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VIA E-MAIL

Marc E. Kasowitz
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Dear Mr. Kasowitz:

We represent the Stanford faculty who issued a “Dear Colleague” letter on September 9, 2020 concerning the falsehoods and misrepresentations of science recently fostered by Dr. Scott Atlas. We write in response to your letter dated September 16, 2020, which seeks to distort the public record—and to chill speech by doctors, scientists, and public health experts on a matter of pressing national concern—by leveling a baseless accusation that our clients defamed Dr. Atlas.

For starters, we are more than a little surprised that Dr. Atlas has chosen to waste his time on this matter. He is a member of the White House Coronavirus Task Force and an advisor to President Trump. The decisions that he is involved in making are literally life and death matters for the people of this nation. If he cannot tolerate science-based criticism of his opinions and statements concerning this public health crisis, then he has no business advising anybody, let alone the President of the United States. More fundamentally, it is disappointing that Dr. Atlas would rather spend his time scheming with private lawyers, cooking up meritless threats against scientists, than working with public officials to slow the spread of a deadly virus.

And make no mistake: his threats are meritless.

That is true for many reasons. For instance, it is obviously a matter of opinion—shielded by the First Amendment of the United States Constitution—whether and how Dr. Atlas has “*fostered*” the spread of falsehoods and misrepresentations of science (emphasis added). Our clients’ letter expresses their belief that “many of [Dr. Atlas’s] opinions and statements run counter to established science,” that “commitment to science-based decision-making is a fundamental obligation of public health policy,” and that “the policy response to this pandemic must reinforce the science.” Their statement that Dr. Atlas has “fostered” failures to abide by these principles

rests not only on his public statements (detailed below), but also on his personal involvement in a policy and political process at the White House that has been widely criticized for misstating scientific facts and departing from sound science-based decision making. In light of all that, our clients' statements are protected as opinions and are not actionable as a matter of law.

Failing to recognize that point, you suggest that our clients defamed Dr. Atlas because "the views he has expressed are consistent with the five statements" described in their letter. Strikingly, you do not say that he in fact agrees with any of those five statements. Nor do you say that he has ever publicly adopted or articulated as his own the prevailing scientific understanding set forth in those five statements. Instead, you claim that all of his public remarks have been "consistent" with them, and that our clients "maliciously defame[d]" Dr. Atlas in suggesting otherwise. But even accepting this faulty framing of the issue, you seem to misapprehend the commonly understood meaning of the word "consistent." Even a cursory review of Dr. Atlas's record since the pandemic began reveals a host of statements that are plainly inconsistent (or that can at least be reasonably interpreted as inconsistent) with the five statements in our clients' letter:

Statement #1: "The use of face masks, social distancing, handwashing and hygiene have been shown to substantially reduce the spread of Covid-19. Crowded indoor spaces are settings that significantly increase the risk of community spread of SARS-CoV-2."

Examples of Relevant Statements by Dr. Atlas:

- "Much of the stuff on masks is really not good science at all."¹
- "I'm going to say this because very few people even talk about it, this idea of masks being necessary, particularly for children, is completely irrational."²
- "You know that there's no real good science on general population widespread in all circumstances wearing masks."³
- "The reality is that there's certain data that's very controversial about masks."⁴
- "It is not logical that otherwise healthy adults, especially younger age groups, should be isolated or maintain a six-foot spacing from each other."⁵
- "I could see requiring restaurants to put a guideline in the door that says if you're over 65 and if you are diabetic, there may be a risk for being in a small space with nearby other people, but that's very different from saying to a restaurant must have six-foot spacing, a restaurant must have mask. I think this is a very important topic. The science behind six-foot spacing is embarrassingly weak."⁶

Statement #2: "Transmission of SARS-CoV-2 frequently occurs from asymptomatic people, including children and young adults, to family members and others. Therefore, testing

¹ Tucker Carlson Tonight, *Should We Be Wearing Masks Everywhere, Even at Home?*, Fox News (Aug. 12, 2020).

² Policy@McCombs, *Scott Atlas – COVID-19 Interview* (June 26, 2020).

³ Elizabeth Thomas, *The New Doctor in Trump's Pandemic Response Briefings: Scott Atlas Agrees with Him on Masks, Opening Schools*, ABC (Aug. 14, 2020).

⁴ Noah Weiland et al., *A New Coronavirus Adviser Roils the White House with Unorthodox Ideas*, N.Y. Times (Sept. 2, 2020).

⁵ Scott Atlas, *How to Reopen Society Using Medical Science and Logic*, The Hill (May 3, 2020).

⁶ Peter Robinson, *The Doctor Is In: Scott Atlas and The Efficacy of Lockdowns, Social Distancing, and Closings*, The Hoover Institution (June 23, 2020).

asymptomatic individuals, especially those with probable Covid-19 exposure is important to break the chain of ongoing transmission.”

Examples of Relevant Statements by Dr. Atlas:

- “The data shows it’s rare or very rare to transmit the disease if you are asymptomatic.”⁷
- “It is not common, in fact, it’s rare to get an infection transmitted from an asymptomatic person.”⁸
- “[W]hen you start introducing closure of schools because people have positive, asymptomatic tests, that’s sort of not the purpose of testing.”⁹

Statement #3: “Children of all ages can be infected with SARS-CoV-2. While infection is less common in children than in adults, serious short-term and long-term consequences of Covid-19 are increasingly described in children and young people.”

Examples of Relevant Statements by Dr. Atlas:

- “Children have nearly no risk of serious illness from COVID-19.”¹⁰
- “It’s not just that children are not at risk at all from this disease. They also do not even transmit the disease.”¹¹
- “Children don’t have any kind of problem with [COVID] from the data.”¹²
- “We know that the risk of the disease is extremely low for children, even less than that of seasonal flu.”¹³
- “If there’s no risk to children, no significant risk I should say, then what are you protecting them from? If kids get the infection in this school that’s still okay.”¹⁴

Statements #4 and #5: “The pandemic will be controlled when a large proportion of a population has developed immunity (referred to as herd immunity) and that the safest path to herd immunity is through deployment of rigorously evaluated, effective vaccines that have been approved by regulatory agencies. In contrast, encouraging herd immunity through unchecked community transmission is not a safe public health strategy. In fact, this approach would do the opposite, causing a significant increase in preventable cases, suffering and deaths, especially among vulnerable populations, such as older individuals and essential workers.”

⁷ Interview, *Dr. Scott Atlas Confirms WHO Statement that Asymptomatic Spread is VERY RARE!!*, Good Morning San Diego (Aug. 28, 2020).

⁸ *Id.*

⁹ Jennifer Cabrera, *Dr. Scott Atlas Joins Desantis for Press Conference: “We Are the Only Nation Among Our Peer Nations That Are Hysterical About Opening Schools”*, Alachua Chronicle (August 31, 2020).

¹⁰ Scott Atlas, *How to Reopen Society Using Medical Science and Logic*, The Hill (May 3, 2020).

¹¹ Peter Robinson, *The Doctor Is In: Scott Atlas and The Efficacy of Lockdowns, Social Distancing, and Closings*, The Hoover Institution (June 23, 2020).

¹² Interview, *Dr. Scott Atlas Confirms WHO Statement that Asymptomatic Spread is VERY RARE!!*, Good Morning San Diego (Aug. 28, 2020).

¹³ Elizabeth Thomas, *The New Doctor in Trump’s Pandemic Response Briefings: Scott Atlas Agrees With Him on Masks, Opening Schools*, ABC (Aug. 14, 2020).

¹⁴ Scott Thuman, *One on One with Dr. Scott Atlas*, WJLA (Aug. 13, 2020).

Examples of Relevant Statements by Dr. Atlas:

- “We can allow a lot of people to get infected. Those who are not at risk to die or have a serious hospital-requiring illness, we should be fine with letting them get infected, generating immunity on their own, and the more immunity in the community, the better we can eradicate the threat of the virus.”¹⁵
- “Low-risk groups getting the infection is not a problem. In fact, it’s a positive.”¹⁶
- “The reality is that when a population has enough people who have had the infection, and since these people don’t have a problem with the infection, that’s not a problem. That’s not a bad thing.”¹⁷
- “When you isolate everyone, including all the healthy people, you’re prolonging the problem because you’re preventing population immunity.”¹⁸
- “Avoid unnecessary requirements for spacing of customers, though — it is not logical that otherwise healthy adults, especially younger age groups, should be isolated or maintain a six-foot spacing from each other. If infection is still prevalent, socializing among these low-risk groups represents the opportunity for developing widespread immunity and eradicating the threat.”¹⁹
- “In fact, infected people without severe illness are the immediately available vehicle for establishing widespread immunity. By transmitting the virus to others in the low-risk group who then generate antibodies, they block the network of pathways toward the most vulnerable people, ultimately ending the threat. Extending whole-population isolation would directly prevent that widespread immunity from developing.”²⁰
- “We know from decades of medical science that infection itself allows people to generate an immune response — antibodies — so that the infection is controlled throughout the population by ‘herd immunity.’”²¹

To be clear, the foregoing is not meant to be a comprehensive list of relevant statements by Dr. Atlas. It merely reflects some of his many statements actually (or at least apparently) at odds with the accepted scientific statements set forth in our clients’ letter. Indeed, it has been widely reported that Dr. Atlas openly espouses beliefs contrary to those that you now claim his statements have always been “consistent with.” *E.g.*, Noah Weiland et al., *A New Coronavirus Adviser Roils the White House With Unorthodox Ideas*, N.Y. Times (Sept. 2, 2020) (“Dr. Scott W. Atlas has argued that the science of mask wearing is uncertain, that children cannot pass on the coronavirus and that the role of the government is not to stamp out the virus but to protect its most vulnerable citizens as Covid-19 takes its course.”); Yasmeen Abutaleb & Josh Dawsey, *New*

¹⁵ Geoff Brumfiel & Tamara Keith, *President Trump’s New COVID-19 Adviser Is Making Public Health Experts Nervous*, NPR (Sept. 4, 2020).

¹⁶ Noah Weiland et al., *A New Coronavirus Adviser Roils the White House with Unorthodox Ideas*, N.Y. Times (Sept. 2, 2020). In this article, Dr. David Dowdy, an infectious disease epidemiologist at Johns Hopkins University, responds that “the appeal of the concept of herd immunity is that it suggests we can simply go about doing our regular daily lives and the coronavirus pandemic will take care of itself,” adding that areas that adhered to this approach “had more cases and more deaths.”

¹⁷ *Id.* In this article, former CDC director Dr. Tom Frieden is quoted as stating, “Trying to get to herd immunity other than with a vaccine isn’t a strategy. It’s a catastrophe.”

¹⁸ *Id.*

¹⁹ Scott Atlas, *How to Reopen Society Using Medical Science and Logic*, The Hill (May 3, 2020).

²⁰ *Id.*

²¹ *Id.*

Trump Pandemic Adviser Pushes Controversial ‘Herd Immunity’ Strategy, Worrying Public Health Officials, Washington Post (August 31, 2020) (“Atlas has argued that the country should be testing only people with symptoms, despite the fact that asymptomatic carriers spread the virus.”). Moreover, applying its established content standards, YouTube recently removed a video involving Dr. Atlas for “disputing existing international and local health authority guidance by falsely stating that a certain age group cannot transmit the virus.”²²

And those are not the only statements Dr. Atlas has made that give credence to the concerns raised in our clients’ letter. On March 31, 2020, he claimed that “all reasonable numbers point to the fact that our number of severe outcomes will be peaking in about three weeks or so.”²³ On June 23, he asserted that “no one knows if COVID-19 will come back in the fall” (and in that same interview he implied that it likely would not).²⁴ On July 30, 2020, he argued in favor of reopening schools without masks, thorough sanitation practices, or social distancing measures.²⁵ Each and every one of these statements, like so many others he has made, defied scientific consensus.

In addition, Dr. Atlas appears to have played a key role in formulating a recommendation that asymptomatic people not be tested. As the *New York Times* reported yesterday, “A heavily criticized recommendation from the Centers for Disease Control and Prevention last month about who should be tested for the coronavirus was not written by C.D.C. scientists and was posted to the agency’s website despite their serious objections . . . [T]he draft went through about 20 versions, with comments from Dr. Redfield; top members of the White House task force, Dr. Anthony Fauci and Dr. Deborah Birx; and Dr. Scott Atlas, President Trump’s adviser on the coronavirus.”²⁶ Given Dr. Atlas’s prior statements, it takes no great leap to infer the position he took on testing asymptomatic individuals. More importantly, to the extent our clients’ disagreements on this point really are “with the entire Coronavirus Task Force”—as you claim in your letter—Dr. Atlas is part of that group. There is nothing defamatory about criticizing him by name for the statements he has made or the policy positions he owns by virtue of his role in the White House as an advisor to President Trump. If anything, the power Dr. Atlas now wields makes it all the more vital that actual experts on these issues—and not a radiologist who flattered President Trump on Fox News—speak freely to the public about scientific truth and fact-based decisionmaking.

The points that we’ve set forth above explain why you have no valid cause of action against our clients: among other reasons, their claim that Dr. Atlas “fostered” error and misunderstanding is shielded as a statement of opinion; their letter otherwise lacks any defamatory meaning or implication; and the discrete parts of their letter that you try to cast as false are, to the contrary, true. But there is yet another reason why your position fails: there is no basis for your suggestion that our clients made any of their assertedly defamatory statements with actual malice. Based on Dr. Atlas’s many public statements, his well-known involvement in the White House Coronavirus Task Force, our clients’ own personal knowledge and expertise, and reporting in reputable news

²² Lateshia Beachum & Kim Bellware, *Youtube Removed Trump Adviser’s Video for Misinformation. He Compared it to ‘Third World’ Censorship.*, Washington Post (Sept. 17, 2020).

²³ Matt Shuham, *Five Points on Scott Atlas, Trump’s Favorite New COVID Source*, TPM (Aug. 13, 2020).

²⁴ Peter Robinson, *The Doctor Is In: Scott Atlas and The Efficacy of Lockdowns, Social Distancing, and Closings*, The Hoover Institution (June 23, 2020).

²⁵ See Paul Peterson & Scott Atlas, *Fear First, Education Last?*, The Hill (July 30, 2020).

²⁶ Apoorva Mandavilli, *C.D.C. Testing Guidance Was Published Against Scientists’ Objections*, N.Y. Times (Sept. 17, 2020).

sources on Dr. Atlas's policy positions and White House role, even if it were to turn out that some statement in our clients' letter were mistaken, it is patently spurious to suggest that our clients either knew they were lying or, as you put it, acted without "regard for the truth." If anything, Mr. Kasowitz, it seems as though *you* are the one who forgot to research the law or facts before sending a letter.

Our clients have no intention of withdrawing their "Dear Colleague" letter or complying with your other demands. They will not be intimidated by a government official who threatens his critics with the burden and expense of litigation, rather than answer on the merits or uphold established scientific principles in his statements and official duties. We reserve all rights, concede none of the legal or factual propositions set forth in your September 16, 2020 letter, and warn you against proceeding any further: your arguments are vacuous, and your letter seems to contemplate the very kind of strategic lawsuit against public participation forbidden by law.

The people of this nation are looking to the White House Coronavirus Task Force to stop the spread of a disease that has already killed far too many of us—nearly 200,000 to date. We respectfully suggest that Dr. Atlas focus more on doing his job successfully and less on attacking our nation's scientists.

Respectfully submitted,



Roberta A. Kaplan, Esq.



Joshua Matz, Esq.