff is a fraud. At this stage, the Court must find that these statements were not simply rhetorical hyperbole.

Order at 17-18 (JA 116-7). Given all the allegations made against Dr. Mann, Defendants' statements regarding Dr. Mann are "aspersions of a verifiable fact" that Dr. Mann is guilty of fraud and misconduct. Defendants' opinion and rhetorical hyperbole defenses are without merit

Defendants also claim that their statements are not actionable because they "raise questions." CEI Br. at 42. But the D.C. Circuit rejected this argument long ago: "Where readers would understand a defamatory meaning, liability cannot be avoided merely because the publication is cast in the form of an opinion, belief, insinuation, or even question." *Afro-American Publ'g Co. v. Jaffe*, 366 F.2d 649, 655 (D.C. Cir. 1965). In Defendants' telling, the crux of Defendant Simberg's initial post was really directed at Penn State's investigation of Dr. Mann, and not Dr. Mann himself. While Mr. Simberg's post may end with a question mark, there is nothing rhetorical about its accusations regarding Dr. Mann. Although it is arguable whether Defendants were even raising questions about Penn State's investigation—a difficult argument to make considering that investigation is characterized as a "cover up and white

wash"—it is clear that Defendants are not raising questions about Dr. Mann, but rather bluntly accusing him of misconduct and fraud.

Defendants do not question whether Dr. Mann engaged in "data manipulation," they directly posit that the CRU e-mails "revealed [he] had been engaging in data manipulation." Nor do they question whether Dr. Mann had engaged in "academic and scientific misconduct." Rather they base their entire call for a "fresh, truly independent investigation" of Dr. Mann upon the premise that Penn State "covered up and whitewashed" its prior investigation in order to "hide academic and scientific misconduct" on the part of Dr. Mann.[66]

4. Defendants Acted With Actual Malice

In addition to their assertion of the opinion defense, the Defendants also argue that Dr. Mann is unlikely to demonstrate facts that the challenged statements were made with "actual malice." A party acts with actual malice when it deliberately ignores evidence that calls into question its published statements or when it encounters persuasive evidence that contradicts the published statement. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989); *Schatz v. Repub. State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012) (internal quotations and citations omitted) (recklessness amounting to actual malice may be found where the defendant relies on a source when there is an obvious reason to doubt its veracity . . . or deliberately ignores evidence that calls into question his published statements); *Levesque v. Doocy*, 560 F.3d 82, 90 (1st Cir. 2009) (recklessness "amounting to actual malice may be found where a publisher . . . deliberately ignores evidence that calls into question his published statements); *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1511 (D.C. Cir. 1996) (internal citations and quotations omitted) (actual malice requires that Plaintiff must show that the defendant "entertained serious doubts as to the truth of [its] publication or acted with a high degree of awareness of ... [its] probable falsity); *Hunt v. Liberty Lobby*, 720 F.2d 631, 645 (11th Cir. 1983) ("An inference of actual malice can be drawn when a defendant publishes a

[66] Defendants conveniently ignore the fact that the NSF Inspector General independently confirmed Penn State's findings.

defamatory statement that contradicts information known to him even when the defendant testifies that he believed that the statement was not defamatory and was consistent with the facts within his knowledge").

As an initial matter, while the CEI Defendants did argue in their Rule 12(b)(6) motion that Dr. Mann had not adequately pleaded actual malice, it did not make that argument in its motion to dismiss based upon the Act. Accordingly, the question of whether the CEI Defendants acted with actual malice is not properly before this Court. *See Hessey v. Burden*, 615 A.2d 562, 581 (D.C. 1992) (appellate courts consistently refuse to consider arguments made for the first time on appeal). Regardless, the evidence already before this Court is more than sufficient to demonstrate that Defendants deliberately ignored facts establishing that Dr. Mann had not engaged in any fraud or misconduct.

Several inquiries and subsequent exonerations of Dr. Mann found that there was no evidence of any fraud, data falsification, or statistical manipulation or misconduct. Defendants read and were aware of the conclusions of these inquiries and exonerations:

- The University of East Anglia assessed the integrity of the research published by the CRU and found "no evidence of any deliberate scientific malpractice in any of the work of the Climatic Research Unit." Three months later, the University of East Anglia examined whether manipulation or suppression of data occurred and concluded that the CRU scientists' "rigour and honesty as scientists are not in doubt."

- The United Kingdom's House of Commons Science and Technology Committee found that with respect to accusations of dishonesty "there is no case to answer."

- The United Kingdom's Secretary of State for Energy and Climate Change agreed, stating: "the rigour and honesty of the scientists are not in doubt."

- Penn State found "no credible evidence that Dr. Mann had or has ever engaged in, or participated in, directly or indirectly, any actions with an intent to suppress of falsify data" and that there was "no substance" to the allegations against Dr. Mann.

- The EPA, in response to petitions filed by Defendant CEI, among others, concluded that there was no evidence of data manipulation or fraud. This finding was later upheld by the D.C. Circuit.

- The Inspector General of the Department of Commerce conducted an independent review of the emails stolen from CRU and found "no evidence" of inappropriate manipulation of data.

- The NSF found no evidence that Dr. Mann had engaged in data manipulation, research misconduct, or fraud.

The evidence unequivocally demonstrates that Defendants knew there was no fraud or recklessly disregarded the evidence that there was no fraud, and deliberately avoided the fact that there was no fraud. *See Harte-Hanks Communications*, 491 U.S. at 685; *Schatz*, 669 F.3d at 58. There is simply no way anyone could have read the litany of inquiries regarding Dr. Mann—some of which were requested by Defendants themselves—without coming to the conclusion that Dr. Mann was not guilty of fraud, misconduct, or data manipulation.

Further, because the evidence demonstrates that Dr. Mann was investigated for and exonerated of any fraud or misconduct, Dr. Mann is likely to establish by clear and convincing evidence that Defendants' statements to the contrary were in reckless disregard of the truth. *See, e.g., WJLA-TV v. Levin,* 564 S.E.2d 383, 392 (Va. 2002) (sufficient evidence of actual malice where defendant accused plaintiff-doctor of criminal sexual assaults on patients with knowledge that no criminal charges had been issued by prosecutors and that he had been absolved of misconduct by the state board of medicine); *Hansen v. Stoll*, 636 P.2d 1236, 1240 (Ariz. Ct. App. 1981) ("a person cannot close his eyes to the obvious truth, yet still claim lack of knowledge"). For example, in *Hansen v. Stoll*, and Arizona appellate court found sufficient evidence of actual malice where defendant's claims regarding plaintiff had been "investigated and found to be without merit." 636 P.2d at 1240; *see also, Holbrook v. Casazza,* 528 A.2d 774, 780-81 (Conn. 1987) (republication of charges by defendant after plaintiff-assessor's exoneration by the state agency supervising assessors was substantial evidence of constitutional actual malice); *Selby v. Savard*, 655 P.2d 342, 345-6 (Ariz. 1982) (evidence of actual malice where the

charges were investigated and found without substance by the state department of public safety, plaintiff's employer).

No doubt aware that there is no evidence that Dr. Mann engaged in any sort of fraud, National Review argues that it was not really accusing Dr. Mann of fraud, it was only stating (in hyperbolic terms) that the "hockey stick rests on shoddy methodology and depicts a misleading picture of global warming." National Review Br. at 45-46. This is nothing more than an attempt by National Review to whitewash its statements and deflect this Court from what is really at issue. As noted above, any reasonable reader of Defendants' statements would understand them for what they actually alleged—Dr. Mann had engaged in fraud and misrepresented his research, not a mere disagreement with the quality of Dr. Mann's research. National Review's "sincere belief" that Dr. Mann's research is wrong is irrelevant to the question of whether they sincerely believed Dr. Mann was guilty of fraud or misconduct. The CEI Defendants, on the other hand, remarkably argue that the investigations did not actually exonerate Dr. Mann of fraud and misconduct and that they actually raise "substantial concerns" regarding so-called "misleading practices." CEI Br. at 48. Both assertions are false. The NSF investigation cleared Dr. Mann of all allegations of misconduct regarding Dr. Mann and the quote from the University of East Anglia report that the CEI Defendants cherry-pick for the purposes of stating that there are questions as to whether Dr. Mann's research is "misleading" do not refer to Dr. Mann's work. *See infra* p. 13.

In addition to the numerous investigations discussed by the Court, there is other proof of actual malice. This proof involves evidence of Defendants' motive behind their defamations. In this regard, it should be noted that actual malice can be proven through circumstantial evidence, *see Levesque*, 560 F.3d at 90 ("Because direct evidence of actual malice is rare, it may be proved through inference, and circumstantial evidence"), and one type of oft-used circumstantial evidence of malice is the defendant's motive to defame. *See Biro v. Condé Nast*, 963 F. Supp. 2d

255, 277 (S.D.N.Y. 2013) (one of the circumstances probative of actual malice is when "the defendant has a motive for defaming the plaintiff"). In this case, there is ample evidence that the defendants had a specific and direct motive to accuse Dr. Mann of being a fraud. Why? Because those aspersions furthered their political agenda of casting doubt on the entire concept of global warming and climate change. Defendants have opposed the science behind global warming and the environmental efforts to address global warming at every turn. Defendants know that if people thought that Dr. Mann and his colleagues were frauds, they would be more inclined to believe that global warming was a hoax. And here the proof is in the pudding. After the release of the hacked emails in 2009, public opinion polls showed a sharp drop in the percentage of respondents who believed that global warming was "real." Moreover, after Dr. Mann and his colleagues began to be exonerated, these percentages started to rise again. What better way to further their political agenda than by convincing the public that the hockey stick is fraudulent and that Dr. Mann committed scientific and academic misconduct? Defendants not only maliciously and recklessly defamed Dr. Mann, but that they did so to further their own political agendas.

C. The Superior Court Correctly Found That Dr. Mann Is Likely To Succeed On The Merits Of His Intentional Infliction Of Emotional Distress Claim

"'To succeed on the claim of intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress.'" *Minch v. District of Columbia*, 952 A.2d 929, 940 (D.C. 2008) (quoting *District of Columbia v. Thompson*, 570 A.2d 277, 289-90 (D.C. 1990)).

To meet the first element, a plaintiff must show that the alleged conduct is "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Kotsch v. District of Columbia*, 924 A.2d 1040, 1045-46 (D.C. 2007) (quoting Restatement (Second) of Torts § 46, cmt. D (1965)). Defendants'

false statement that Dr. Mann was the "Jerry Sandusky of climate science" is unquestionably extreme and outrageous—and the public response to the comparison and the fact that the CEI Defendants promptly retracted those statements provide compelling evidence of the outrageousness of the comparison. And certainly, the comparison of Dr. Mann to a convicted child molester is far more offensive than the conduct at issue in many other emotional distress cases. *See, e.g.. Muratore v. M/S Scotia Prince,* 845 F.2d 347, 349-50, 352-53 (1st Cir. 1988) (court found extreme and outrageous conduct where photographer repeatedly took plaintiff's picture over her objection, doctored her photos with a gorilla face and displayed them to other passengers and made offensive comments to plaintiff); *Moore v. Green*, 431 F.2d 584, 591 (9th Cir. 1970) (question of whether five letters sent by attorney to former client containing "barrage of offensive and insulting remarks" were outrageous was "properly for the jury"); *Kolegas v. Heftel Broad. Corp.*, 607 N.E.2d 201, 212 (Ill. 1992) (radio host's statements that plaintiff's family was hideous and deformed were extreme and outrageous giving rise to claim for emotional distress).

Dr. Mann also easily satisfies the second and third elements of his intentional infliction of emotional distress claim. The Complaint asserts that Dr. Mann has suffered extreme emotional distress for many months as a result of Defendants' statements, an assertion that is more than just plausible under the circumstances of the Sandusky matter. The types of emotional distress required for an intentional infliction of emotional distress claim, are often far less. *See* Restatement 2d Torts § 46 (1965) (the types of emotional distress required for an intentional infliction of emotional distress claim include "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea"). Finally, there is no question that the publishing of Defendants' statements was the actual and proximate cause of Dr. Mann's emotional distress. Accordingly, Dr. Mann established a likelihood of prevailing on his intentional infliction of emotional distress claim.

D. National Review Is Liable For Steyn's Statements

For the first time in this lawsuit, National Review argues that Section 230 of the Communications Decency Act of 1996 shields it from liability from statements that its own "Happy Warrior,"[67] Mark Steyn, posted on National Review's website. Because National Review did not raise this issue below, this Court need not even consider Section 230.

1. National Review Failed To Raise With The Superior Court That It Was Immune From Suit Under Section 230 of the Communications Decency Act

This court, and appellate courts generally, consistently refuse to consider arguments made for the first time on appeal. *Hessey v. Burden*, 615 A.2d at 581 (citations omitted). Only in "exceptional circumstances, where injustice might otherwise result," should an appellate court consider an issue not raised in the trial court. *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1085. There are no exceptional circumstances here. National Review has had ample opportunity over the course of this lawsuit—including two motions to dismiss and a motion for reconsideration—to argue that it is not be liable for Steyn's Football and Hockey blog post. This court should not consider this new argument, made for the first time after almost two years of litigation.

2. The CDA Does Not Provide Immunity For National Review

Even if National Review had properly raised its CDA defense below, it would still fail. The CDA was enacted to provide immunity for companies that serve as intermediaries for other parties' potentially injurious messages, not to shield content providers from liability for defamatory speech created by its agents and endorsed authors. *See Chi. Lawyers' Comm. for Civ. Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 689 (N.D. Ill. 2006) (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31(4th Cir. 1997)). Immunity for an intermediary interactive computer service provider under Section 230 is limited to content provided by an independent information content provider for which the intermediary had no role in creating,

[67] *See* Steyn's biography from National Review's website (noting that Steyn "serves as National Review's Happy Warrior"), available at: http://www.nationalreview.com/author/1832/bio.

developing, or transforming that content. *See, e.g., HyCite Corp. v. BadBusinessBureau.com (RipOff Report/Ed Magedson/XCENTRIC Ventures LLC)*, 418 F. Supp. 2d 1142 (D. Ariz. 2005); *Kruska v. Perverted Justice Found. Incorporated.Org*, No. CV–08–00054, 2011 WL 1260224, at *4 (D. Ariz. Apr. 5, 2011).

The critical inquiry for Section 230 immunity is whether the defendants merely published information provided by a third-party or had any hand in creating or developing any of the information posted as an information content provider. *Doctor's Assocs. v. QIP Holder LLC*, No. 3:06–cv–1710, 2010 WL 669870, at *23 (D. Conn. Feb. 19, 2010). In this inquiry, courts generally look to the defendant's relationship with the author of the content and the defendant's relationship to the content itself. *See* David Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 Loy. L.A. L. Rev. 373, 457 (2010) ("In making this determination, courts have focused on both the defendant's relationship with the third-party source and the defendant's interaction with the content itself."). In assessing both National Review's relationship to Steyn and National Review's interaction with the defamatory content, National Review does not qualify for Section 230 immunity under the CDA.

a. National Review Endorsed Steyn As A National Review Online Author, Rather Than A Third-Party Commenter

Section 230 applies only when "another information content provider" creates the tortious content at issue. 47 U.S.C. § 230(c)(1). The CDA does not immunize a computer service if it "also functions as an information content provider" for the statement or publication at issue. *MCW, Inc. v. badbusinessbureau.com(RipOff Report/Ed Magedson/XCENTRIC Ventures LLC)*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *17 (N.D. Tex. Apr. 19, 2004).

In support of its claim that Section 230 applies, National Review relies on *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.C. Cir. 1998) and *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014), both of which are distinguishable from this case. In *Drudge*, AOL was granted immunity under Section 230 for a defamatory Drudge Report article written by Matt Drudge, where AOL

and Drudge entered into a license agreement allowing AOL to post Drudge Report blog articles on the AOL subscriber homepage. In *Zuckerberg*, Larry Klayman claimed that Facebook's delay in removing an anti-Semitic third-party Facebook page constituted intentional assault and negligence, but the circuit court upheld the trial court's dismissal of the case due to Facebook's Section 230 immunity.

In *Drudge*, Matt Drudge was an independent blogger responsible for the creation and publication of articles for the blog *The Drudge Report*. 992 F. Supp. at 47. Although AOL contracted with Drudge to link to *The Drudge Report* articles on the AOL homepage, Drudge was not an employee or agent of AOL, did not write articles under an AOL blog banner, and did not cease distribution or publication of *The Drudge Report* as its own independent entity separate from AOL, including publication of the articles licensed to AOL for reprint. *Id.* The court recognized that "there is no evidence to support the view ... that Drudge is or was an employee or agent of AOL," but the court and the parties insinuated that Section 230 would not immunize AOL if Drudge were an employee or agent of AOL. *Id.* at 50; *see also* Eric M.D. Zion, *Protecting the E-Marketplace of Ideas by Protecting Employers: Immunity for Employers Under Section 230 of the Communications Decency Act*, 54 Fed. Comm. L.J. 493, 507 (2002). In *Zuckerberg*, the complaint acknowledges that the content at issue was entirely provided by independent third-party users and the alleged harm perpetrated by Facebook was in "allowing" the pages to exist. 753 F.3d at 1358.

Here, National Review is not an intermediary posting links to articles on a separate blog similar to AOL posting links to The Drudge Report; it is the owner and sole publisher of the blog at issue. Mark Steyn is not an independent third-party commenter; National Review provides him with a detailed author page where Steyn is described as "National Review's Happy Warrior" with links to hundreds of articles and posts written for National Review spanning back to 2001, including the defamatory article at issue in this case. National Review attempts to paint Steyn as a third-party participant in an online forum where he logged on with personal credentials to independently comment on a National Review forum. However, unlike general third-party

commenters, National Review lists Steyn as a National Review Online author, grants him administrative access to The Corner to post main articles like the defamatory post in question here, links all of Steyn's articles to an author page with a full archive and RSS author feed for his National Review articles written since 2001, and includes Steyn as one of only 25 authors with full biographies and author photographs for National Review Online. National Review represents Steyn as a National Review Online author – not as an independent third-party commenter – and is precluded from Section 230 immunity.

b. National Review's role in developing and endorsing the defamatory content precludes Section 230 immunity

Even if the relationship between National Review and Steyn does not bar Section 230 immunity, National Review's role in developing and endorsing Steyn's defamatory message prevents Section 230 immunity. "Section 230 [does] not bar claims premised on service provider's creation of its own comments and other defamatory content to accompany third-party postings on its website." *Doe v. Friendfinder Network*, 540 F. Supp. 2d 288, 297 (D.N.H. 2008) (citing *HyCite Corp.*,418 F. Supp. 2d 1142). In *Hycite Corp.*, a website moderator posted material that encouraged and endorsed defamatory postings by third parties. 418 F. Supp. 2d at 1149. The website was barred from claiming Section 230 immunity because it was acting in concert with the third-party posters. *Id.* Similarly, in *MCW, Inc.*, a defendant website operator that actively encouraged consumers to gather and post specific information, negative reviews of businesses, which the court determined was "participating in the process of developing information" for the defamatory content. 2004 WL 833595, at *10. Here, National Review encouraged and endorsed Steyn's defamatory comments through subsequent posts on National Review's website by National Review editors.[68]

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

[68] *See*, R. Lowry, "Get Lost: My response to Michael Mann," (JA 94-95);

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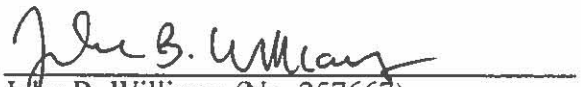
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties consented in writing to electronic service under Rule 25(c)(1)(D), and on September 3, 2014, I caused a copy of the foregoing brief to be served by e-mail on the following:

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