No. 14-CV-126

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

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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 En Banc of Appellant National Review, Inc.

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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 stated that the scientific work at issue is the very "foundation for the conclusion" that global warming is "caused by . . . human activity." Op. 8-9. 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 specific action—such as fabricating data—that could be proved true or false. Instead, the statements are mere subjective characterizations, opining that the Plaintiff's undisputed methods for analyzing and presenting data were improper and deceptive in their portrayal of global warming. Under the First Amendment, this type of normative characterization evaluating the propriety of scientific work is not susceptible to being proved true or false in a jury trial. Instead, it is precisely the type of protected opinion that must be resolved through free and open debate.

After National Review filed a petition for rehearing nearly two years ago, the panel issued an amended opinion adding one footnote and modifying another. Those slight modifications do not solve the fundamental problem with the panel's analysis,

which contradicts numerous earlier precedents recognizing the First Amendment's robust protection for the type of speech at issue here. The panel's slightly amended opinion continues to create 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 harshly criticizing the ethics and propriety of a scientist's methods impugns his "scientific integrity." Op. 72-73. Rehearing en banc is thus needed both 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 and deceptive. According to one prominent academic statistician, for example, "[t]he [statistical] technique" used by 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 early centuries, then switches to thermometer readings for later years, while omitting data that would show a temperature decline in those years. 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 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. Mann sued for defamation. On December 22, 2016, a panel of this Court held that these criticisms are not entitled to First Amendment protection because they could properly be "verified or discredited" by a jury. Op. 73-74. According to the panel, Steyn's article is actionable because it contains an "implication" that Mann engaged in "serious misconduct" in his scientific portrayal of global warming. Op. 71.

National Review and CEI filed petitions for rehearing on January 19, 2017. On December 13, 2018, the panel vacated its original opinion and issued an amended opinion. The amended opinion contains no changes except that it "add[s] a new footnote 39 and revise[s] former footnote 45 (now 46)." Op. 1.

ARGUMENT

I. THE PANEL DECISION CONTRADICTS THIS COURT'S PRECEDENT ON "PROVABLY FALSE" SPEECH

To protect vigorous debate under the First Amendment, the Supreme Court has made clear that "statement[s] on matters of public concern must be provable as false before there can be liability under state defamation law." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990). That is especially true when it comes to the realm of

political and scientific controversy, where courts have a duty to ensure that private lawsuits do not "becom[e] an instrument for the suppression of" opposing viewpoints. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011). Accordingly, speakers on such matters cannot be punished through defamation damages for expressing negative characterizations of a person's conduct, even if they employ the most "vehement, caustic" terms. *N.Y. Times*, 376 U.S. at 270. Here, the panel decision failed to respect that bedrock principle and squarely contradicted this Court's precedent.

A. "Under the First Amendment there is no such thing as a false idea" or a false "opinion." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974). Reaffirming that principle, this Court has repeatedly held that pejorative characterizations of a person's conduct are not "provably false," and hence not actionable, unless they allege some specific act that could be objectively disproved in a jury trial. For example, in *Armstrong v. Thompson*, 80 A.3d 177 (D.C. 2013), the defendant accused 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." *Id.* at 188. The court held that these "characterizations" were not actionable because they did not allege any specific act that could be disproved. *Id.* Instead they "reflected one person's subjective view" of how the plaintiff's "underlying conduct" should be *characterized*, which was "not verifiable as true or false." *Id.* Likewise, this Court has held that referring to a "shady group of bar owners" is not actionable because it does not attribute any specific

action to anyone, but simply states an "opinion." *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 48 (D.C. 1983). A mere characterization of someone's conduct as dishonest, deceptive, or "shady" cannot be deemed "false."

In the present case, by contrast, the panel held it actionable to characterize Mann's work as "deceptive" and "academic and scientific misconduct," because the panel believed those statements to be "objectively verifiable." Op. 65; 72. That directly contradicts the principle that characterizing someone's actions as "serious" and "gross misconduct" and "integrity violations" are "unverifiable and therefore a non-actionable opinion." *Armstrong*, 80 A.3d at 187-88; *Myers* 472 A.2d at 48. Even worse, the panel's decision here stifles free speech on a matter of intense public concern: It authorizes punitive lawsuits against those who claim that certain data methods used in the global-warming debate are unethical and deceptive, effectively prohibiting expression of that view.

Here, as in *Armstrong* and *Myers*, the article published by National Review is completely devoid of any assertion that Mann took any specific action that could be proved or disproved in a jury trial. Instead, the article uses a metaphor ("molested and tortured data") and caustic characterizations ("deception" and "misconduct") to express the view that Mann's work is based on improper and deceptive methods of data analysis and presentation. The panel suggested that a jury could somehow resolve the "truth" of these characterizations without deciding the validity of "criticisms of the hockey stick graph," which are protected "expression[s] of scientific and policy

opinions." Op. 83. But this conclusion contradicts itself. The adjectives of "deception" and "misconduct" are *how* appellants expressed their protected "criticisms," so the jury would have to adjudge the validity of those "opinions." Such criticisms are protected whether they are conveyed through caustic or mild adjectives. Indeed, the panel's error is demonstrated by its own (correct) conclusion that characterizing the hockey stick as "fraudulent" is an "expression of opinion protected by the First Amendment." Op. 70, 76. Characterizing the hockey stick "fraudulent" is not actionable because it does not allege any specific, provably false action. Op. 61. The same is true of "deception," "misconduct," and "molested and tortured" data.[1]

To be sure, if Appellants had made some contested assertion about something that Mann allegedly *did*—*e.g.*, fabricated or falsified data—then a jury could determine whether this specific act had, in fact, occurred. But since Appellants concededly made no such factual assertion, their statements of "deception," "misconduct," and "molested and tortured data" are nothing more than protected characterizations of the *propriety* of what Mann did. To resolve whether the hockey stick reflects "misconduct" or "deception," a jury would have to resolve hotly disputed opinions and make judgment calls about the validity of statistical techniques and proper academic standards for data analysis and presentation.

[1] The panel itself recognized that the statements here contain no specific allegation of any particular act taken by Mann. *See* Op. 60, 66. (noting that "the article does not comment on the specifics of Mann's methodology" and "does not assemble facts that prove Mann's alleged deception and misconduct.").

B. In its amended opinion, the panel tried to distinguish *Armstrong* in a single sentence, saying that the present case is different because "the statements accusing Dr. Mann of 'fraud,' 'deception,' and 'academic' and 'scientific' misconduct specifically referred to the CRU emails and were therefore verifiable." Op. 65 n.39. But the question is whether the allegedly defamatory *characterizations* are objectively verifiable, not whether they refer to some specific underlying facts that form the basis of the characterizations. Indeed, the protected characterizations in *Armstrong* were also based on specific instances of the plaintiff's "underlying conduct." 80 A.3d at 187-88. But nevertheless, the characterizations were not actionable because they did not allege that the plaintiff took any specific act that he disputed taking. *Id. See also Myers*, 472 A.2d at 48 (characterizing people as a "shady group of bar owners" was not actionable because it alleged no specific verifiable action).

So too here, characterizing Mann's actions as "deception" and "misconduct" is not actionable because it does not attribute any specific act to him that he disputes taking. He may dispute whether his actions should be *characterized* as misconduct, but he does not dispute any act attributed to him. Indeed, the disclosure to readers of the undisputed emails between CRU scientists that (partially) formed the basis of National Review's criticism *immunizes* the opinions from liability; it does not, as the panel would have it, somehow *remove* the protection afforded those opinions. That is because the "expression of [an] opinion based on disclosed or assumed nondefamatory facts" is not actionable, "no matter how unjustified and unreasonable the [defendant's]

opinion may be or how derogatory it is." Restatement (Second) of Torts § 566 cmt. c. Moreover, the CRU emails *themselves* do not assert any disputed disprovable facts about Mann, but discuss "statistical technique[s] [he used] used to interpret the data and to exclude certain non-relevant data," such as his statistical "trick" to "hide the decline" in temperature. Op. 11 & n.9. Whether the statistical techniques that Mann undisputedly used were "legitimate" or instead "deceptive," *id.*, is clearly a matter of protected opinion.

Indeed, the panel itself effectively acknowledged that the criticisms here are protected opinion. The panel stated that "the standards applied to charges of scientific and research misconduct are primarily professional or ethical . . . and that their application requires the exercise of judgment." It nonetheless remarkably asserted this "does not [make them] . . . incapable of verification." Op. 94. But as this Court's cases make clear, "no threshold showing of 'falsity' is possible" with respect to normative statements that exercise judgment about proper scientific and academic (and other) standards, because they are not *factual* assertions that can be proven false, but are subjective judgements about propriety. *Rosen v. Am. Israel Pub. Affairs Comm., Inc.*, 41 A.3d 1250, 1258 (D.C. 2012). Contrary to the panel's suggestion that Appellants here had "standards of 'a particular kind identifiable in writing'" specifying their criteria for characterizing Dr. Mann's work as "deception" and "misconduct," Op. 94, it is undisputed that Appellants had no such written standards. Worse still, the panel's notion that the "specific standards" of the federal government or other agencies can

be *imposed* on Appellants, Op. 93, 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).

C. The panel decision also conflicts with well-established precedent holding that a subjective characterization cannot be stripped of First Amendment protection simply because it *could* be interpreted to assert a provably false fact. An ambiguous or "amorphous" 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*, 41 A.3d at 1258. Because "subjective" statements on matters of public concern are absolutely protected, *id.*, they cannot be converted into actionable, "provably false" assertions when they do not actually express such an assertion, either explicitly or by clear implication.

Thus, in *Rosen*, although the 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 ultimately indicted), the statement was too 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 Guilford Transp. Indus., Inc. v. Wilner, 760 A.2d 580, 583 (D.C. 2000) (statement not actionable if it is "capable of a number of possible rational interpretations").

Since it a *constitutional requirement* that a statement must be "provably false" to be actionable, the standard is obviously not whether a "jury *could find*" the statement to be provably false. Op. 59; 73 n.46 (emphasis added). 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*, 760 A.2d at 583 (quoting *Myers*, 472 A.2d at 50). 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) (emphasis added). "[I]mprecise language" and "ambiguities" cannot be actionable, because that would "put the publisher virtually at the mercy of the unguided discretion of a jury." *Time, Inc. v. Pape*, 401 U.S. 279, 291 (1971). If there is any doubt as to whether speech is provably false or protected, courts must "err on the side of nonactionability,'" *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 317 (D.C. Cir. 1994); *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.").

D. In an apparent effort to reconcile its decision with the directly contrary precedent described above, the panel distinguished between two different categories

of ambiguous speech that it believed should be treated differently. According to the panel, the "stricter standard" of protection for ambiguous speech applies only where "readers expect to find spirited critiques," such as in "book reviews" or "op-ed column[s]," and not in the context of "ordinary" or "garden-variety" libels that are directed "against the professional character of a person." Op. 73 n.46. But this newly minted distinction is not only unsupported by precedent, it is directly contrary to it. It is unsupported because there is no case in *any* context holding that ambiguous speech is actionable. It is contrary because, for example, *Rosen* held ambiguous speech to be protected in a case involving accusations of professional misconduct, 41 A.3d at 1251, which the panel would deem a "garden-variety" libel.

This Court's precedent also makes clear that protection for ambiguous speech does not turn on whether the speech is cast as a criticism of a plaintiff "personally," or as criticism of his "work." In *Rosen*, for example, the speech criticized the personal "behavior" of the plaintiff, but it was not actionable because it was capable of "multiple interpretations." 41 A.3d at 1251, 1258. And in *Guilford*, the plaintiffs alleged that the speech "falsely portray[ed] *them* as hostile and antagonistic to labor," but it was not actionable because it was "capable of a number of possible rational interpretations." 760 A.2d at 585, 603 (emphasis added). As these cases show, criticizing someone *personally* cannot be separated from criticizing his "work" as unethical and misleading. There is no difference between saying the hockey stick is "deceptive" and saying that Mann was being "deceptive" in creating the hockey stick.

In any event, even if the panel's newfound distinction made any sense, the speech here would fall on the non-actionable side of the line because it appeared on National Review's opinion blog—which is indistinguishable from the "op-ed column" in *Guilford*. Like an op-ed page, an opinion blog is certainly a place where "readers expect to find spirited critiques" and charged rhetoric that is "capable of a number of possible rational interpretations." Op. 73 n.46. Moreover, while the "book review" in *Moldea* and the "labor" op-ed in *Guilford* were obviously protected speech, they cannot possibly be entitled to *more* protection than the scientific and political speech at issue here, 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 THIS COURT'S PRECEDENT ON "ACTUAL MALICE"

The panel's erroneous conclusion that vague characterizations such as "deceptive" and "misconduct" can be deemed true or false by a jury also renders the "actual malice" protection—concededly an "essential safeguard of First Amendment rights," Op. 79—utterly toothless. The panel first authorizes Appellants' amorphous characterizations to be rewritten into specific disprovable factual assertions by a jury, and then concludes that these hypothetical assertions have been "definitively discredited" by various reports concluding that Mann did not engage in "plagiarism, fabrication [or] falsification." Op. 93, 101. Chief among the many 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 Mann on the non-issue of data falsification in no way respond to, much less refute, this criticism of Mann's deceptive presentation.

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; *Doe No. 1 v. Burke*, 91 A.3d 1031, 1044 (D.C. 2014) (same). 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 deceptive. 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." Op. 87. Thus, the panel's "actual malice" standard will subject Appellants to potentially crippling damages for a "falsified data" allegation they never made.

The panel's abandonment of the subjective "actual malice" standard is particularly threatening to National Review, which has explained 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 this opinion is "protected by the First Amendment." Op. 76. But neither the panel nor Mann has cited any evidence that

National Review 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 be put on trial for its protected opinion that the hockey stick is "intellectually bogus and wrong."

The panel's final nail in the "actual malice" coffin is 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.* at 98.

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. If the panel decision stands, it creates a real risk that defamation suits will "becom[e] an instrument for the suppression of" opposing viewpoints. *Snyder*, 131 S.Ct. 1219.

This case illustrates the danger, as any adjudication of "falsity" here would turn the jury into a Ministry of Truth on a variety of political and scientific issues, including:

- whether the undisputed use of proxy data spliced together with modern instrument data after 1960 creates a "deceptive" picture of global warming;
- whether Mann's use of Principal Component Analysis was a misleading technique that misleadingly displays an upward temperature curve; *id.*;
- whether Mann's undisputed actions are properly characterized as academic or scientific "misconduct," based on no specified standard;

To resolve these questions, a jury would be forced to take sides in an ongoing debate about hotly disputed issues of science and public policy, and proper academic standards.

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: 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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CERTIFICATE OF SERVICE

I hereby certify that all parties consented in writing to electronic service under Rule 25(c)(1)(D), and on December 27, 2018, I caused a copy of the foregoing brief to be served by e-mail upon:

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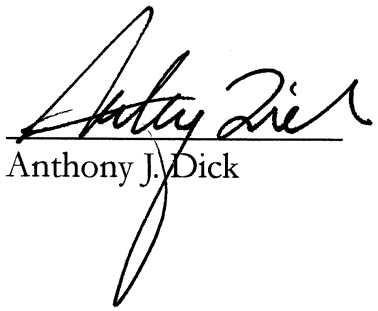

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