Nos. 18-1451 and 18-1477

In The Supreme Court of the United States

NATIONAL REVIEW, INC.,

Petitioner,

v.

MICHAEL E. MANN,

Respondent.

COMPETITIVE ENTERPRISE INSTITUTE, *et al.*,

Petitioners,

v.

MICHAEL E. MANN,

Respondent.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

CONSOLIDATED BRIEF OF RESPONDENT IN OPPOSITION TO THE CERTIORARI PETITIONS

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QUESTIONS PRESENTED

1. Should this Court accept jurisdiction of this interlocutory decision which addresses a state law issue: whether the evidence presented below was sufficient to state a claim under District of Columbia law?

2. Should this Court accept jurisdiction of this interlocutory decision which was made at a very early stage of the proceeding, and prior to any discovery or development of a factual record?

3. Should this Court accept jurisdiction of this matter when its resolution would not preclude further litigation below, contrary to long-standing precedent? *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 611 (1892).

4. Should this Court accept jurisdiction when the decision below does not "erode federal policy," *Cox v. Cohn*, 420 U.S. 469 (1975), and in particular, when the court below applied the law precisely as the petitioners assert it was required to do: by determining for itself, and *as a matter of law*, that the defamatory statements were "verifiable" and "capable of being proven true or false"?

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INTRODUCTION

The petitioners in this matter accused a distinguished scientist, Michael E. Mann, of fraud, data manipulation, academic misconduct, and scientific misconduct. They compared him to a convicted pedophile, Jerry Sandusky, because "instead of molesting children, he has molested and tortured data." And they did so in the face of numerous academic and governmental determinations, including one by the National Science Foundation, clearing Dr. Mann of any notion of any such misconduct. The decision of the District of Columbia Court of Appeals was consistent in all respects with federal law and poses no threat to the suppression of "subjective value-laden criticisms on matters of public concern." NRI Petition at 26. This is, as the court observed, a case involving "'garden variety' libels." NRI App. 65a n. 46; CEI App. 70 n. 46.

And there are other reasons to deny the petitions:

This Court lacks jurisdiction under 28 U.S.C. § 1257. The court construed a matter of state law: whether Dr. Mann had presented sufficient evidence at a preliminary stage of the proceeding to "make out a claim for defamation under the law of the District of Columbia," NRI App. 37a; CEI App. 41, and to withstand a "special motion to dismiss" brought under the D.C. anti-SLAPP statute. *See* District of Columbia Code Section 16-5501, *et seq*.

Nor was this a final decision. As the court stated, the "precise question" addressed was "whether a jury properly instructed on the law, including any

applicable heightened fault and proof requirements, could reasonably find for the claimant on the evidence presented." NRI App. 38a; CEI App. 42. The court made no ruling on the proper instructions on the law, and specifically noted the preliminary nature of its decision permitting the case to proceed, observing that the petitioners National Review, Inc ("NRI"), Competitive Enterprise Institute (CEI), and Rand Simberg preserved the right to seek summary judgment and directed verdict. NRI App. 41a; CEI App. 46.

Moreover, under the exception to Section 1257 relied upon by petitioners, the reversal of the state court judgment must be preclusive of any further litigation. Here, one of the defendants, Mark Steyn, did not appeal the court's decision and has brought a counterclaim against Dr. Mann that will not be terminated by this Court's resolution of this matter.

Finally, there is no concern that the court's decision will "seriously erode federal policy," another requirement to invoke petitioners' Section 1257 exception. The court did not abdicate its responsibility to determine whether the defamatory statements were verifiable. To the contrary, it made its own determination (noted eight times in the decision) that the allegations of data manipulation, academic fraud, and scientific fraud were capable of being determined true or false by the jury.

And this issue of verifiability was hardly a close one given that the allegations against Dr. Mann have already been proven false in numerous scientific

inquiries. As the court stated: "not only is [the allegation against Dr. Mann] capable of being proved true or false, but *the evidence of record is that it actually has been proven false by four separate investigations.*" NRI App. 57a; CEI App. 62 (emphasis added).

Nor was there any "ambiguity" on this issue of verifiability, or, any ambiguity regarding the nature or target of the defamatory articles. While petitioners claim they were simply "critiquing" Dr. Mann's work, as opposed to attacking him personally, the court properly rejected this "forced interpretation." NRI App. 53a; CEI App. 58. As the court stated, these statements were "levelled against the professional character of a person." NRI App. 65a n. 46; CEI App. 70 n. 46. The petitioners made specific and verifiable "factual assertions," based on specific and verifiable facts, that Dr. Mann engaged in data manipulation and academic and scientific misconduct. *Id.*

If anything, this matter of verifiability should be considered conceded—and established. Each of the petitioners has called for an investigation into Dr. Mann's conduct. Mr. Simberg demanded a "fresh truly independent investigation." NRI App. 56a; CEI App. 61. CEI petitioned the Environmental Protection Agency to investigate Dr. Mann's alleged misconduct. NRI stated that this lawsuit would permit it to conduct "our investigation of Mann through discovery." NRI App. 102a; CEI App. 108. One would not call for an investigation if one did not believe that the investigation would provide a verifiable result. As the court stated, the call for an investigation denotes the necessity "to

uncover facts that, impliedly, are there to be found." NRI App. 56a; CEI App. 61. The petitioners' public cry for more investigation into Dr. Mann's conduct cannot be squared with their position before this Court that their claims of "data manipulation" and "academic and scientific misconduct" cannot be verified.

JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. § 1257. The decision of the District of Columbia Court of Appeals was interlocutory, and this case does not fall within any exception to this Court's finality rules.

STATEMENT OF FACTS

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

A. The Hockey Stick.

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 from "proxy" indicators—natural archives that record past climatic conditions—gathered and analyzed in prior peer-reviewed studies.[1] These proxies include growth rings of ancient trees and corals, sediment cores from ocean and lake bottoms, ice cores from glaciers, and cave sedimentation cores. The 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) AD1400," and that rising carbon dioxide concentrations are the primary "forcing" cause.

In 1999, Dr. Mann co-authored a second peer-reviewed paper in *Geophysical Research Letters* ("MBH99").[2] MBH99 built upon MBH98 and concluded that the recent 20th century rise in global temperature is *likely* unprecedented in at least the past millennium. Included was a graph depicting this 20th century rise in global temperature which came to be known as the "Hockey Stick," due to its shape—the "shaft" reflecting a long-term cooling trend from the so-called "Medieval

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[1] M.E. Mann, R.S. Bradley, and M.K. Hughes, "Global-scale Temperature Patterns and Climate Forcing Over the Past Six Centuries," *Nature*, Vol. 392 (6678), 779-787, (April 23, 1998), available at: http://www.geo.umass.edu/faculty/bradley/mann1998.pdf.

[2] M.E. Mann, R.S. Bradley, and M.K. Hughes, "Northern hemisphere temperatures during the past millennium: Inferences, uncertainties and limitations," *Geophysical Research Letters*, Vol. 26:6, 759-762 (March 15, 1999), available at: http://www.geo.umass.edu/faculty/bradley/mann1999.pdf.

Warm Period" through the "Little Ice Age," and the "blade" reflecting a dramatic upward temperature swing in the 20th century.

The key findings of these papers prompted a number of follow-up peer-reviewed studies, both replicating Dr. Mann's work using the same data and methods, but independently validating (and extending) his conclusions using other techniques, and more extensive datasets. In 2001, the Intergovernmental Panel on Climate Change (IPCC)[3] published its Third Assessment Report. This report summarized Dr. Mann's work as well as the work of other scientists and included the Hockey Stick graph.[4]

After the publication of the IPCC report, the Hockey Stick became an iconic depiction in the debate over climate change and aroused the ire of anti-environmental organizations, many of them funded by fossil fuel interests and conservative foundations. As Harvard professor Naomi Oreskes writes in her study of scientific denialism, *Merchants of Doubt*, these entities seek to "spread confusion" by supporting a coterie of other "scientists" who (without undertaking any of

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[3] 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.

[4] *See* IPCC, "Climate Change 2001: Synthesis Report," Fig. 9-1b, available at: https://archive.ipcc.ch/ipccreports/tar/vol4/english/fig.9-1b.htm.

their own research) would "deliberately misrepresent" the work of the scientists who were actually doing the research. The aim is to create public doubt in order to prevent the global development of solutions to combat climate change.

In 2005, mining consultant Stephen McIntyre and University of Guelph Economics Professor Ross McKitrick published a paper asserting that the hockey stick was an artifact of a faulty statistical approach.[5] Their conclusion on this point led to a number of peer review studies, all finding their claims to be inaccurate.[6] IPCC,

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[5] S. McIntyre & R. McKitrick, "Hockey Sticks, Principal Components, and Spurious Significance," *Geophysical Research Letters*, 32 (2005), available at: https://agupubs.onlinelibrary.wiley.com/doi/epdf/10.1029/2004GL021750.

[6] *See*, *e.g.*, E.R. Wahl & C.M. Amman, "Robustness of the Mann, Bradley, Hughes Reconstruction of Northern Hemisphere Surface Temperatures: Examinations of Criticisms Based on the Nature and Processing of Proxy Climate Evidence," *Climactic Change*, 85 (2007); 33-69, available at https://www.researchgate.net/profile/Caspar_Ammann/publication/225961901_Robustness_of_the_Mann_Bradley_Hughes_reconstruction_of_Northern_Hemisphere_surface_temperatures_Examination_of_criticisms_based_on_the_nature_and_processing_of_proxy_climate_evidence/links/09e4150ba3067d285f000000/Robustness-of-the-Mann-Bradley-Hughes-reconstruction-of-Northern-Hemisphere-surface-temperatures-Examination-of-criticisms-based-on-the-nature-and-processing-of-proxy-climate-evidence.pdf?origin=publication_detail; E.R. Wahl & C.M. Amman, "The Importance of the Geophysical Context in Statistical Evaluations of Climate Reconstruction Procedure," *Climactic Change*, 85 (2007); 71-88, available at: https://ral.ucar.edu/projects/rc4a/millennium/refs/Ammann_ClimChange2007.pdf; H. Von Storch & E. Zorita, "Comment on 'Hockey Sticks, Principal Components, and Spurious Significance' by S. McIntyre and R. McKitrick," *Geophysical Research Letters*, 32 (2005): L20701, doi:10.1029/2005GL022753,

in its Fourth Assessment Report, also weighed in against McIntyre and McKitrick, noting that the impact of their supposed flaws was inconsequential. The Fourth Assessment included a discussion of other studies, by other scientists, using data other than that used by Dr. Mann and his colleagues, that similarly demonstrated the recent and sharp uptick in global temperatures.[7]

Nevertheless, the McIntyre and McKitrick criticisms led to the commencement of a congressional inquiry by former Congressman Joe Barton of Texas. He demanded that Dr. Mann and his co-authors turn over information concerning their grants and financial support, their data archives, and their source codes. While this investigation was widely criticized in the scientific community, it was applauded by CEI and its Director of Global Warming Myron Ebell: "We've always wanted to get the science on trial [and] we would like to figure

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available at: http://www.hvonstorch.de/klima/pdf/2005.commenton.myintyre.grl.pdf; P. Huybers, "Comment on 'Hockey Sticks, Principal Components, and Spurious Significance' by S. McIntyre and R. McKitrick," *Geophysical Research Letters*, 32 (2005), available at: https://agupubs.onlinelibrary.wiley.com/doi/epdf/10.1029/2005GL023395.

[7] *See* S. Solomon, *et al.*, "Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change," (2007), Chapter 6, available at: https://archive.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-chapter6.pdf.

out a way to get this into a court of law. . . . This could work."[8]

B. "Climategate."

In late 2009, shortly before the United Nation's Global Climate Change Conference in Copenhagen, there was a release of a number of emails stolen from the prestigious Climate Research Unit ("CRU") at the University of East Anglia in the United Kingdom. The CRU emails, some of which had been exchanged between Dr. Mann and researchers at CRU, had been "cherry-picked" by climate change skeptics (as described by the EPA[9]), 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 emails proved that anthropogenic climate change was a "hoax" perpetrated by scientists in collusion with government officials to reap financial benefits. The CRU emails led to the controversy now referred to as "Climategate."

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[8] Roland Pease, "Politics plays climate 'hockey,' " BBC News, 18 July 2005, available at: http://news.bbc.co.uk/2/hi/science/nature/4693855.stm.

[9] 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: https://www.epa.gov/ghgemissions/myths-vs-facts-denial-petitions-reconsideration-endangerment-and-cause-or-contribute.

The most quoted email is a November 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." Petitioners say that this email is "telling" and suggests "wrongdoing." NRI Petition at 5; CEI petition at 8. Fundamentally, they ignore the correct interpretation of this email, determined by every organization which has looked into the matter, 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.

Following the publication of the CRU emails, a number of climate change skeptics, including CEI, called for official inquiries alleging that the researchers had committed fraud, and had improperly manipulated data. In response, the University of East Anglia, the British House of Commons, Pennsylvania State University, the Environmental Protection Agency, the Department of Commerce, and the National Science Foundation all independently investigated the allegations of fraud and misconduct against Dr. Mann and others. Every one of these investigations concluded

that there was no basis to the allegations of fraudulent conduct, data manipulation, or the like, exonerating Dr. Mann and the CRU researchers.

1. University Of East Anglia.

The University of East Anglia convened an international Scientific Assessment Panel, in consultation with the Royal Society of London for Improving Natural Knowledge, 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."[10] In response to certain criticisms of the report in the wake of comments made in a press conference, 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."[11]

Three months later, the University of East Anglia published another report, the Independent Climate Change Email Review report, prepared under the

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[10] 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, available at: http://www.uea.ac.uk/documents/3154295/7847337/SAP.pdf/a6f591fc-fc6e-4a70-9648-8b943d84782b.

[11] *Id.* at p. 6.

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."[12]

2. United Kingdom's House of Commons.

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."[13]

3. Pennsylvania State University.

In response to allegations it received from some alumni and politicians, Penn State launched an inquiry into whether Dr. Mann had committed research misconduct, finding: "there exists no credible evidence

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[12] Sir Muir Russell, *et al.*, "The Independent Climate Change Emails Review," (July 2010), at p. 11, available at: http://www.cce-review.org/pdf/FINAL%20REPORT.pdf.

[13] Government Response to House of Commons Report at p. 3, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228975/7934.pdf.

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."[14] Moreover, given the severity of the charges, the inquiry committee empaneled an investigatory committee to further consider these allegations against Dr. Mann which also found that there was "no substance" to the allegations that Dr. Mann engaged in any action with an intent to suppress or falsify data."[15]

4. United States Environmental Protection Agency.

In February 2010, CEI, along with other entities, 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 was the contention that Dr. Mann and other scientists had distorted, concealed, and manipulated certain temperature data, which fundamentally called into question EPA's endangerment finding. In its petition, CEI alleged that Dr. Mann's proxy data was 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

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[14] *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 p. 5, NRI App. 320a.

[15] *See* RA-10 Final Investigation Report Involving Dr. Michael E. Mann (June 4, 2010), at p. 5, NRI App. 321a.

not."[16] CEI went on to accuse Dr. Mann of "artful deceit" and "deliberate" "deception," and detailed its charges in a document entitled "An Explanation of How Michael Mann Hid the Decline."[17] In response, the EPA found that there was no evidence of data manipulation or fraud.[18] It also rejected CEI's fraud allegations against Dr. Mann as a "myth."[19]

Subsequently, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the EPA's "Endangerment Finding" and the denial of CEI's petition for reconsideration. *Coalition for Responsible Regulation Inc. v. EPA*, 684 F.3d 102, 124-125 (D.C. Cir. 2012).

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[16] *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.

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

[18] *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, available at: https://www.epa.gov/sites/production/files/2016-08/documents/response-volume1.pdf.

[19] 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: https://www.epa.gov/ghgemissions/myths-vs-facts-denial-petitions-reconsideration-endangerment-and-cause-or-contribute.

5. United States Department Of Commerce.

In response to a request from Senator James Inhofe, the Inspector General of the Department of Commerce conducted its own investigation. It also found no evidence of inappropriate data manipulation.[20]

6. 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 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). NSF investigated "to determine if data fabrication or falsification may have occurred."[21] It interviewed Dr. Mann, and his critics, and "disciplinary experts,"[22] and found no evidence of impropriety or other direct evidence of research misconduct.[23]

This NSF inquiry was intended to, and did, close the book on the question of whether Dr. Mann and his

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[20] Detailed Results of Inquiry Responding to May 26, 2010, Request from Senator Inhofe, at pp. 2-3, available at: https://www.oig.doc.gov/OIGPublications/2011.02.18-IG-to-Inhofe.pdf.

[21] *See* National Science Foundation, Office of Inspector General, Office of Investigations, "Closeout Memorandum, Case No. A09120086," at p. 3, available at: https://www.nsf.gov/oig/case-closeout/A09120086.pdf.

[22] *Id.*

[23] *Id.*

colleagues had engaged in research misconduct or fraud. NSF's exoneration of Dr. Mann was widely reported in the national press,[24] and as the court noted, the petitioners do not claim they were unaware of the results of this or any other investigation. NRI App. 75a; CEI App. 80.

C. Defendants Falsely Accuse Dr. Mann Of Fraud, Data Manipulation, And Academic and Scientific Misconduct.

A year later, the results of an investigative report by Louis Freeh (the former director of the Federal Bureau of Investigation) into the Penn State/Jerry Sandusky child abuse scandal were released. Mr. 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 petitioners, the Sandusky scandal presented a new avenue to castigate Dr. Mann and impugn his reputation and integrity. Their new theory

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[24] *See*, *e.g.*, Douglas Fisher and The Daily Climate, Federal Investigators Clear Climate Scientist, Again (August 23, 2011), *Scientific American*, available at: https://www.scientificamerican.com/article/federal-investigators-clear-climate-scientist-michael-mann/; Associated Press, National Science Foundation Investigation Clears Climate Change Researcher (August 24, 2011), *Fox News*, available at: https://www.foxnews.com/science/national-science-foundation-investigation-clears-climate-change-researcher.

was that because Penn State had "whitewashed" the sexual improprieties in the Sandusky episode, it must have done the same with respect to Dr. Mann, working behind the scenes to conceal improper conduct on his part. This comparison strains credulity; but this was their 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. Mr. Simberg reminded his readers of the Sandusky matter: "another cover up and whitewash" that occurred at Penn State:

> 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.[25]

He continued:

> 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

[25] R. Simberg, "The Other Scandal In Unhappy Valley," *Openmarket.org* (July 13, 2012), NRI App. 234a, available at: https://cei.org/blog/other-scandal-unhappy-valley.

> 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?[26]

Mr. Simberg concluded by calling for a truly fresh independent investigation into Dr. Mann's conduct. (After this publication was released, the editors of Openmarket.org removed the sentence comparing Dr. Mann to Jerry Sandusky, labelling it as "inappropriate."[27])

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.

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[26] NRI App. 234a-238a.

[27] *See* https://cei.org/blog/other-scandal-unhappy-valley.

Mr. Steyn reproduced verbatim the defamatory statements from Mr. Simberg and CEI.[28] 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." He 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." As noted, while CEI removed the Sandusky comparison, National Review has not, and the reference remains visible on National Review Online.

The debate over climate change and Dr. Mann's hockey stick had been pointed before, but these articles brought the issue to a new level, invoking swift condemnation. Journalists and scientists from distinguished organizations described the new attacks as disgusting and defamatory. The *Columbia Journalism Review*, perhaps the most highly regarded media authority (and no friend of defamation lawsuits), stated that "the low to which Simberg and Steyn stooped is certainly deplorable, if not unlawful." It went on to note that Dr. Mann has endured "witch hunts and death threats in order to defend his work," yet his critics continue to "dredge up a discredited charge" and ignore "almost half a dozen investigations [that had]

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[28] M. Steyn, "Football and Hockey," *National Review*, (July 15, 2012), NRI App. 99a-100a, available at: https://www.nationalreview.com/corner/football-and-hockey-mark-steyn/.

affirmed the integrity of Mann's research."[29] *Id.* The scientific publication *Discover Magazine* described the attacks as "slimy," "disgusting," and "defamatory."[30] And the Union of Concerned Scientists wrote that it was "aghast" at these attacks, calling them "disgusting," "offensive," and a "defamation of character."[31]

After the publication of the above statements, Dr. Mann demanded retractions and apologies from both National Review and CEI. On August 22, National Review published a response from its editor Rich Lowry entitled "Get Lost."[32] He refused to retract, and repeated the fraud allegation, which he then attempted to clarify: "fraudulent doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong." He went on to suggest that NRI would welcome any lawsuit because then it would be able to conduct its own "investigation" of Dr. Mann through discovery and "to teach[] him a thing or two about the

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[29] *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=2.

[30] *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/.

[31] *See* M. Halpern, "CEI Compares Climate Scientist to a Child Molester," *Union of Concerned Scientists* (July 23, 2012), available at: https://blog.ucsusa.org/michael-halpern/cei-compares-climate-scientist-to-a-child-molester.

[32] R. Lowry, "Get Lost: My response to Michael Mann," *National Review* (August 22, 2012), NRI App. 101a-102a, also available at: https://www.nationalreview.com/2012/08/get-lost-rich-lowry/.

law and about how free debate works in a free country." *Id.*

STATEMENT OF THE CASE

Dr. Mann filed this lawsuit against four defendants: National Review, Mark Steyn, CEI, and Rand Simberg. All filed special motions to dismiss pursuant to the D.C. anti-SLAPP 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 sufficiently plead actual malice. On July 19, 2013, the Superior Court denied the special motions, finding that Dr. Mann was likely to succeed on the merits of all of his claims; that petitioners' statements were accusations of fraud, not opinion or mere hyperbole; and that there was sufficient evidence of actual malice. On January 22, 2014, a second Superior Court judge denied a subsequent special motion to dismiss, again finding that Dr. Mann was likely to succeed on the merits of his claims.

NRI, CEI, and Simberg then filed their notices of appeal. Notably Mark Steyn, the fourth defendant, did not join the appeal. Rather, Mr. Steyn filed a counterclaim against Dr. Mann, claiming a violation of his constitutional rights. That claim remains pending in the Superior Court, NRI App. 16a n. 12; CEI App. 19 n. 12, as does petitioners' claim for attorneys' fees against Dr. Mann under the anti-SLAPP statute.

The appeal was submitted to the District of Columbia Court of Appeals in November 2014. On December 22, 2016, the court issued its initial opinion, holding that interlocutory review was appropriate, and affirming in part and reversing in part. The court permitted the claims based on the Simberg and Steyn articles to proceed but reversed with respect to the claims based on the Lowry article. It also reversed the lower court's decision on the emotional distress claim. After a petition for rehearing and rehearing *en banc*, the court released a slightly modified opinion on December 13, 2018. Subsequent petitions for rehearing and rehearing *en banc* were denied on March 1, 2019.

The court began its decision on the merits by reviewing the anti-SLAPP statute and addressing a matter of first impression: the meaning of the statute's requirement that the plaintiff had to establish, at the motion to dismiss stage, a "likelihood of success" on the merits. The court held that the applicable standard would be that imposed by Rule 56 of the Federal Rules of Civil Procedure. NRI App. 41a n. 32; CEI App. 46 n. 32. Applying this standard, the court observed that it was required to determine "whether a jury, properly instructed on the law, including any applicable heightened fault and proof requirements, could reasonably find for the claimant on the evidence presented." NRI App. 38a; CEI App. 42. In so doing, the court specifically noted the preliminary nature of the record—only Dr. Mann had presented evidence, and had done so without the benefit of discovery—and stated that petitioners preserved "the ability to move for summary

judgment under Rule 56 later in the litigation, after discovery had been completed, or for a directed verdict under Rule 50 after the presentation of evidence at trial." NRI App. 41a; CEI App. 46. The court then conducted a *de novo* review of the record to determine if Dr. Mann's evidence "could support, with the clarity required by First Amendment principles, a jury verdict in his favor." NRI App. 45a-46a; CEI App. 50.

With respect to the issues presented in the petitions, the court first reviewed this Court's opinion in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990). *Milkovich* rejected "an additional separate constitutional protection for opinion," holding that a statement is not protected as an "opinion" if it is capable of being proven true or false. It then analyzed the challenged statements to determine whether the allegations against Dr. Mann were capable of verification. Contrary to petitioners' assertions, the court did not hold that the issue of verifiability is a question for the jury. The court itself made the determination that the allegations were factual in nature and were capable of being proven true or false. And it did so repeatedly:

- "Mr. Simberg's article can fairly be read as making defamatory *factual* assertions outright. Mr. Simberg would not have concluded the article with the prescription that a 'fresh, truly independent investigation' is necessary, unless he supposed [that Dr. Mann's misconduct] could be ferreted out." NRI App. 56a; CEI App. 61.

- "The assertion that the CRU emails showed or revealed that Dr. Mann engaged in deception and academic and scientific misconduct is not simply a matter of opinion: not only is it capable of being proved true or false, but the evidence of record is that it actually has been proved to be false by four separate investigations." NRI App. 56a-57a; CEI App. 62.
- "In this case the statements accusing Dr. Mann of 'fraud,' 'deception,' and 'academic' and 'scientific' misconduct specifically referred to the CRU emails and were therefore verifiable." NRI App. 58a n. 39; CEI App. 63 n. 39.
- The statements that Dr. Mann "acted dishonestly, engaged in misconduct, and compared him to notorious persons . . . included statements of fact that can be proven to be true or false." NRI App. 61a; CEI App. 66.
- "The statements in Mr. Steyn's article are similarly factual and specific in their attack on Dr. Mann's scientific integrity." NRI App. 64a; CEI App. 69.
- The statements in this case "made factual assertions, based on the CRU emails, that Dr. Mann had engaged in 'data manipulation' that was fraudulent and constituted academic and scientific misconduct." NRI App. 65a n. 46; CEI App. 70 n. 46.

- Mr. Steyn's "injurious allegations about Dr. Mann's character are capable of being verified or discredited." NRI App. 65a-66a; CEI App. 70-71.
- "[W]e conclude that Dr. Mann has demonstrated that Mr. Simberg's and Mr. Steyn's articles are capable of conveying a defamatory meaning and contain statements of fact that can be proven to be true or false . . . ". NRI App. 68a; CEI App. 73.

The court reached a different conclusion with respect to the Lowry article. It noted that although Mr. Lowry described the hockey stick as "fraudulent," he did not repeat the "factual assertions" that it found to be actionable. This claim was therefore dismissed because it did not "contain defamatory assertions of fact that were provably false. . . ." NRI App. 67a; CEI App. 72. As such, the court again ruled, *as a matter of law*, on whether the statements at issue were verifiable, this time holding that the Lowry statement was not.

It is also significant to note that throughout its opinion the court specifically rejected the notion that the petitioners' comments were aimed at Dr. Mann's research (a "forced interpretation" NRI App. 53a; CEI App. 58). To the contrary, the petitioners' statements were "pointed accusations of personal wrongdoing by Dr. Mann." NRI App. 54a; CEI App. 59. Similarly, the court dismissed the assertion, advanced now by petitioners, that their statements were "rhetorical" and insufficiently concrete to impose liability. The evidence of record was sharply to the contrary. As the court

observed, the petitioners' statements were both "factual" and "specific":

- Mr. Simberg's statements "specifically referred to the CRU emails." NRI App. 58a n. 39; CEI App. 63 n. 39.
- "The statements in Mr. Steyn's article are similarly factual and specific in their attack on Dr. Mann's scientific integrity." NRI App. 64a; CEI App. 69.
- The statements in this case made factual assertions "based on the CRU emails." NRI App. 65a n. 46; CEI App. 70 n. 46.

The court left no room for argument that these statements were somehow worthy of constitutional protection because they were simply expressing a difference of opinion on an issue of public importance: "the implication that serious misconduct has been covered up is inescapable." NRI App. 63a; CEI App. Op. at 68. The court also observed that the petitioners do not deny the allegations that their statements are false. NRI App. 54a; CEI App. 59.

REASONS FOR DENYING THE PETITION

Pursuant to 28 U.S.C. § 1257, this Court's jurisdiction is limited to cases involving final decisions of the state courts, and the decision of the D.C. Court of Appeals was interlocutory. Petitioners assert, however, that this case falls within one of the exceptions to nonreviewability, set forth in *Cox v. Cohn*, 420 U.S. 469

(1975), because "a federal issue has been finally decided in the state courts" and "reversal of the state court on the federal issue would be preclusive of any further litigation." NRI Petition at 4. As discussed below, this exception does not apply for a number of reasons.

I. No Federal Issue Has Been Finally Decided.

The court below did not decide a federal issue, and certainly did not issue a final decision. The court did nothing other than to hold that the facts presented by Dr. Mann—at the motion to dismiss phase, and before any discovery—were sufficient to permit him to proceed to the next stage of the case. The court's decision was limited to a review of Dr. Mann's evidence to determine "whether a jury properly instructed on the law, including any applicable heightened fault and proof requirements, could reasonably find for the claimant on the evidence presented." NRI App. 38a; CEI App. 42. The court did not rule on how the jury was to be instructed and certainly did not suggest that the jury would be instructed in any way that departed from the heightened fault and proof requirements imposed by federal law. In essence, what the petitioners are seeking from this Court is an advisory opinion as to how the jury should be instructed under D.C. law, and then a further opinion that Dr. Mann could not prevail under those instructions.

While the court was guided by constitutional precedent, at bottom this decision was a procedural

determination addressing the anti-SLAPP standards under D.C. law at the motion to dismiss stage, and a review of the evidence of record to determine whether Dr. Mann could "make out a claim for defamation under the law of the District of Columbia" and the case law establishing different levels of fault and proof in defamation cases. NRI App. 37a; CEI App. 41. Moreover, the court stressed the preliminary nature of its decision. No discovery had been undertaken. Petitioners preserved the right to seek summary judgment under Rule 56. NRI App. 41a; CEI App. 46. Petitioners preserved the right to have the case decided by a jury "properly instructed on the law." NRI App. 38a; CEI App. 42. Petitioners preserved the right to move for a directed verdict after the trial. NRI App. 41a; CEI App. 46. And petitioners preserved the right to appeal any unfavorable verdict to the Court of Appeals.

As the court noted, at this juncture of the proceeding its task was not to anticipate which party would prevail, but to determine "whether, on the evidence of record in connection with the special motion to dismiss, a jury *could* find for Dr. Mann." NRI App. 85a; CEI App. 91. The matter remains in its infancy, and no decision has been rendered that conflicts with any federal law or policy.

II. Reversal Would Not Be Preclusive Of Further Litigation.

As discussed in Stern, Supreme Court Practice (7th ed.), this Court traditionally requires that the

state court decision is final as to "all parties and issues." Where there are a number of defendants to the same cause of action, as here, the record must show that the state court decision concludes the action as to all of them. *Id.* at 94. This rule was set out in *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 611 (1892), where this Court ruled that a case had to be final as to all parties before an appeal could be taken to this Court.

In this case, however, the state court decision does not conclude the action as to all defendants. Petitioners fail to mention the fact that one of their co-defendants, Mark Steyn, refused to join the appeal and has taken the public position that he wishes to litigate Dr. Mann's claims against him. As he published on his blog, SteynOnline (where he posts on this matter after parting ways with the National Review), he chose not to appeal "because I'm tired of both Doctor Fraudpants (his sophomoric name for Dr. Mann) and the clogged toilet of DC justice and want to move straight to trial."[33] Furthermore, Mr. Steyn has filed a separate counterclaim, asserting that Dr. Mann's actions against him violated his constitutional rights. Regardless of this Court's decision on this matter, this litigation in the District of Columbia will proceed.

It should also be mentioned that the petitioners have informed the Superior Court that they intend to seek attorneys' fees against Dr. Mann. Under the D.C. anti-SLAPP Act, D.C. Code Ann. § 16-5504, a

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[33] https://www.steynonline.com/6576/the-mann-act.

defendant who prevails on an anti-SLAPP motion may seek attorneys' fees against the plaintiff, and the petitioners have asserted the right to do so with respect to the dismissal of the causes of action based on the Lowry article and the cause of action based on intentional infliction of emotional distress. This matter must also be litigated below.

III. The State Court's Decision Adhered To Federal Law.

Petitioners also fail to mention that the jurisprudential exception they rely upon for this Court to take jurisdiction applies only if the state court decision would "seriously erode federal policy." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 483 (1975). The court's decision did not depart in any way from federal precedent.

A. The Court did not abdicate the issue of verifiability to the jury.

Petitioners first assert that there is a split between federal and state courts on the issue of whether the court must determine, as a matter of law, that the statements at issue are capable of being proven true or false, or if this issue of verifiability is an issue to be determined by the jury. According to Sack on Defamation, Section 4:3.7, the federal courts generally hold that this is a legal issue to be decided by the court, whereas the state courts generally submit this issue to the jury. That may be, but it is irrelevant here. That is

because, in this case, the court below made the verifiability determination for itself and as a matter of law—precisely what the petitioners assert is the obligation of the court.

As discussed above, the court held *on eight separate occasions* that the statements at issue in this case were capable of verification—and hence not opinion. Two of the court's comments on this issue stand out. Noting that the Simberg article called for a "fresh truly independent investigation," the court aptly observed: "[a]n opinion may be subject to further discussion or debate, but a 'truly independent *investigation*' is necessary to uncover facts that, impliedly, are there to be found." NRI App. 56a; CEI App. 61 (emphasis in original).[34] Furthermore, the court's repeated findings that the allegations against Dr. Mann were capable of verification were unequivocal: these allegations were not only "capable of being proved true or false," they were proven "false by four separate investigations." NRI App. 57a; CEI App. 62.

Ignoring all this, petitioner NRI points to three inapposite (and misquoted) references to try to argue that the court did not itself find that the allegations were verifiable. NRI Petition at 19. NRI begins by setting forth two partial quotations from page 59 of the court's opinion, in both cases omitting the full quotation that reveals that the court there was discussing

[34] As noted above, the other petitioners have also called for investigations into this matter. CEI petitioned the EPA to investigate Dr. Mann's conduct, and NRI states that it intends to use this litigation to investigate Dr. Mann.

the issue of defamatory meaning—not verifiability—which is plainly a jury issue. The third reference, from page 72 of the opinion, is similarly misquoted. The court did not state that a "jury" could take the Steyn article as a statement of a true fact. Rather, the court stated that "a reader could take [the indictment of Dr. Mann] to be a true fact," and then went on to close off the point: "[t]hese injurious allegations about Dr. Mann's character and his conduct as a scientist *are capable of being verified or discredited.*" NRI App. 65a-66a; CEI App. 70-71 (emphasis added).

B. There is No "Ambiguity" in Petitioners' Statements.

Glossing over the fact that the court itself held that the defamations at issue here were capable of verification, the petitioners next argue that the decision improperly enables the jury to impose liability for "ambiguous" statements which would offend the First Amendment. NRI Petition at 21. This argument ignores the record evidence. It also ignores the opinion of the court to the contrary. Observing that the defamatory statements had referred to the CRU emails, the court ruled that the statements were "factual and specific" in their allegations against Dr. Mann.

And even were the petitioners' statements somehow capable (at least in the view of petitioners) of conveying an ambiguous or non-defamatory message to certain readers, that does not insulate them from liability. A jury is entitled to impose liability in cases in

which a statement might have a non-defamatory connotation. That was the holding in *Milkovich*, in which this Court stated that there were sufficient constitutional safeguards already in place to ensure that a statement of opinion on a matter of public concern that does not contain a provably false statement will receive full protection. Those safeguards are laid out in the *Milkovich* opinion, and include the protections afforded in *Philadelphia Newspapers Inc.*; *Greenbelt Cooperative Publishing Ass'n Inc.*; *Letter Carriers; Falwell*; and *Bose Corp.*[35]

Finally, NRI attempts to argue around the clear holding in *Milkovich* by suggesting that the defamation in that case was "clear," whereas the statements here are somehow less than clear. NRI Petition at 24. If anything, the allegations of data manipulation and academic and scientific misconduct, particularly with the tethered references to the CRU email issue, are far

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[35] *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (plaintiff bears the burden of showing falsity and fault in an action against a media defendant in a matter of public concern); *Greenbelt Cooperative Publishing Ass'n Inc. v. Bresler*, 398 U.S. 6 (1970) (use of the word "blackmail" along with vigorous epithets, without more, is not defamatory); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264 (1974) (use of the word "traitor" in a figurative sense is merely rhetorical hyperbole); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (statements that cannot reasonably be interpreted as stating actual facts are protected); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) (in First Amendment cases, the appellate court has the obligation to make an independent review of the entire record).

more specific than the rather generic "lying" allegation addressed in *Milkovich*.

C. Petitioners Are Not Protected Because Climate Change is a "Hot Button" Issue.

Nor can the petitioners skirt liability by arguing that their statements are nothing more than rhetorical hyperbole which is appropriate in addressing "hot button matters of public concern." NRI Petition at 27. First, petitioners' assertion that their allegations of data manipulation and scientific misconduct are somehow "vague" and "subjective," does not withstand scrutiny. *Id.* As the court held and as discussed above, these were statements of fact and not opinion.

Second, while petitioners 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. Petitioners 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, specifically referring to a concrete fact: the CRU emails.

The specific nature of the factual allegations against Dr. Mann stand in marked contrast to the cases cited by NRI in its petition at 28-30, which it divides into three categories: (1) general allegations of "deception," (2) "generic assertions of misconduct," and (3) "comparisons to odious figures." But the cases

described in these categories all involved defamation claims based upon loose epithets and conjectural name-calling, without reference to specific facts. They are distinct from those cases in which the defendants accompany their loose language with specific factual allegations that are capable of being proven true or false. In that case the line has been crossed, and the defendant can no longer hide behind the protection of "rhetorical hyperbole."

For example, *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), involved a defamation case brought by William F. Buckley, the founder and former publisher of petitioner NRI. Mr. Buckley's lawsuit claimed he had been defamed in three separate statements: (1) he had been called a "fascist"; (2) he had been called a "deceiver"; and (3) he had been compared to Westbrook Pegler "who lied day after day." The Second Circuit rejected Mr. Buckley's first two claims on the ground 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 defamation, 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.2d at 895-96.

The court below called out the distinction reached in *Buckley* between "generic labels with derogatory connotations and comparisons to specific individuals from which defamatory factual allegations can be inferred." NRI App. 63a; CEI App. 68. It then ruled precisely as the Second Circuit ruled in the *Buckley* case.

It dismissed the Lowry claim because it did not contain verifiable statements of fact; and it permitted the Simberg and Steyn claims to proceed because those allegations were "factual and specific in their attack on Dr. Mann's scientific integrity." NRI App. 64a; CEI App. 69. And regarding the comparison to Jerry Sandusky: "the implication that serious misconduct has been covered up is inescapable." NRI App. 63a; CEI App. 68.

The *Buckley* decision is also instructive in terms of petitioners' claims that different rules apply when the statements are made in the context of a heated debate. The Second Circuit addressed this issue, holding that the fact that the statements regarding Mr. Buckley were made in the context of a political attack did not entitle them to any more 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").

The D.C. Court of Appeals recognized the "important societal interest in vigorous debate," NRI App. 47a; CEI App. 52, as well as the fact that the statements were made in the context of significant disagreement over "the existence and cause of global warming." NRI App. 49a; CEI App. 54. But that provides no reason to depart from the constitutional distinctions between fact and opinion established almost 30 years ago in *Milkovich*. The court's conclusion on this point is unassailable. To the extent that the statements attacked

the soundness of Dr. Mann's methodology and conclusions in a scientific debate, they would be protected, but when they attacked Dr. Mann's honesty and integrity and asserted provably false facts, they do not enjoy protection. NRI App. 50a; CEI App. 54-55.

D. CEI's "Supportable Interpretation" Argument is Baseless.

CEI's principal argument is that its statements are immunized because it "disclosed" the underlying facts upon which the statements were based. This assertion lacks record support and was quickly rejected by the court. Not a single one of CEI's purportedly disclosed facts could support its allegations of fraud or misconduct. Indeed, many of the supposedly disclosed facts were: (1) authored by Mr. Simberg himself; (2) related solely to Penn State's investigation of Jerry Sandusky; (3) provided mere biographical information regarding Dr. Mann; and (4) pre-dated NSF's exoneration of Dr. Mann. None of these "facts" set forth a scintilla of evidence that could support the opinion that Dr. Mann was guilty of research misconduct or fraud. The article also failed to provide any textual material from which the readers could draw their own conclusions.

As the court noted, to be entitled to this type of immunity under the "supportable interpretation" defense, the "facts upon which the purported opinion is based must be accurate and complete." NRI App. 58a; CEI App. 63 (citing *Milkovich*). Further: "[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 19.

Here, however, as the court held, the facts disclosed by CEI were "inaccurate" and "incomplete." NRI App. 60a; CEI App. 65. For example, CEI claimed that the NSF study was flawed because it relied on the integrity of the Penn State report. But the NSF study relied on far more than the Penn State study, including a substantial amount of documentation relating both to Dr. Mann's research as well as the research conducted by other scientists. *Id.* NSF also independently interviewed Dr. Mann, and his critics, and other "disciplinary experts." *Id*. Furthermore, as the court correctly observed, CEI's "facts" were incomplete, as it failed to even mention the other parallel investigations of the CRU emails. *Id*. CEI's supportable interpretation defense lacks any merit whatsoever.

E. The Decision Does Not Open the Litigation Floodgates.

NRI says that this decision invites defamation suits in every major public policy debate. NRI Petition at 33. CEI says that this decision will seriously chill public policy debate. CEI Petition at 25.

But the defamation sky is not falling—in the District of Columbia or elsewhere. The decisions in the Superior Court were issued six years ago, and the initial decision of the D.C. Court of Appeals was issued two and a half years ago. Despite petitioners' dire predictions in the wake of those opinions, we have seen no

evidence of any uptick in defamation lawsuits, and petitioners certainly provide no evidence of that. Nor does this decision appear to have had any effect on the level, or tone, of public discourse in the District of Columbia or elsewhere.

This decision poses no threat to public advocacy, discussion, or debate. That is because, as the court correctly observed, this is just a "garden variety" libel suit. NRI App. 65a n. 46; CEI App. 70 n. 46.

CONCLUSION

The Court should deny the petitions.

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