IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

MAINE LOBSTER, INC., et al., *Plaintiffs,* v. MONTEREY BAY AQUARIUM FOUNDATION, *Defendant.*	Civ. Action No. 2:23-cv-00129-JAW

BRIEF OF PROPOSED AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, NEW ENGLAND FIRST AMENDMENT COALITION, MAINE CENTER FOR PUBLIC INTEREST REPORTING, AND MAINE PRO CHAPTER, SOCIETY FOR PROFESSIONAL JOURNALISTS IN SUPPORT OF DEFENDANT'S MOTION TO CERTIFY FOR INTERLOCUTORY APPEAL

Sigmund D. Schutz, Esq., #8549
Alexandra A. Harriman, Esq., #6172
Preti Flaherty
One City Center
Portland, ME 04101
Phone: 207-791-3000
sschutz@preti.com
aharriman@preti.com

Counsel for Proposed Amici Curiae

Lisa Zycherman*
Mara Gassmann*
Abigail Sintim*
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Ste. 1020
Washington, D.C. 20005
Phone: 202-795-9300
lzycherman@rcfp.org

**Of Counsel*

INTRODUCTION

This lawsuit arises out of a 64-page report by the Monterey Bay Aquarium Seafood Watch about American Lobster in the Northwest Atlantic and the fishing industry's impact on endangered right whales (the "Report"). In writing on this matter of public concern, Defendant Monterey Bay Aquarium Foundation ("MBAF") did not single out Plaintiffs—three commercial seafood companies and two trade associations —for criticism, but rather discussed and opined on data and the industry practices of over 5,600 lobster fishermen.

Proposed amici curiae ("amici") write in support of MBAF's motion pursuant to 28 U.S.C. §1292(b) to address the Court's novel interpretation of the "of and concerning" requirement and opinion defense. By allowing Plaintiffs' claims to proceed, the decision contravenes the rule against group libel. It also introduces a new overly restrictive approach to the constitutional protection for statements that disclose the predicate facts for a defendant's conclusions, a development particularly concerning where the content involves scientific research and related public policy. Because the protections against group libel and for opinion enable public interest journalism, the decision raises significant concerns for the press, and without immediate appellate review, risks chilling swaths of reporting and commentary.

ARGUMENT

I. The unprecedented application of the group libel rule threatens news reporting.

As the Court correctly recognized, for an allegedly libelous statement "to be actionable, it must be 'of or concerning the plaintiff.'" *Hudson v. Guy Gannett Broad. Co.*, 521 A.2d 714, 716 (Me. 1987) (quoting *Robinson v. Guy Gannett Publ'g Co.*, 297 F. Supp. 722, 725 (D. Me. 1969)) (*see* Order on Mot. to Dismiss at 108 (ECF No. 56) [hereinafter "Order"]). Put simply, the allegedly "defamatory words must refer to 'some ascertained or ascertainable person, and that

person must be the plaintiff.'" *E.g.*, *Serv. Parking Corp. v. Wash. Times Co.*, 92 F.2d 502, 504 (D.C. Cir. 1937) (citations omitted).[1]

From this it follows that "[d]efamation of a large group gives rise to no civil action on the part of an individual member of the group unless he [] can show special application of the defamatory matter to [himself]." *Sullivan v. Chester Water Auth.*, No. 2:22-CV-00147-JDL, 2022 WL 2901068, at *13 (D. Me. July 22, 2022). This rule against group libel evolved from early common law, *see Sumner v. Buel*, 12 Johns. 475, 477 (N.Y. Sup. Ct. 1815) (recognizing that criticism of an "order of men, is no libel," but instead "must descend to particulars and individuals, to make it a libel"), and has remained the prevailing standard, relied upon by publishers, for centuries, *see, e.g.*, *Alexis v. Dist. of Columbia*, 77 F. Supp. 2d 35, 40 (D.D.C. 1999) (explaining that claim is insufficient if allegedly defamatory statement "is used broadly concerning the members of a large class or group."); *Arcand v. Evening Call Publ'g Co.*, 567 F.2d 1163, 1164 (1st Cir. 1977) (same); Restatement (Second) of Torts § 564A (1977) (same).

Application of the rule here demands appellate review. The Court conceded there were 5,600 individuals "in Maine alone" who "fish within the Gulf of Maine or Georges Bank"—a class "not so small that the Statements [in the Report] can reasonably be understood to refer to the five individual Plaintiffs." Order at 107–08. It nevertheless held that the Report—despite that it did not single out any Plaintiff—"implicated all lobstermen who fish within the Gulf of Maine or Georges Bank," and that Plaintiffs thus satisfied the "of and concerning" requirement.

[1] In Maine, this requirement is not only a common law prerequisite but at least with regards to speech involving public figures, a constitutional requirement. *Hudson*, 521 A.2d at 716 n.5 ("At least in public figure defamation cases[,] the [F]irst [A]mendment . . . requires that a publication . . . must be 'of and concerning' the plaintiff.'" (citing *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966))); *accord N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964) (claim over statements that were not "of and concerning" plaintiff were "constitutionally defective").

Id. at 108. This conclusion was misguided. *See, e.g., Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1016 (3d Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995) (statements that retailers were "pirates" not of and concerning plaintiff-retailers where group of 25 was too "amorphous and ill-defined"); *Weatherhead v. Globe Int'l, Inc.*, 832 F.2d 1226, 1227 (10th Cir. 1987) (same, for statements about "America's Dog 'Death Camps'" challenged by 955 dog breeders); *Neiman-Marcus v. Lait*, 13 F.R.D. 311, 316 (S.D.N.Y. 1952) (same, for statement that "all" saleswomen employed by a Neiman-Marcus store were "call girls" where there were 382 saleswomen); *Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800 (Fla. Dist. Ct. App. 1997) (same, for ad claiming environmental damage from net fishing challenged by 436 fishermen).

Extension of the Restatement's "circumstances of publication" exception to the group libel doctrine here would mark a shift in the law. Order at 112; *see* Restatement (Second) of Torts § 564A(b). That exception "arises when the defamation, though made in group terms, is really a veiled reference to a specific group member." Comment, *Group Defamation and Individual Actions: A New Look at an Old Rule*, 71 Calif. L. Rev. 1532, 1535 (1983). Commentators and courts have described it as "merely a recognition that one who is individually defamed can sue even if the defamation is disguised as a group slur." *Id.* at 1536; *accord Church of Scientology of Cal. v. Flynn*, 744 F.2d 694, 697 n.5 (9th Cir. 1984). In other words, it must still make "particular reference," or "personal application," to the individual suing:

> Even when the group or class defamed is a large one, there may be circumstances that are known to the readers or hearers and which *give the words such a personal application to the individual* that he may be defamed as effectively as if he alone were named. Thus "All lawyers are shysters" may be defamatory as to an individual lawyer, when the words are uttered on an occasion when he is the only lawyer present and the context or the previous conversation *indicates that the speaker is making personal reference to him*.

Restatement (Second) of Torts § 564A, cmt. d (emphasis added). The Restatement further illustrates the principle by describing a situation in which a newspaper publishes a statement about

"all radio repairmen" soliciting customers by a particular method, but a particular individual is "the only radio repairman in the community who solicits business in this manner[.]" *Id*. illus. 5. In that situation, "readers of the newspaper thus reasonably understand that the article is intended to have personal reference to him." *Id*. This is not the circumstance here. MBAF did not refer to a group under circumstances that effectively made a veiled reference to the individual Plaintiffs. *See Weatherhead*, 832 F.2d at 1226 (no language or circumstances singled out plaintiffs among nearly 1,000 dog breeders). The circumstances-of-publication exception should not apply.

Importantly, there are practical policy reasons for "the limitations the concept of group libel imposes on actions for defamation," *Provisional Gov't of New Afrika v. ABC, Inc.*, 609 F. Supp. 104, 108 (D.D.C. 1985), by those connected to an industry or organization subject to scrutiny. Chief among these is "the social interest in free press discussion of matters of general concern." *Serv. Parking Corp.*, 92 F.2d at 505 (affirming directed verdict for newspaper where article discussed "downtown parking lots and their owners as a class" but did not identify particular ones); *Mich. United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 900 (W.D. Mich. 1980), *aff'd sub nom., Mich. United Conservation Clubs v. CBS News, A Div. of CBS, Inc.*, 665 F.2d 110 (6th Cir. 1981) (explaining that claims unconstrained by group libel rule would "seriously interfere with public discussion of issues, or groups, which are in the public eye" and "result in the public receiving less information about topics of general concern").[2] As one court put it, holding that statements about a public controversy "are of and concerning individuals prominent in the controversy would chill heated public debate into lukewarm pap." *Schuster v.*

[2] And as a practical matter, the larger the group of persons criticized, the less impact that criticism is likely to have on any one group member. *See* Rodney A. Smolla, *Law of Defamation* § 4:50 (2d ed.) (rule prevents claims when "disparagement is too diffuse to create a realistic likelihood of reputational injury to any individual member").

U.S. News & World Rep., Inc., 459 F. Supp. 973, 978 (D. Minn. 1978), *aff'd*, 602 F.2d 850 (8th Cir. 1979). The First Amendment "does not countenance such a deterrent to free speech." *Id.*

By rejecting libel claims on the basis of one's association with an allegedly defamed group, the law preserves "journalistic freedom" to "investigat[e] and report[] on matters of public interest." *Schuster*, 602 F.2d at 853. This has resulted in legal protection for many stories on matters of public concern, including those touching on the activities of companies, organizations, and even entire industries. *Id.* (group libel doctrine protects magazine reports on cancer drug controversy)*; O'Brien v. Williamson Daily News*, 735 F. Supp. 218, 222 (E.D. Ky. 1990), *aff'd*, 931 F.2d 893 (6th Cir. 1991) (same, for wire service report on high school teachers allegedly having affairs with students, when there were between 27-35 total teachers, "too large [a group]" to bring libel claim); *Riss & Co. v. Ass'n of Am. R.R.s*, 187 F. Supp. 323, 325 (D.D.C 1960) (same, for newspaper reports on illegal cargo carried by railroads).[3] Expanding the universe of individuals able to sue over such speech threatens essential reporting.[4]

---

[3] Some reporting might never have been published were libel plaintiffs able to maintain suit due to their mere association with the subject matter of a story. *See, e.g.*, Emily Bader, *At the root of an epidemic in Maine: a prescription pad*, Sun Journal (Apr. 2022), https://www.sunjournal.com/2022/04/10/legacy-of-pain-part-1-at-the-root-of-an-epidemic-in-maine-a-prescription-pad/ (reporting on web of persons, companies, and interests underlying opioid crisis); Juliet Eilperin, *Facing Catastrophic Climate Change, They Still Can't Quit Big Oil*, Wash. Post (Dec. 13, 2019), https://www.washingtonpost.com/graphics/2019/national/climate-environment/climate-change-alaska/ (Pulitzer Prize-winning story on the conflicting needs and corporate interests in Alaska's coastal communities); Kay Neufeld, *Freight railroads police themselves and inspect their own tracks. Some say a disaster is inevitable*, Press Herald (Oct. 8, 2023), https://www.pressherald.com/2023/10/08/freight-railroads-police-themselves-and-inspect-their-own-tracks-some-say-a-disaster-is-inevitable/ (reporting on those involved in rail system, unreported accidents, and secret transport of hazardous chemicals).

[4] The Court also held that the statements in the Report are of and concerning Plaintiffs because they "were not merely informational but included a call to action," Order at 110, but speech is not entitled to lesser protection because it expresses a viewpoint, *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

The Court's decision on this question is a notable departure in an important area of the law, with the potential to impact speech, and should be certified for review.

II. Commentary on a matter of scientific debate should be non-actionable opinion.

The decision, if not reviewed and reversed, will impose an especially profound chill on commentary about important scientific and public policy issues. Under the First Amendment—separate and apart from the requirements of Maine law—opinion doctrine protects not only pure opinion but also speech "'when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions.'" *Riley v. Harr*, 292 F.3d 282, 289 (1st Cir. 2002) (quoting *Partington v. Bugliosi*, 56 F.3d 1147, 1156–57 (9th Cir. 1995)). This constitutional standard safeguards commentary that relies on and discloses predicate facts to form a conclusion. *See id.* ("[T]hose statements are generally protected by the First Amendment."); *Piccone v. Bartels*, 785 F.3d 766, 773 (1st Cir. 2015) (affirming defendant's statements "were not actionable under defamation law" where he had "fully disclosed the non-defamatory facts" underlying them and audience could form "own impression"). This is consistent with the rule that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.'" *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 727 (1st Cir. 1992) (quoting *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)). The Court's interpretation of First Circuit law as to the required extent of disclosure, and the right to make editorial decisions, creates an open question in the law, which will create uncertainty for the press and other speakers. Order at 118.

Notably, these legal protections are particularly vital where the public policy under discussion involves a complex scientific issue, which courts have explained is properly left to scientists and concerned citizens to test, debate, and resolve—not the judicial system in the

context of a defamation action. *See ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 496–97 (2d Cir. 2013) (affirming dismissal of libel case "involving 'matters of argument,'" observing courts "have been reluctant to recognize causes of action grounded on statements of fact that are best evaluated by an informed reader"); *Spelson v. CBS, Inc.*, 581 F. Supp. 1195, 1202–03 (N.D. Ill. 1984), *aff'd*, 757 F.2d 1291 (7th Cir. 1985) (entering judgment for libel defendant because "[r]egardless of the merit of [the] opinion," "underlying subject matter, medical science, is at best an inexact science" of "numerous and widely varied approaches and philosophies" and "much debate and disagreement"; it is a "view which [defendant] is entitled to hold and to expound"); *Arthur v. Offit*, No. 01:09-cv-1398, 2010 WL 883745, at *6 (E.D. Va. Mar. 10, 2010) (dismissing claim by vaccine skeptic against critic because "[c]ourts have a justifiable reticence about venturing into the thicket of scientific debate, especially in the defamation context.").[5]

The Seafood Watch program "evaluates the environmental sustainability of wildcaught and farmed seafood" and publishes "assessments" on the environmental impacts of seafood

[5] *See also, e.g., Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994) ("Scientific controversies must be settled by the methods of science rather than by the methods of litigation. . . . More papers, more discussion, better data, and more satisfactory models—not larger awards of damages—mark the path toward superior understanding of the world around us."); *Auvil v. CBS "60 Minutes"*, 836 F. Supp. 740, 742 (E.D. Wash. 1993) (entering judgment for defendant because assertions that a chemical was a carcinogen could not be properly resolved as true or false in court), *aff'd*, 67 F.3d 816 (9th Cir. 1995); *Freyd v. Whitfield*, 972 F. Supp. 940, 945–46 (D. Md. 1997) (holding that psychologist's statement endorsing repressed memory theory was protected opinion because "existence of repressed memories remains hotly contested" and "cannot . . . be objectively proven false or verified as true"); *Immuno AG. v. Moor-Jankowski*, 7567 N.E.2d 1270, 1271 (N.Y. 1991) (affirming dismissal of libel action over letter to editor in scientific journal because discussion of animal experimentation was protected opinion); *Oxycal Lab'ys, Inc. v. Jeffers*, 909 F. Supp. 719, 724 (S.D. Cal. 1995) ("The Court cannot inquiry into the validity of [author's scientific theories in challenged book regarding causes of cancer], nor should it." (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (academic freedom is "a special concern of the First Amendment"))).

consumption and sustainability "recommendations" for consumers and businesses. Compl. Ex. 2. The Report contains MBAF's commentary and recommendations based on its scientific analysis, and it sets forth the facts underlying its opinions as to the sustainability of lobster catch. Under controlling First Amendment law, the Report is non-actionable opinion and this issue of constitutional law—critical to all publishers that seek to inform the public regarding matters of scientific debate—merits certification for interlocutory review.

CONCLUSION

For the foregoing reasons, and those set forth in Defendant's Motion, amici respectfully urge the Court to certify these issues pursuant to Section 1292(b) for interlocutory appeal.

DATED: March 6, 2025

Respectfully submitted,

/s/ Sigmund D. Schutz

Sigmund D. Schutz, Esq., #8549
Alexandra A. Harriman, Esq., #6172
Preti Flaherty
One City Center
Portland, ME 04101
Phone: 207-791-3000
sschutz@preti.com
aharriman@preti.com

Counsel for Proposed amici curiae

Lisa Zycherman*
Mara Gassmann*
Abigail Sintim*
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Ste. 1020
Washington, D.C. 20005
Phone: 202-795-9300
lzycherman@rcfp.org

**Of Counsel*