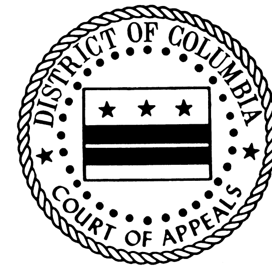

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No. 14-CV-126

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

National Review, Inc.,
Defendant–Appellant,

v.

Michael E. Mann, Ph.D.,
Plaintiff–Appellee

On Appeal from the Superior Court of the District of Columbia,
Civil Division, No. 2012 CA 008263 B

(The Honorable Natalia Combs Greene;
The Honorable Frederick H. Weisberg)

Petition for Rehearing or Rehearing En Banc of Appellant National Review, Inc.

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January 19, 2017

RULE 26.1 DISCLOSURE STATEMENT

A corporate-disclosure statement has already been filed along with National Review's opening brief on August 4, 2014. The disclosure statement is located on page "i" of that brief as part of the Rule 28(a)(2) Disclosure. The corporate-disclosure statement is unchanged, except that National Review's parent corporation is now National Review Institute. National Review has no subsidiaries, and there is no publicly held corporation that holds 10% or more of its stock.

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INTRODUCTION AND RULE 35(a) STATEMENT

For the first time anywhere in the United States since *New York Times v. Sullivan*, 376 U.S. 254 (1964), the panel here authorized the imposition of defamation damages for the expression of caustic criticism of a work of political and scientific advocacy. Indeed, the panel admitted that the scientific work at issue is the very "*foundation* for the conclusion" that global warming is "caused by . . . human activity." Op. 8-9 (emphasis added). But nonetheless, the panel held that the First Amendment allows National Review to be sued for publishing criticism of this "foundational" work, along with the statistical and scientific techniques that the Plaintiff used to create it.

Crucially, the statements published by National Review do not contain any concrete *factual* allegation that the Plaintiff took any particular action—such as fabricating data—that could be proved true or false. Instead, the statements are mere *characterizations*, opining that the Plaintiff's techniques and data presentation constitute deceptive misconduct. This type of characterization is not susceptible to verification by any objective standard. Instead, it is precisely the type of contestable, value-laden opinion that must be resolved through free and open debate. While the First Amendment obviously does not "create a wholesale defamation exemption for anything that might be *labeled* 'opinion,'" *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) (emphasis added), it just as obviously forbids imposing defamation damages for the expression of political and scientific opinions simply because they arguably can be *labeled* "fact."

The panel's decision contradicts numerous binding precedents recognizing the robust protection that the First Amendment provides for the type of expression at issue here. It also creates the chilling prospect that the law in our nation's capital will no longer tolerate free and open debate on matters of political and scientific controversy, because such debate might impugn someone's "scientific integrity." Op. 73. Rehearing en banc is thus badly needed both because of the need to "maintain uniformity of the court's decisions," and because of the "exceptional importance" of the First Amendment rights at stake. Rule 35(a)(1)-(2).

BACKGROUND

Plaintiff-Appellee Dr. Michael E. Mann is a professor and political activist who is famous for creating the "hockey stick" graph, which portrays global temperature trends over the past thousand years. It shows a long flat trend line followed by a sharp uptick, indicating a dramatic increase in the 20th century. Unsurprisingly, this has made the hockey stick the subject of intense political and scientific controversy, with many critics arguing that it is highly misleading. According to one prominent academic statistician, for example, "[t]he [statistical] technique" used by Dr. Mann (known as a "Principal Components Analysis") is flawed in a way that "exaggerate[s] the size" of the temperature increase. Others criticize the hockey stick for splicing together two different types of data: It uses historical "proxy" data for the first several centuries, then switches to thermometer readings for later years, while omitting data that would show a temperature *decline* in those years. Dr. Mann himself has not denied

this omission, but has argued that it is legitimate because there is "an enigmatic decline" in the reliability of the proxy data "after about 1960." *See* NR Br. at 4-5.

In July 2012, National Review published a 270-word blog post written by Mark Steyn that sharply criticized the hockey stick. Steyn's blog post quoted another article written by Rand Simberg of the Competitive Enterprise Institute, which characterized the hockey stick as a "deception" based on "molested and tortured" data. Op. 109. Dr. Mann sued for defamation. On December 22, 2016, a panel of this Court held that the statements at issue are not entitled to First Amendment protection because they are "an indictment of reprehensible conduct against Dr. Mann" that could properly be "verified or discredited" by a jury. Op. 73-74.

ARGUMENT

I. THE PANEL DECISION CONTRADICTS BINDING PRECEDENT LIMITING DEFAMATION TO "PROVABLY FALSE" SPEECH

1. The First Amendment provides robust protection for free expression on matters of political and scientific controversy. Consequently, citizens who speak on these issues cannot be punished through defamation damages for expressing negative characterizations of a libel plaintiff's conduct, even when they employ the most "vehement, caustic" terms. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). That is because a pejorative characterization is not a factual assertion that can be objectively proved or disproved, and "statement[s] on matters of public concern must be provable as false before there can be liability under state defamation law." *Milkovich*,

497 U.S. at 19. Until now, the Court had vigorously implemented this bedrock protection in two closely related ways.

First, this Court has repeatedly held that even extremely pejorative characterizations of a plaintiff's conduct are not actionable; rather, a statement is actionable only if it alleges some concrete action or event whose occurrence can be proved or disproved. Whether a particular incident occurred is a question of objective fact; it either happened or it didn't. But a mere *characterization* reflecting a judgment that the plaintiff's conduct is unethical or dishonest cannot be deemed "false." Rather, such characterizations merely convey the defendant's opinion about the propriety of the plaintiff's conduct, and under the First Amendment "there is no such thing" as a "false" opinion, no matter how wrongheaded. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974).

This Court has stressed this point repeatedly by precluding defamation actions for accusations of "gross misconduct and integrity violations," or "shady" or "corrupt" activity, because these characterizations reflect the defendant's judgment concerning the *propriety* of the plaintiff's behavior—not a disprovable factual assertion about what the plaintiff *did*. *See Armstrong v. Thompson*, 80 A.3d 177, 188 (D.C. 2013); *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 48-49 (D.C. 1983) (per curiam). In *Armstrong*, for example, the defendant made a series of statements accusing the plaintiff of "serious integrity violations," "serious misconduct and other violations," "gross misconduct and integrity violations," and "serious issues of misconduct, integrity violations and

unethical behavior." 80 A.3d at 188. The court held these "characterizations" were not actionable because they did not allege any concrete incident; instead they "reflected one person's subjective view" of how "the underlying conduct" should be *characterized*, which was "not verifiable as true or false." *Id.*

Second, this Court has also made clear that a value-laden characterization cannot be stripped of First Amendment protection simply because it *could* be interpreted to imply an objectively disprovable fact. An ambiguous statement that "lend[s] itself to multiple interpretations cannot be the basis of a successful defamation action because as a matter of law no threshold showing of 'falsity' is possible in such circumstances." *Rosen v. Am. Israel Pub. Affairs Comm., Inc.*, 41 A.3d 1250, 1258 (D.C. 2012). Since subjective characterizations and other opinions about matters of public concern are absolutely protected under the First Amendment, such opinions cannot be converted into actionable, "provably false" assertions unless the defendant has actually *made* such an assertion, either directly or by *necessary* implication.

Thus, in *Rosen*, although the defendant's statement that the plaintiff "did not comport with the standards [the defendant] expects of its employees" certainly *could have* been interpreted to imply that he engaged in the criminal receipt of classified information (for which he was later indicted), the statement was too imprecise and ambiguous to be "provably false." *Id.* at 1260. It "could have meant many things, none self-evident, and certainly none specifically directed at 'receiving or handling classified information.'" *Id.* Thus, since no "objectively verifiable" incident of

espionage had been specifically "mentioned in the [defendant's] statements," they were not actionable. *Id.* at 1259; *see also id.* ("general characterizations" are not actionable unless they allege "particular behaviors that were concrete enough to reveal 'objectively verifiable' falsehoods") (citing *McClure v. Am. Family Mut. Ins. Co.*, 223 F.3d 845, 854 (8th Cir. 2000)).

Since it a *constitutional requirement* that a statement must be "provably false" to be actionable, the standard is obviously not whether a "reasonable jury *could find*" the statement to be provably false. Op. 74 n.45. Rather, if a statement is ambiguous, then it "cannot be the basis of a successful defamation action . . . *as a matter of law*." *Rosen*, 41 A.3d at 1258 (emphasis added). "[I]t is the court, not the jury, that must vigilantly stand guard against even slight encroachments on the fundamental constitutional right of all citizens to speak out on public issues without fear of reprisal." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 583 (D.C. 2000); *Myers*, 472 A.2d at 49-50 (granting motion to dismiss to defamation action challenging statement that plaintiffs were "[a] shady group of bar owners," because the "critical determination of whether the allegedly defamatory statement constitutes fact or opinion is a question of law.") As the Supreme Court has emphasized, courts must make their own "independent review" "to be sure that the speech in question actually falls within the unprotected category." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984). "[I]mprecise language" and "ambiguities" cannot be actionable, because any "test of 'truth'" in that

circumstance would "put the publisher virtually at the mercy of the unguided discretion of a jury." *Id.* at 492; *Time, Inc. v. Pape*, 401 U.S. 279, 291 (1971).

2. The panel opinion repeatedly violated this well-established precedent. First, the panel directly clashed with *Armstrong* by holding that it is actionable to characterize the hockey stick as "deceptive" and based on "academic and scientific misconduct," because those statements are "objectively verifiable." Op. 66. By contrast, *Armstrong* held that accusations of "serious" and "gross misconduct" and "integrity violations" are "unverifiable and therefore a non-actionable opinion" because they are imprecise and do not allege any disprovable event. 80 A.3d at 187-88. The panel did not even discuss *Armstrong*, much less try to distinguish it. It likewise ignored the plain holding of *Myers* that merely characterizing someone as "shady" or "corrupt" is non-actionable as a matter of law. 472 A.2d at 48-49.

While the panel did attempt to distinguish *Rosen*, both purported "distinctions" actually confirm that *Rosen* is controlling here. First, the panel noted that in *Rosen*, "no specific misconduct was mentioned in the allegedly defamatory statement." Op. 66. But, as the panel itself repeatedly recognized, the statements here also contain no specific allegations of deception or misconduct. *See, e.g.,* Op. 61 ("the article does not comment on the specifics of Dr. Mann's methodology"); Op. 67 ("[The] article does not assemble facts that prove Dr. Mann's alleged deception and misconduct."). Second, the panel also claimed that, unlike in *Rosen*, Appellants here purportedly had "standards of a particular kind identifiable in writing" specifying their criteria for

characterizing Dr. Mann's work as "deception" and "misconduct." Op. 94. But in fact, it is undisputed that appellants had no such written standards. Worse still, the panel's extraordinary notion that the standards of the federal government or other reviewing agencies can be *imposed* on Appellants constitutes precisely the type of "prescribe[d] . . . orthodox[y]" on "matters of opinion" that facially violates core First Amendment principles. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The panel's holding is also irreconcilable with the basic distinction between factual assertion and protected opinion. The panel stated that, although "the standards applied to charges of scientific and research misconduct are primarily professional or ethical . . . and that their application requires the exercise of judgment," this "does not [make them] . . . incapable of verification." Op. 94. But to the contrary, precisely because Appellants' statements "exercise judgment" about whether Dr. Mann adhered to proper "ethical" "standards," they cannot be *factual* assertions that can be proven false. "Judgment" calls about "proper" statistical, scientific, and academic "standards" are quintessentially opinions. If Appellants had asserted something that Dr. Mann allegedly *did*—*e.g.*, fabricated or falsified data—then a fact-finder could determine whether this specific action had, in fact, occurred. But since appellants concededly made no such factual assertions, their general characterizations of "deception" and "misconduct" are nothing more than opinions about the *propriety* of what Dr. Mann did. As the panel recognized, litigating these characterizations would thus require the

jury to adjudicate the "probable falsity of [Appellants'] *beliefs*," Op. 93 (emphasis added)—precisely what the First Amendment prohibits.

Specifically, any adjudication of "falsity" here would require the jury to opine on obvious "judgment" calls such as:

1. whether Dr. Mann's undisputed use of proxy data spliced together with modern instrument data after 1960 creates a "deceptive" picture of global warming;
2. whether the identified peer-reviewed journal articles are correct that the "hockey stick graph was the result of bad data and flawed statistical analysis." Op. 10;
3. whether the peer-reviewed articles correctly concluded that Dr. Mann's use of Principal Component Analysis was a misleading statistical technique that would show an upward temperature curve *regardless of the input data*; *id.*; CEI Br. at 8.
4. whether Dr. Mann's undisputed actions are properly characterized as academic or scientific "misconduct," based on no specified standard;
5. whether the University of East Anglia's statement that the hockey stick is "misleading," and "should have been presented to be more transparent," suggests a "deceptive use of data." Op. 91;
6. whether Dr. Mann's supporter's characterization of his graph as using a "trick" to "hide the decline" refers to a misleading technique, or is a mere "colloquialism" that means the opposite of normal English usage. Op. 12 & n.9;
7. whether the cited investigative reports "definitively discredited" Appellants' statements, or, alternatively, "should not be credited or given much weight," particularly "in light of several articles by third parties that criticize the investigations." Op. 82, 95, 101.

In order to resolve these purportedly "verifiable" and "objective" fact questions, a lay jury would be forced to take sides in an ongoing debate about enormously contested and important issues of science and public policy. This would require the jurors not

only to have detailed knowledge of these subjects, but also to make value-laden judgment calls about earth science, statistics, and proper ethical and academic standards.

The panel suggested that the jury could somehow resolve these issues without adjudicating the validity of Appellants' "criticisms of the hockey stick graph," which are concededly protected "expression[s] of scientific and policy opinions." Op. 83. But this dividing line is illusory. The adjectives of "deception" and "misconduct" are *how* appellants expressed their protected "opinions" and "criticisms" of the hockey stick graph. Such criticisms are protected regardless of whether they are conveyed through caustic or mild adjectives. The harshness of the adjective can only affect the question whether the statements are *defamatory*, in the sense of being pejorative; it cannot somehow convert a subjective characterization into a provably false assertion of some concrete, disprovable event.

The panel's fundamental error is demonstrated by its own (correct) conclusion that calling Dr. Mann's hockey stick "fraudulent" is an "ambiguous" "expression of opinion protected by the First Amendment" and "insufficient as a matter of law" to be actionable. Op. 70, 76. The statement that Dr. Mann engaged in "fraudulent" conduct regarding the hockey stick is no different from the "assertions that Dr. Mann engaged in deception and misconduct" that the panel found "to be actionable." Op. 75. Like these other adjectives, "fraudulent" is defamatory because it conveys "personal wrongdoing," but is nonetheless concededly not actionable because it does not allege any concrete, provably false event. Op. 62. The same has to be true of "deception" and

"misconduct." The allegation of "molested and tortured" data is non-actionable for the same reason, and also because it is *necessarily* "rhetorical hyperbole." *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970). Unlike a human child, an intangible number cannot literally be molested or tortured. Thus, "the comparison of Dr. Mann to [convicted child molester] Sandusky" was obviously and concededly a "metaphor." Op. 71, 109.

3. Reflecting its basic confusion over whether a statement is defamatory (*i.e.,* pejorative) and whether it is "provably false," the panel erred by ruling that the threshold legal question of provable falsity is a question for the jury. According to the panel, defendants can be liable for an ambiguous statement if a "jury *could* find" that the statement asserts an objectively verifiable fact. Op. 60, 74 n.45, 79. While that is the standard for determining whether a statement has a "defamatory meaning," it is clearly not the standard for assessing whether the statement is a provably false factual assertion. Rather, the precedent described above clearly establishes that an ambiguous statement that "could be" either fact or opinion "cannot be the basis of a successful defamation action . . . as a *matter of law*." *Rosen*, 41 A.3d at 1258 (emphasis added). Thus, "it is the court, not the jury," that must be "sure" that the challenged statement is provably false, based on an "independent review" at the "threshold." *Guilford*, 760 A.2d at 583; *Bose*, 466 U.S. at 505. If there is any doubt, then the statement is not sufficiently precise to be proved definitively false, and courts must "err on the side of nonactionability,'" *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 317 (D.C. Cir. 1994) ("*Moldea II*"). *See also FEC v. Wisconsin*

Right to Life, Inc., 551 U.S. 449, 457 (2007) ("the First Amendment requires [courts] to err on the side of protecting political speech").

The panel simply ignored the binding precedent cited above and expressly rejected the established principle that "the correct measure of the challenged statements' verifiability as a matter of law is whether *no reasonable person* could find that the characterizations" are protected opinions rather than objectively verifiable factual assertions. Op. 74, n.45, (quoting *Moldea II*). It did so on the remarkable ground that *Moldea's* more stringent First Amendment test applies only to "reviews of *artistic* work," and does not apply to Appellants' criticisms of *scientific and political* work of enormous public-policy significance. *Id.* (emphasis added). But while "book reviews" are obviously protected speech, they cannot possibly have *greater protection* than scientific and political speech, which "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U. S. 138, 145 (1983).

II. THE PANEL DECISION CONTRADICTS BINDING PRECEDENT ON "ACTUAL MALICE"

The panel's erroneous conclusion that characterizations such as "deceptive" can go to a jury as objectively verifiable factual assertions also renders the "actual malice" protection—concededly an "essential safeguard of First Amendment rights," Op. 80—utterly toothless. The panel first authorizes Appellants' amorphous characterizations to be rewritten into verifiable factual assertions by a jury, and then concludes that these hypothetical assertions have been "definitively discredited" by various reports

concluding that Dr. Mann did not engage in "plagiarism, fabrication [or] falsification." Op. 93, 101. Chief among the many fatal flaws in this reasoning is that no one, including Appellants, ever alleged that the hockey stick is based on fabricated or falsified data, but rather criticized it for using "decepti[ve]" statistical techniques to wrongly *present* data to create a misleading view of global warming—thus qualifying as "academic misconduct." Consequently, the reports clearing Dr. Mann on the non-issue of data *falsification* in no way respond to, much less refute, this criticism of Dr. Mann's deceptive *presentation* of unaltered data.

The panel's decision thus conflicts with the well-established rule that "actual malice" turns on whether the defendant "*subjectively* entertained serious doubt as to the truth of his statement." *Bose Corp.*, 466 U.S. at 511 n.30 (emphasis added); *Doe v. Burke*, 91 A.3d 1031, 1044 (D.C. 2014) ("subjective" inquiry). The "reports" cited by the panel say nothing about whether Appellants subjectively believed what they *said,* because Appellants never *said* what the reports investigated—that Mann falsified data—and the reports never *investigated* what Appellants said—that the hockey stick was deceptively invalid. As the panel recognized, the reports "expressly disclaim that their purpose or conclusions were concerned with the validity of the underlying statistical methodology or its representation in the hockey stick graph" and, in any event, defamation cases cannot constitutionally resolve "criticisms" of the "validity" of a scientific work. Op. 83. In short, the panel's "actual malice" standard, far from protecting speech, will subject

Appellants to potentially crippling damages either for a "falsified data" allegation they never made, or for their concededly protected criticisms.

The panel's erroneous abandonment of the subjective "actual malice" standard is particularly threatening to National Review, because it expressly stated that it interprets the criticism it published to mean only that the hockey stick is "intellectually bogus and wrong." Op. 110-11. The panel agrees that this opinion is "protected by the First Amendment." Op. 76. But neither the panel nor Dr. Mann has ever cited *any* evidence that National Review subjectively believes that the criticism it published has any different meaning. Thus, under the panel's reasoning, National Review will either be subjected to a Kafkaesque inquiry into whether it "believed" a statement it never published, or will impermissibly be put on trial for its opinion that the hockey stick is "intellectually bogus and wrong."

The panel's final nail in the "actual malice" coffin was its unprecedented and dangerous conclusion that, because Appellants were "deeply invested in one side of the global warming debate," this is probative evidence that they told knowing falsehoods about the hockey stick. Op. 97. This not only empowers juries to financially penalize those with whom they disagree on vital matters of public debate, but invites them to do so especially against those who have exercised their First Amendment rights most vigorously, with "zeal in advancing their cause." *Id.*

III. THE PANEL'S CURTAILMENT OF CORE FIRST AMENDMENT RIGHTS RAISES AN ISSUE OF EXCEPTIONAL IMPORTANCE

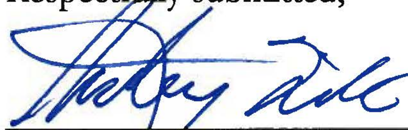
Rehearing is also warranted due to the exceptional importance of the First Amendment rights at stake, which "are not limited to [this] case." *Tyler v. United States*, 705 A.2d 270, 274 (D.C. 1997). Indeed, the "likelihood of recurrence" of this issue is extremely high, *id.*, because the panel's decision declares open season on a whole genre of criticism—alleging the deceptive use of statistics and the misleading presentation of data—that is utterly commonplace in political and scientific debate.

The importance of this issue is especially acute in the nation's capital, where vigorous debate over climate change and similar issues is the very lifeblood of deliberative democracy. The panel's decision strikes at the heart of this process, and it will cut both ways: Dr. Mann himself has blasted his opponents for engaging in "pure scientific fraud," "knowingly lying about the threat [of] climate change," and issuing "deceptive . . . report[s]" on the topic. NR Br. 6-7. Under the panel's reasoning, big oil companies and other well-heeled interests can begin launching their own lawsuits asking juries in Texas or Oklahoma to silence such criticism. The panel thus opens a dangerous new frontier in the strategic use of lawsuits to silence political opponents. This Court should act now and spare the Supreme Court the task of eliminating this extreme outlier in the nation's First Amendment jurisprudence.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,



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I hereby certify that all parties consented in writing to electronic service under Rule 25(c)(1)(D), and on January 19, 2017, I caused a copy of the foregoing brief to be served by e-mail upon:

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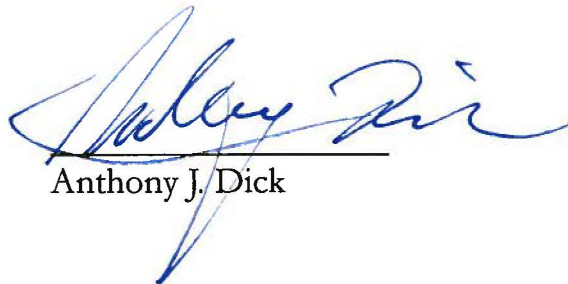

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